Federal Rules of Civil Prodedure
1996-97

I. SCOPE OF RULES--ONE FORM OF ACTION

Rule 1. Scope and Purpose of Rules

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.

Notes

Rule 2. One Form of Action

There shall be one form of action to be known as "civil action."

Notes

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

Notes

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.

(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.

(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 the 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.

(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 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.

(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 proofs 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.

(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.

(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.

(g) Service Upon Infants and Incompetent Person.

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 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.

(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.

(i) Service Upon the United States, and its Agencies, Corporations, or Officers.

(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) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(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.

(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.

(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.

(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).

(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 than 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.

Notes

Rule 4.1. Service of Other Process

(a) Generally.

Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(1). 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.

(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.

Notes

Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When Required.

Except as otherwise provided in these rules, every order required by its terms to

be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Same: How Made.

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney‘s or party’s last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney‘s or party’s office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person‘s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(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.

(d) Filing; Certificate of Service.

All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents,

requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(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 the 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 by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. 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 by any local rules or practices.

Proposed 1996 Amendment[1]

Notes

Rule 6. 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.

(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), 60(b), and 74(a), except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term.

[Rescinded Feb. 28, 1966, eff. July 1, 1966.]

(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.

(e) Additional Time After Service by Mail.

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 by mail, 3 days shall be added to the prescribed period.

Notes

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(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.

(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.

(c) Demurrers, Pleas, etc.,

Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Notes

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.

(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.

(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.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Notes

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.

(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.

(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.

(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.

(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.

(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.

(g) Special Damage.

When items of special damage are claimed, they shall 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. The

reference in Title 28, USC § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Notes

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.

(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.

(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.

Notes

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to 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 attorney or party.

(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.

(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.

(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.

Notes

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

(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) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the 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.

(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.

(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.

(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.

(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.

(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.

(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.

(h) Waiver or Preservation of Certain Defense

(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.

Notes

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party‘s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

Notes

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, the claimant of 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.

(c) Admiralty and Maritime Claims.

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, 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.

Notes

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.

(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.

(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.

(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.

Notes

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.

(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.

(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 27 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;

(8) the advisability of referring matters to a magistrate judge or master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representatives 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.

(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.

(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.

Notes

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real party in interest.

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(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).

(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.

Notes

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.

(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.

Notes

Rule 19. Joinder of Persons Needed for Just Adjudication

(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.

(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.

(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.

(d) Exception of Class Actions.

This rule is subject to the provisions of Rule 23.

Notes

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.

(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.

Notes

Rule 21. Misjoinder and Non-Joinder 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.

Notes

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, USC §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

Notes

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.

(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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(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.

(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.

(e) Dismissal or Compromise.

A class 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 all members of the class in such manner as the court directs.

Notes

Rule 23.1. Derivative Actions by Shareholders

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.

Notes

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).

Notes

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.

(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.

(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.

Notes

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.

(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.

(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.

(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.

Notes

V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures.

Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business

may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall 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.

(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.

(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).

(3) Pretrial Disclosures.

In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing.

Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(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.

(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, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature,

custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations.

By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(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.

(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.

(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.

(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;

(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.

(d) Timing and Sequence of Discovery.

Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses.

A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision

(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(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.

(f) Meeting of Parties; Planning for Discovery.

Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

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

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

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

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

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(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.

Notes

Rule 27. Depositions Before Action or Pending Appeal

(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.

(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.

(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).

(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.

(c) Perpetuation by Action.

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Notes

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

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

(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.

(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.

Notes

Rule 29. Stipulations Regarding 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.

Notes

Rule 30. Deposition Upon 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.

(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.

(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.

(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.

(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.

(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.

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

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to

enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistently with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney‘s fees incurred by any parties as a result thereof.

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

(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.

(f) Certification and Filing by Officer; Exhibits; Copies; Notices of Filing.

(1) The officer shall 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 shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall 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 shall promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording, who shall 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, shall, 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.

(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.

(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.

Notes

Rule 31. Depositions Upon 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).

(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.

(b) Officer to Take Responses and Prepare Record.

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) Notice of Filing.

When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Notes

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions.

(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.

(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.

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.

(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.

(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.

(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.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Notes

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).

(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.

(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.

(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.

Notes

Rule 34. Production of Documents and Things and Entry Upon 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, phonorecords, 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).

(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.

(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.

Notes

Rule 35. Physical and Mental Examination of Persons

(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.

(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 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.

(c) Definitions.

For the purpose of this rule, a psychologist is a psychologist licensed or certified by a State or the District of Columbia.

Notes

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.

(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.

Notes

Rule 37. Failure to Make or 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.

(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 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.

(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.

(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.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the sanctions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(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.

(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.

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).

(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 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.

Notes

VI. TRIALS

Rule 38. Jury Trial of Right

(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.

(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 the issue, and (2) filing the demand as required by Rule 5(d).

Such demand may be indorsed upon a pleading of the party.

(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.

(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.

(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).

Notes

Rule 39. Trial by Jury or by the Court

(a) By Jury.

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(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.

(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.

Notes

Rule 40. Assignment of 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.

Notes

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.

(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.

(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.

(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.

(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.

Notes

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.

(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.

Notes

Rule 43. Taking of Testimony

(a) Form.

In all trials the testimony of witnesses shall be taken orally in open court, unless

otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

Proposed 1996 Amendment[2]

(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.

(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.

(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.

Notes

Rule 44. Proof of 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.

(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. 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) 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 of his office, 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.

(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.

Notes

Rule 44.1. Determination of 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.

Notes

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.

(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.

(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.

(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).

(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.

(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.

(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.

(3) (A) On timely motion, the court by which a subpoena was issued shall

quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(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.

(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.

(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).

Notes

Rule 46. Exceptions Unnecessary

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.

Notes

Rule 47. Selection of 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.

(b) Peremptory Challenges.

The court shall 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.

Notes

Rule 48. Number of Jurors--Participation in 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.

Notes

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts.

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. 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.

(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.

Notes

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) 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.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial; Conditional Rulings.

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.

(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.

(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.

Notes

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Notes

Rule 52. Findings by the Court; 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.

(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.

(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.

Notes

Rule 53. Masters

(a) Appointment and Compensation.

The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference.

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in

actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers.

The order of reference to the master may specify or limit the master‘s powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master’s report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master‘s duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings.

When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master’s discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses.

The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and

remedies provided in Rules 37 and 45.

(3) Statement of Accounts.

When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing.

The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions.

In an action to be tried without a jury the court shall accept the master‘s findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions.

In an action to be tried by a jury the master shall not be directed to report the evidence. The master’s findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings.

The effect of a master‘s report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master’s

findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report.

Before filing the master‘s report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application to 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.

Notes

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definintion; 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.

(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 desgnated, 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.

(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.

(d) Costs.

Except when express provision therefor is made either in a statute of the United States or in these rules, costs 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. 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.

Notes

Rule 55. Default

(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.

(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.

(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).

(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.

Notes

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.

(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.

(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.

(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.

(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.

(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.

(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.

Notes

Rule 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28, USC, § 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.

Notes

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys‘ fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

Notes

Rule 59. New Trials; Amendment of Judgments

(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.

(b) Time for Motion.

Any motion for a new trial shall be filed no later than 10 days after entry of the

judgment.

(c) Time for Serving Affidavits.

When a motion for new trial is based upon 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.

(d) On Initiative of Court.

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.

(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.

Notes

Rule 60. Relief from 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.

(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. 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. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Notes

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.

Notes

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.

(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).

(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.

(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.

(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.

(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.

(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.

(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.

Notes

Rule 63. Inability of a Judge 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.

Notes

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of 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. 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.

Notes

Rule 65. Injunctions

(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.

(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. 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. 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.

(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.

(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.

(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, USC, § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC, § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

Notes

Rule 65.1. Security: Proceedings Against Sureties

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.

Notes

Rule 66. Receivers Appointed by Federal Courts

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.

Notes

Rule 67. Deposit in 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. 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.

Notes

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.

Notes

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.

(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.

Notes

Rule 70. Judgment for Specific Acts; Vesting Title

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.

Notes

Rule 71. Process in Behalf of and Against Persons Not Parties

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.

Notes

IX. SPECIAL PROCEEDINGS

Rule 71A. Condemnation of 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.

(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.

(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." 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.

(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.

(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.

(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 if 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.”

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.

(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.

(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 he 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.

(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.

(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. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. 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 paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(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.

(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.

(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.

(l) Costs.

Costs are not subject to Rule 54(d).

Notes

Rule 72. Magistrate Judges; Pretrial Orders

(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.

(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.

Notes

Rule 73. Magistrate Judges; Trial by Consent and Appeal Options

(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)(7).

(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.

(c) Normal Appeal Route.

In accordance with Title 28, U.S.C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, 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.

(d) Optional Appeal Route.

In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the court and thereafter, by petition only, to the court of appeals.

Notes

Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)

(a) When Taken.

When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the

decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.

Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

(b) Notice of Appeal; Service.

The notice of appeal shall specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the appeal is to a judge of the district court. The clerk shall mail copies of the notice to all other parties and note the date of mailing in the civil docket.

(c) Stay Pending Appeal.

Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security."

(d) Dismissal.

For failure to comply with these rules or any local rule or order, the district judge

may take such action as is deemed appropriate, including dismissal of the appeal. The district judge also may dismiss the appeal upon the filing of a stipulation signed by all parties, or upon motion and notice by the appellant.

Notes

Rule 75. Proceedings on Appeal from Magistrate Judge to District Judge Under Rule 73(d)

(a) Applicability.

In proceedings under Title 28, U.S.C. § 636(c), when the parties have previously elected under Rule 73(d) to appeal to a district judge rather than to the court of appeals, this rule shall govern the proceedings on appeal.

(b) Record on Appeal.

(1) Composition.

The original papers and exhibits filed with the clerk of the district court, the transcript of the proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

(2) Transcript.

Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, the appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall promptly make arrangements for inclusion of all such parts unless the magistrate judge, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

(3) Statement in Lieu of Transcript.

If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notices of appeal, file a statement of the evidence from the best available means to be submitted in lieu of a transcript.

If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.

(c) Time for Filing Briefs.

Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply.

(1) The appellant shall serve and file the appellant's brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.

(2) The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee.

(4) If the appellee has filed a cross-appeal, the appellee may file a reply brief limited to the issues on the cross-appeal within 10 days after service of the reply brief of the appellant.

(d) Length and Form of Briefs.

Briefs may be typewritten. The length and form of briefs shall be governed by local rule.

(e) Oral Argument.

The opportunity for the parties to be heard on oral argument shall be governed by local rule.

Notes

Rule 76. Judgment of the District Judge on the Appeal under Rule 73(d) and Costs

(a) Entry of Judgment.

When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.

(b) Stay of Judgments.

The decision of the district judge shall be stayed for 10 days during which time a

party may petition the district judge for rehearing, and a timely petition shall stay the decision of the district judge pending disposition of a petition for rehearing. Upon the motion of a party, the decision of the district judge may be stayed in order to allow a party to petition the court of appeals for leave to appeal.

(c) Costs.

Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.

Notes

X. DISTRICT COURTS AND CLERKS

Rule 77. District Courts and Clerks

(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.

(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.

(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.

(d) Notice of Orders or Judgments

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 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.

Notes

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.

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.

Notes

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(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.

(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.

(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.“

(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.

Notes

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence

(a) Stenographer.

(Abrogated Dec 27, 1946, eff March 19, 1948.)

(b) Official Stenographers.

(Abrogated Dec 27, 1946, eff March 19, 1948.)

(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.

Notes

XI. GENERAL PROVISIONS

Rule 81. Applicability in General

(a) To what proceedings applicable.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, USC, §§ 7651--81. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, USC, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(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 and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 USC § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, USC, relating to arbitration, or under the Act of May 20, 1926, ch 347, § 9 (44 Stat 585), USC, 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, c. 57, § 2 (42 Stat 388), USC, Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat 534), as amended, USC, 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, c. 742, § 2 (48 Stat 1214), USC, Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat 31), USC, Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat 453) as amended USC, 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, USC, 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, c. 477, Title III, c. 2, § 340 (66 Stat 260), USC, Title 8, § 1451, remain in effect.

(7) (Abrogated April 30, 1951, eff August 1, 1951)

(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.

(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. 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. 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.

(d) District of Columbia; Courts and Judges.

(Abrogated Dec 29, 1948, eff Oct 20, 1949.)

(e) Law Applicable.

Whenever in these rules the law of the state in 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.

(f) References to Officer of the United States.

Under any rule in which reference is made to an officer or agency of the United States, the term ”officer“ includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

Notes

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, USC §§ 1391--93.

Notes

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.

(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.

Notes

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.

Notes

Rule 85. Title

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

Notes

Rule 86. Effective Date

(a) [Effective date of original rules].

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.

(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. [The amendments adopted by the Supreme Court on March 30, 1970, take effect on July 1, 1970. The amendments adopted by the Supreme Court on March 1, 1971, take effect on July 1, 1971.]

Notes

ADVISORY COMMITTEE NOTES

NOTES TO RULE 1

HISTORY: (Amended Oct. 20, 1949; July 1, 1966; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

1. Rule 81 states certain limitations in the application of these rules to enumerated special proceedings.

2. The expression ”district courts of the United States“ appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the Territories and insular possessions. See Mookini et al. v United States, 303 US 201, 58 S Ct 543, 82 L Ed 748 (1938).

3. These rules are drawn under the authority of the act of June 19, 1934, USC,

Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make), and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court) and also other grants of rule making power to the Court. See Clark and Moore, A New Federal Civil Procedure--I. The Background, 44 Yale LJ 387, 391 (1935). Under former § 723b (now § 2072) after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with former § 723c (now § 2072) the Court has united the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. See Rule 2 (One Form of Action). For the former practice in equity and at law see USC, Title 28, formerly §§ 723 and 730 (now §§ 2071--2073) (conferring power on the Supreme Court to make rules of practice in equity) and the former Equity Rules promulgated thereunder; USC, Title 28, former § 724 (Conformity Act): former Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity--Transfer); former Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein); USC, Title 28, former §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

4. With the second sentence compare USC, Title 28, former §§ 777 (Defects of form; amendments), 767 (Amendment of process); former Equity Rule 19 (Amendments Generally).

Effect of 1948 amendment.

The amendment, effective Oct. 20, 1949, substituted the words ”United States district courts“ for the words ”district courts of the United States“.

Notes of Advisory Committee on 1966 amendments to Rules.

This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

Notes of Advisory Committee on 1993 amendments to Rules.

The purpose of this revision, adding the words ”and administered“ to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

NOTES TO RULE 2

Notes of Advisory Committee on Rules.

1. This rule modifies USC, Title 28, former § 384 (Suits in equity, when not sustainable). USC, Title 28, formerly §§ 723 and 730 (now §§ 2071--2073) (conferring power on the Supreme Court to make rules of practice in equity), are unaffected insofar as they relate to the rule making power in admiralty. These sections, together with former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) are continued insofar as they are not inconsistent with former § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). See Note 3 to Rule 1. USC, Title 28, former §§ 724 (Conformity Act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are NY Code 1848 (Laws 1848, ch 379) § 62; NYCPA (1937) § 8; Calif Code Civ Proc (Deering, 1937) § 307; 2 Minn Stat (Mason, 1927) § 9164; 2 Wash Rev Stat Ann (Remington, 1932) §§ 153, 255.

NOTES TO RULE 3

Notes of Advisory Committee on Rules.

1. Rule 5(e) defines what constitutes filing with the court.

2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Rule 4(d), or otherwise pursuant to Rule 4(e).

3. With this rule compare former Equity Rule 12 (Issue of Subpoena--Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:
USC, Title 28, former:
§ 45 (District courts; practice and procedure in certain cases under interstate commerce laws).
§ 762 (Petition in suit against United States).
§ 766 (Partition suits where United States is tenant in common or joint tenant).

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether

the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

NOTES TO RULE 4

HISTORY: (Amended July 1, 1963; July 1, 1966; Aug. 1, 1980; Jan. 12, 1983, P. L. 97-462, § 2, 96 Stat. 2527; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

With the provision permitting additional summons upon request of the plaintiff compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena--Time for Answer).

Note to Subdivision (b).

This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena--Time for Answer) and 7 (Process, Mense and Final).

USC, Title 28, former § 721 (now § 1691) (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. USC, Title 28, former § 722 (Teste of process, day of), is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to Subdivision (c).

This rule does not affect USC, Title 28, former § 503 (now § 547), as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them insofar as they may imply service by a marshal only:

USC, Title 15: § 5 (Bringing in additional parties) (Sherman Act), § 10 (Bringing in additional parties), § 25(Restraining violations; procedure)

USC, Title 28, former: § 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d).

Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see USC, Title 28, former § 109 (now §§ 1400, 1694) (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See Christian v International Ass'n of Machinists, 7 F2d 481 (DC Ky 1925) and Singleton v Order of Railway Conductors of America, 9 F Supp 417 (DC Ill 1935). Compare Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v Case, 93 F2d 56 (App DC 1937).

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see USC, Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see USC, Title 7, §§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); USC, Title 26, § 3679 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); USC, Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws), former § 763 (Petition in suit against the United States; service; appearance by district attorney), former § 766 (now § 2409) (Partition suits where United States is tenant in common or joint tenant), former § 902 (now § 2410) (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified insofar as they prescribe a different method of service or dispense with the service of a summons.

For the former Equity Rule on service, see former Equity Rule 13 (Manner of Serving Subpoena).

Note to Subdivision (e).

The provisions for the service of a summons or of notice or of an order in lieu of summons contained in USC, Title 8, former § 405 (now § 1451) (Cancellation of certificates of citizenship fraudulently or illegally procured)

(service by publication in accordance with State law); USC, Title 28, former § 118 (now § 1655) (Absent defendants in suits to enforce liens); USC, Title 35, former § 72a (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); USC, Title 38, § 445 (Action against the United States on a veteran‘s contract of insurance) (parties not inhabitants of or not found within the District may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 of the Code of the District of Columbia (Publication against nonresident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

Note to Subdivision (f).

This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

USC, Title 28, former § 113 (now § 1392) (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), former § 115 (Suits of a local nature), former § 116 (now § 1392) (Property in different districts in same State), former § 838 (Executions run in all districts of State); USC, Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner--”upon any agent of the company found in such state“); USC, Title 49, § 321(c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the State) and similar statutes, allowing the running of process throughout a State, are substantially continued.

USC, Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); USC, Title 28, former § 44 (now § 2321) (Procedure in certain cases under interstate commerce laws; service of processes of court), former § 117 (now §§ 754, 1692) (Property in different States in same circuit; jurisdiction of receiver), former § 839 (now § 2413) (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a State, are expressly continued.

Note to Subdivision (g).

With the second sentence compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (h).

This rule substantially continues USC, Title 28, former § 767 (Amendment of process).

Notes of Advisory Committee on 1963 amendments to Rules.

Subdivision (b).

Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as may be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4).

This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. NJ Rule 4:5-2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7).

Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in McCoy v Siler, 205 F2d 498, 501--2 (3d Cir) (concurring opinion), cert denied, 346 US 872, 74 S Ct 120, 98 L Ed 380 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see Holbrook v Cafiero, 18 FRD 218 (D Md 1955); Pasternack v Dalo, 17 FRD 420 (WD Pa 1955); cf. Super Prods. Corp. v Parkin, 20 FRD 377 (SD NY 1957), or by reading paragraph (7) as not limited by subdivision (f). See Griffin v Ensign, 234 F2d 307 (3d Cir 1956); 2 Moore's Federal Practice, para. 4.19 (2d Ed 1948); 1 Barron & Holtzoff, Federal Practice & Procedure § 182.1 (Wright ed 1960); Comment, 27 U of Chi L Rev 751 (1960). See also Olberding v Illinois Central R. R., 201 F2d 582 (6th Cir), revd on other grounds, 346 US 338, 74 S Ct 83, 98 L Ed 39 (1953); Feinsinger v Bard, 195 F2d 45 (7th Cir 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill Ann Stat, ch. 110,

§§ 16, 17 (Smith-Hurd 1956); Wis Stat § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See Farr & Co. v Cia. Intercontinental de Nav. de Cuba, 243 F2d 342 (2d Cir 1957); Kappus v Western Hills Oil, Inc. 24 FRD 123 (ED Wis 1959); Star v Rogalny, 162 F Supp 181 (ED Ill 1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See Farr & Co. v Cia. Intercontinental de Nav. de Cuba, supra. But cf. Sappia v Lauro Lines, 130 F Supp 810 (SD NY 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e).

For the general relation between subdivisions (d) and (e), see 2 Moore, supra, para. 4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, supra, para.4.32, at 1004; Smit, International Aspects of Federal Civil Procedure, 61 Colum L Rev 1031, 1036--39 (1961). But see Commentary, 5 Fed Rules Serv 791 (1942).

Examples of the statutes to which the first sentence relates are 28 USC § 2361 (Interpleader; process and procedure); 28 USC § 1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 USC § 1450; Rorick v Devon Syndicate, Ltd. 307 US 299, 59 S Ct 877, 83 L Ed 1303 (1939); Clark v Wells, 203 US 164, 27 S Ct 43, 51 L Ed 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, Attachment and Garnishment in the Federal Courts, 59 Mich L Rev 337 (1961), arguing that

this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See Big Vein Coal Co. v Read, 229 US 31, 33 S Ct 694, 57 L Ed 1053 (1913); Davis v Ensign-Bickford Co. 139 F2d 624 (8th Cir 1944); 7 Moore's Federal Practice para. 64.05 (2d Ed 1954); 3 Barron & Holtzoff, Federal Practice & Procedure § 1423 (Wright ed 1958); but cf. Note, 13 So Calif L Rev 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made upon them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, supra, at 374--80; Nordbye, Comments on Proposed Amendments Rules of Civil Procedure for the United States District Courts, 18 FRD 105, 106 (1956); Note, 34 Corn LQ 103 (1948); Note, 13 So Calif L Rev 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f).

The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision

will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See Pennsylvania R. R. v Erie Avenue Warehouse Co. 5 FR Serv 2d 14a.62, Case 2 (3d Cir 1962); Dery v Wyer, 265 F2d 804 (2d Cir 1959); United Artists Corp. v Masterpiece Productions, Inc. 221 F2d 213 (2d Cir 1955); Lesnik v Public Industrials Corp., 144 F2d 968 (2d Cir 1944); Vaughn v Terminal Transp. Co. 162 F Supp 647 (ED Tenn 1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, supra, § 4.01 [13] (Supp 1960); 1 Barron & Holtzoff, supra, § 184; Note, 51 NW UL Rev 354 (1956). But cf. Nordbye, Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 18 FRD 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see Graber v Graber, 93 F Supp 281 (DDC 1950); Teele Soap Mfg. Co. v Pine Tree Products Co., Inc. 8 F Supp 546 (DNH 1934); Mitchell v Dexter, 244 Fed 926 (1st Cir 1917); In re Graves, 29 Fed 60 (ND Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see Mississippi Pub Corp. v Murphree, 326 US 438, 66 S Ct 242, 90 L Ed 185 (1946).

Subdivision (i).

The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale LJ 515 (1953); Longley, Serving Process, Subpoenas and Other Documents in Foreign Territory, Proc ABA, Sec Int'l & Comp L 34 (1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum L Rev 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 USC § 1451(b); 35 USC §§ 146, 293; Me Rev Stat, ch 22, § 70 (Supp 1961); Minn Stat Ann § 303.13 (1947); NY Veh & Tfc Law § 253. Several decisions have construed statutes to permit service in

foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., Chapman v Superior Court, 162 Cal App 2d 421, 328 P2d 23 (Dist Ct App 1958); Sperry v Fliegers, 194 Misc 438, 86 NYS2d 830 (Sup Ct 1949); Ewing v Thompson, 233 NC 564, 65 SE2d 17 (1951); Rushing v Bush, 260 SW2d 900 (Tex Ct Civ App 1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 USC §§ 77v(a), 78aa, 79y; 28 USC § 1655; 38 USC § 784(a); Ill Ann Stat, c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis Stat § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and the return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore ”sovereign,“ acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, supra, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridical Committee, Report on Uniformity of Legislation on International Cooperation in Judicial Procedures 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See ibid.

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i)(1).

Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of

the judgment abroad. See Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See In re Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed 652 (SD NY 1919); Jones, supra, at 543; Comment, 44 Colum L Rev 72 (1944); Note, 58 Yale LJ 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See Milliken v Meyer, 311 US 457, 61 S Ct 339, 85 L Ed 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 USC §§ 146, 293; 46 USC § 1292; Calif Ins Code § 1612; NY Veh & Tfc Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev Laws §§ 230-31, 230-32 (1955); Minn Stat Ann § 303.13 (1947); NY Civ Prac Act, § 229-b; NY Veh & Tfc Law § 253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. Zurini v United States, 189 F2d 722 (8th Cir 1951); United States v Cardillo, 135 F Supp 798 (WD Pa 1955); Autogiro Co. v Kay Gyroplanes, Ltd. 55 F Supp 919 (DDC 1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to by the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or

the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 USC §§ 146, 293; 38 USC § 784(a); 46 USC § 1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. Cf. Rule 45(c); NY Civ Prac Act §§ 233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is this alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another ”sovereign,“ may be particularly offensive to the foreign country. See generally Smit, supra, at 1040--41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (i)(2).

When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See Jones, supra, at 537; Longley, supra, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see Aero Associates, Inc. v La Metropolitana, 183 F Supp 357 (SD NY 1960).

Notes of Advisory Committee on 1966 Amendments to Rules.

The wording of Rule 4(f) is changed to accord with the amendments of Rule 13(h) referring to Rule 19 as amended.

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (a).

This is a technical amendment to conform this subdivision with the amendment of subdivision (c).

Subdivision (c).

The purpose of this amendment is to authorize service of process to be made by any person who is authorized to make service in actions in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

There is a troublesome ambiguity in Rule 4. Rule 4(c) directs that all process is to be served by the marshal, by his deputy, or by a person specially appointed by the court. But Rule 4(d)(7) authorizes service in certain cases "in the manner prescribed by the law of the state in which the district court is held. . . ." And Rule 4(e), which authorizes service beyond the state and service in quasi in rem cases when state law permits such service, directs that "service may be made . . . under the circumstances and in the manner prescribed in the [state] statute or rule." State statutes and rules of the kind referred to in Rule 4(d)(7) and Rule 4(e) commonly designate the persons who are to make the service provided for, e.g., a sheriff or a plaintiff. When that is so, may the persons so designated by state law make service, or is service in all cases to be made by a marshal or by one specially appointed under present Rule 4(c)? The commentators have noted the ambiguity and have suggested the desirability of an amendment. See 2 Moore's Federal Practice para.4.08 (1974); Wright & Miller, Federal Practice and Procedure: Civil § 1092 (1969). And the ambiguity has given rise to unfortunate results. See United States for the use of Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838 (5th Cir. 1966); Veeck v. Commodity Enterprises, Inc., 487 F.2d 423 (9th Cir. 1973).

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

Effective date of 1980 amendments. Section 2 of the Order of April 29, 1980, -- US --, 64 L Ed 2d, No. 2, v., -- S Ct --, which adopted the 1980 amendments to this Rule, provided "That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."

Effect of 1983 amendment.

Act Jan. 12, 1983, P.L. 97-462, §§ 2(1)-2(7), amended Rule 4 as follows: in subd. (a), substituted "deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint" for "deliver it for service to the marshal or to any other person authorized by Rule 4(c) to serve it"; in subd. (c), substituted provision with subd. heading "Service" for provision with subd. heading "By Whom Served" which read: "Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. Service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made."; in subd. (d), substituted "Summons and Complaint: Person to be Served" for "Summons: Personal Service" in subd. heading; in subd. (d)(5), substituted "sending a copy of the summons and of the complaint by registered or certified mail" for "delivering a copy of the summons and of the complaint"; in subd. (d)(7), struck out para. (7) which read: "Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held 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."; in subd. (e), substituted "Summons" for "Same" as subd. heading; in subd. (g), substituted in second sentence "deputy United States marshal" and "such person" for "his deputy" and "he" and inserted third sentence "If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision."; and added subd. (j).

Effective date of 1983 amendment. Act Jan. 12, 1983, P.L. 97-462, 96 Stat. 2530, § 4, provided that "the amendments made by this Act [for full classification, consult USCS Tables volumes] shall take effect 45 days after the enactment of this Act [enacted Jan. 12, 1983].".

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

Purposes of Revision.

The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the methods of service so authorized always provide appropriate notice to persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.

First, the revised rule authorizes the use of any means of service provided by the law not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

Second, the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing ”service-by-mail,“ a procedure that effects economic service with cooperation of the defendant. Defendants that magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects in service.

Fourth, the revision calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service. In some respects, these treaties have facilitated service in foreign countries but are not fully known to the bar.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant’s person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. A new provision enables district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and

several disconnected provisions are removed, to be relocated in a new Rule 4.1.

The Caption of the Rule.

Prior to this revision, Rule 4 was entitled ”Process“ and applied to the service of not only the summons but also other process as well, although these are not covered by the revised rule. Service of process in eminent domain proceedings is governed by Rule 71A. Service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled ”Summons“ and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the test of this rule.

Subdivision (a).

Revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be the same in all cases. Few states now employ distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

Subdivision (b).

Revised subdivision (b) replaces the former subdivision (a). The revised text makes clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of the court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original bearing the names of multiple defendants if the addressee of the summons is effectively identified.

Subdivision (c).

Paragraph (1) of revised subdivision (c) retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit for service set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals‘ offices of much of the burden of serving the summons. Subdivision (c) eliminates the requirement for service by the marshal’s office in actions in which the party seeking

service is the United States. The United States like other civil litigants, is now permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to appoint a marshal, a deputy, or some other person to effect service of a summons in two classes of cases specified by statute: actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to appoint a process server on motion of a party. If a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d).

This text is new, but is substantially derived from the former subdivision (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F2d 161 (8th Cir. 1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for hearing costs of service in cases in which they ultimately prevail. Infants or incompetent persons likewise are not called upon to waive service because,

due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.

It was unclear whether the former rule authorized mailing of a request for "acknowledgment of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to employ this device in an effort to obtain service outside the state, and there are many instances in which it was in fact so used, with respect both to defendants within the United States and to defendants in other countries.

The opportunity for waiver has distinct advantages to a foreign defendant. By waiving service, the defendant can reduce the costs that may ultimately be taxed against it if unsuccessful in the lawsuit, including the sometimes substantial expense of translation that may be wholly unnecessary for defendants fluent in English. Moreover, a defendant that waives service is afforded substantially more time to defend against the action than if it had been formally served: under Rule 12, a defendant ordinarily has only 20 days after service in which to file its answer or raise objections by motion, but by signing a waiver it is allowed 90 days after the date the request for waiver was mailed in which to submit its defenses. Because of the additional time needed for mailing and the unreliability of some foreign mail services, a period of 60 days (rather than the 30 days required for domestic transmissions) is provided for a return of a waiver sent to a foreign country.

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the "service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. Nor are there any adverse consequences to a foreign defendant, since the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts promptly in effecting service, and whose policies discourage it residents from waiving formal service, there will be little reasons for a plaintiff to send the notice and request under subdivision (d) rather than use convention methods. On the other hand, the procedure offers significant potential benefits to a plaintiff when suing a defendant that, though fluent in English, is located in country where, as a condition to formal service under a convention, documents must be translated into another language or where formal service

will be otherwise costly or time-consuming.

Paragraph (1) is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant‘s person, or to assert other defenses that may be available. The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.

Paragraph (2) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18-A.

Paragraph (2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service. The general mail rooms of large organizations cannot be required to identify the appropriate individual recipient for an institutional summons.

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request; or was insufficiently literate in English to understand it. It should be noted that the provisions for shifting the cost of service apply only if the plaintiff and the defendant are both located in the United States, and accordingly a foreign defendant need not show ”good cause“ for its failure to waive service.

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay by declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is

not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F2d 35 (2d Cir. 1984). Cf. Walker v. Armco Steel Corp., 446 US 740 (1980).

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

The procedure of requesting waiver of service should also not be used if the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F Supp 278 (N.D. Ga 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h). It may be noted that the presumptive time limit for service under subdivision (m) does not apply to service in a foreign country.

Paragraph (5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, costs of unneeded translation or the cost of the time of a process server required to make contact with a defendant residing in guarded apartment houses or residential developments. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in

paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

Subdivision (e).

This subdivision replaces former subdivisions (c)(2)(C)(i) and (d)(1). It provides a means for service of summons on individuals within a judicial district of the United States. Together with subdivision (f), it provides for service on persons anywhere, subject to constitutional and statutory constraints.

Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may assert the territorial limits of the court‘s reach set forth in subdivision (k), including the constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment.

Paragraph (1) authorizes service in any judicial district in conformity with state law. This paragraph sets forth the language of former subdivision (c)(2)(C)(i), which authorized the use of the law of the state in which the district court sits, but adds as an alternative the use of the law of the state in which the service is effected.

Paragraph (2) retains the text of the former subdivision (d)(1) and authorizes the use of the familiar methods of personal or abode service or service on an authorized agent in any judicial district.

To conform to these provisions, the former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f), which had restricted the authority of the federal process server to the state in which the district court sits.

Subdivision (f).

This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. E.g., Martens v. Winde, 341 F2d 197 (9th Cir.), cert denied, 382 U.S. 937 (1965). This authority, however, was found to exist by implication. E.Q., SEC v. VTR. Inc., 39 FRD 19 (SDNY 1966). Given the substantial increase in the number of international

transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

A secondary effect of this provision for foreign service of a federal summons is to facilitate the use of federal long-arm law in actions brought to enforce the federal law against defendants who cannot be served under any state law but who can be constitutionally subjected to the jurisdiction of the federal court. Such a provision is set forth in paragraph (2) of subdivision (k) of this rule, applicable only to persons not subject to the territorial jurisdiction of any particular state.

Paragraph (1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., Fed. R. Civ. P. 4 (Supp. 1986). This Convention is an important means of dealing with problems of service in a foreign country. See generally 1 B. Ristau, International Judicial Assistance §§ 4-1-1 to 4-5-2 (1990). Use of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (noting that voluntary use of these procedures may be desirable even when service could constitutionally be effected in another manner); J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989). Therefore, this paragraph provides that, when service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires.

The Hague Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows a lack of adequate notice either to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

The Hague Convention does not specify a time within which a foreign country's Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provisions set forth in subdivision (f)(3).

Two minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous

with ”letter rogatory,“ ”letter of request“ is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subdivision (i)(1)(B), ”when service in either case is reasonably calculated to give actual notice,“ has been relocated.

Paragraph (2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule. Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using a local authority. Subparagraph (C) prescribes other methods authorized by the former rule.

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances. Other circumstances that might justify the use of additional methods include the failure of the foreign country‘s Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corp., 248 F Supp 537 (S.D.N.Y. 1965).

Subdivision (g).

This subdivision retains the text of former subdivision (d)(2). Provision is made for service upon an infant or incompetent person in a foreign country.

Subdivision (h).

This subdivision retains the text of former subdivision (d)(3), with changes reflecting those made in subdivision (e). It also contains the provisions for service on a corporation or association in a foreign country, as formerly found in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the

corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

Subdivision (i).

This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States Attorney.

Paragraph (2) replaces former subdivision (d)(5). Paragraph (3) saves the plaintiff from the hazard of losing a substantive right because of failure to comply with the complex requirements of multiple service under this subdivision. That risk has proved to be more than nominal. E.g., Whale v. United States, 792 F2d 951 (9th Cir. 1986). This provision should be read in connection with the provisions of subdivision (c) of Rule 15 to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff‘s failure to correctly identify and serve all the persons who should be named or served.

Subdivision (j).

This subdivision retains the text of former subdivision (d)(6) without material change. The waiver-of-service provision is also inapplicable to actions against governments subject to service pursuant to this subdivision.

The revision adds a new paragraph (1) referring to the statute governing service of a summons on a foreign state and its political subdivisions, agencies, and instrumentalities, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608. The caption of the subdivision reflects that change.

Subdivision (k).

This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the ”100-mile bulge“ provision added in 1963, or the federal interpleader act. Paragraph (1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any

federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state longarm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F2d 406, 418 (9th Cir. 1977). There also may be a further Fifth Amendment constraint in that a plaintiff‘s forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F2d 280, 286 n.3 (3rd Cir.), cert. denied, 454 U.S 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill. L. Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside

in a foreign country from forum selection so onerous that injustice could result. ”[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.“ Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat’l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court‘s discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).

Subdivision (l).

This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procures § 1132 (2d ed. 1987).

Subdivision (m).

This subdivision retains much of the language of the present subdivision (j).

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff’s failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 FRD 104 (E.D Mich 1987). A specific instance of good cause is set forth in paragraph (3) of this Rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an informa pauperis petition. Robinson v. America‘s Best Contacts & Eyeglasses, 876 F2d 596 (7th Cir 1989).

The 1983 revision of this subdivision referred to the ”party on whose behalf such service was required,“ rather than to the ”plaintiff,“ a term used generically elsewhere in this rule to refer to any party initiating a claim

against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n).

This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (1) incorporates any requirements of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstance. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

NOTES TO RULE 4.1

HISTORY: (Amended Dec. 1, 1993.)

Notes of Advisory Committee on 1993 amendments to Rules.

This is a new rule. Its purpose is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. Subdivision (a) contains no new language. "

Subdivision (b) replaces the final clause of the penultimate sentence of the former subdivision 4(f), a clause added to the rule in 1963. The new rule provides for nationwide service of orders of civil commitment enforcing decrees of injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights. "

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show

cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. Chagas v. United, 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause. Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir 1985).

The new rule does not affect the reach of the court to impose criminal contempt sanctions. Nationwide enforcement of federal decrees and injunctions is already available with respect to criminal contempt: a federal court may effect the arrest of a criminal contemnor anywhere in the United States, 28 U.S.C. § 3041, and a contemnor when arrested may be subject to removal to the district in which punishment may be imposed. Fed. R. Crim. P. 40. Thus, the present law permits criminal contempt enforcement against a contemnor wherever that person may be found.

The effect of the revision is to provide a choice of civil or criminal contempt sanctions in those situations to which it applies. Contempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumacious act. Ex parte Bradley, 74 U.S. 366 (1869). This is so even if the offensive conduct or inaction occurred outside the district of the court in which the enforcement proceeding must be conducted. E.g., McCourtney v. United States, 291 Fed 497 (8th Cir.), cert. denied, 263 U.S. 714 (1923). For this purpose, the rule as before does not distinguish between parties and other persons subject to contempt sanctions by reason of their relation or connection to parties.

NOTES TO RULE 5

HISTORY: (Amended July 1, 1963; July 1, 1970; Aug. 1, 1980; Aug. 1, 1987; Dec. 1, 1991; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Note to Subdivisions (a) and (b).

Compare 2 Minn Stat (Mason, 1927) §§ 9240, 9241, 9242; NY CPA (1937) §§ 163, 164, and NY RCP (1937) Rules 20, 21; 2 Wash Rev Stat Ann (Remington, 1932) §§ 244--249.

Note to Subdivision (d).

Compare the present practice under former Equity Rule 12 (Issue of Subpoena--Time for Answer).

Notes of Advisory Committee on 1963 amendments to Rules.

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760--61 (Wright ed 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of

papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22-A and the Advisory Committee‘s Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

Notes of Advisory Committee on 1970 amendments to Rules.

The amendment makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties, unless the court orders otherwise. The present language expressly includes notices and demands, but it is not explicit as to answers or responses as provided in Rules 33, 34, and 36. Discovery papers may be voluminous or the parties numerous, and the court is empowered to vary the requirement if in a given case it proves needlessly onerous.

In actions begun by seizure of property, service will at times have to be made before the absent owner of the property has filed an appearance. For example, a prompt deposition may be needed in a maritime action in rem. See Rules 30(a) and 30(b)(2) and the related notes. A provision is added authorizing service on the person having custody or possession of the property at the time of its seizure.

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (d).

By the terms of this rule and Rule 30(f)(1) discovery materials must be promptly filed, although it often happens that no use is made of the materials after they are filed. Because the copies required for filing are an added expense and the large volume of discovery filings presents serious problems of storage in some districts, the Committee in 1978 first proposed that discovery materials not be filed unless on order of the court or for use in the proceedings. But such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally. Accordingly, this amendment and a change in Rule 30(f)(1) continue the requirement of filing but make it subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

Subdivision (d).

This subdivision is amended to require that the person making service under the rule certify that service has been effected. Such a requirement has generally been imposed by local rule.

Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service. The certificate will generally specify the date as well as the manner of service, but parties employing private delivery services may sometimes be unable to specify the date of delivery. In the latter circumstance, a specification of the date of transmission of the paper to the delivery service may be sufficient for the purposes of this rule.

Subdivision (e).

The words ”pleading and other“ are stricken as unnecessary. Pleadings are papers within the meaning of the rule. The revision also accommodates the development of the use of facsimile transmission for filing.

Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

Notes of Advisory Committee on 1993 amendments to Rules.

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Notes of Advisory Committee on 1996 Amendments to Rules

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

The most significant change discards the requirement that the Judicial Conference

authorize local electronic filing rules. As before, each district may decide for itself whether it has the equipment and personnel required to establish electronic filing, but a district that wishes to establish electronic filing need no longer await Judicial Conference action.

The role of Judicial Conference standards is clarified by specifying that the standards are to govern technical matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address these issues until Judicial Conference standards are adopted.

The amended rule also makes clear the equality of filing by electronic means with written filings. An electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification. An electronic filing that otherwise satisfies the requirements of 28 U.S.C. s 1746 need not be separately made in writing. Public access to electronic filings is governed by the same rules as govern written filings.

The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

NOTES TO RULE 6

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; July 1, 1968; July 1, 1971; Aug. 1, 1983; Aug. 1, 1985; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivisions (a) and (b).

These are amplifications along lines common in state practices, of former Equity Rule 80 (Computation of Time--Sundays and Holidays) and of the provisions for enlargement of time found in former Equity Rules 8

(Enforcement of Final Decrees) and 16 (Defendant to Answer--Default--Decree Pro Confesso). See also Rule XIII, Rules and Forms in Criminal Cases, 292 US 661, 666. Compare Ala Code Ann (Michie, 1928) § 13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

Note to Subdivision (c).

This eliminates the difficulties caused by the expiration of terms of court. Such statutes as USC Title 28, former § 12 (Trials not discontinued by new term) are not affected. Compare Rules of the United States District Court of Minnesota, Rule 25 (Minn Stat (Mason, Supp 1936), p. 1089).

Note to Subdivision (d).

Compare 2 Minn Stat (Mason, 1927) § 9246; NY RCP (1937) Rules 60 and 64.

Notes of Advisory Committee on 1946 amendments to Rules.

Subdivision (b).

The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73(a). Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Decisions of lower federal courts suggests that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b), and 73(g).

In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b), and in some cases the rule has been so construed.

With regard to Rule 25(a) for substitution, it was held in Anderson v Brady, ED Ky 1941, 1 FRD 589, 4 Fed Rules Service 25a.1, Case 1, and in Anderson v Yungkau, CCA 6th, 1946, 153 F2d 685, cert granted, 1946, 66 S Ct 1025, that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in Leishman v Associated Wholesale Electric Co. 1943, 318 US 203, 63 S Ct 543, that Rule 6(b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See Coca-Cola v Busch, ED Pa 1943, 7 Fed Rules Service 59b.2, Case 4. Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered ”forthwith“ on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See Safeway Stores, Inc. v Coe, App DC 1943, 78 US App DC 19, 136 F2d 771; Jusino v Morales & Tio, CCA 1st, 1944, 139 F2d 946; Coca-Cola Co. v Busch, ED Pa 1943, 7 Fed Rules Service 59b.2, Case 4; Peterson v Chicago Great Western Ry. Co. D Neb 1943, 3 FRD 346, 7 Fed Rules Service 59b.2, Case 1; Leishman v Associated Wholesale Electric Co. 1943, 318 US 203, 63 S Ct 543.

As to Rule 60(b) for relief from a judgment, it was held in Schram v O’Connor, ED Mich 1941, 5 Fed Rules Serv 6b.31, Case 1, 2 FRD 192, s c 5 Fed Rules Serv 6b.31, Case 2, 2 FRD 192, that the six-months time limit in original Rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in Wallace v United States, CCA2d 1944, 142 F2d 240, cert den 1944, 323 US 712, 65 S Ct 37; Reed v South Atlantic Steamship Co. of Del., D Del 1942, 2 FRD 475, 6 Fed Rules Serv 60b.31, Case 1.

As to Rule 73(g), fixing the time for docketing an appeal, it was held in Ainsworth v Gill Glass & Fixture Co. CCA3d 1939, 104 F2d 83, that under

Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in Mutual Benefit Health & Accident Ass'n v Snyder, CCA 6th 1940, 109 F2d 469 and in Burke v Canfield, App. D.C. 1940, 72 App DC 127, 111 F2d 526.

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for a new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. Leishman v Associated Wholesale Electric Co. 1943, 318 US 203, 63 S Ct 543. By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one-year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73(g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6(b).

As to Rule 59(c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6(b) to enlarge the time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6(b) are merely clarifying and conforming. Thus "request" is substituted for "application" in clause (1) because an application is defined as a motion under Rule 7(b). The phrase "extend the time" is substituted for "enlarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6(b), "or the period for taking an appeal as provided by law," is deleted and a reference to Rule 73(a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

Subdivision (c).

The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See Hill v Hawes, 1944, 320 US 520, 64 S Ct 334; Boaz v Mutual Life Ins. Co. of New York, CCA8th 1944, 146 F2d 321; Bucy v Nevada Construction Co. CCA9th 1942, 125 F2d 213.

Notes of Advisory Committee on 1963 amendments to Rules.

Subdivision (a).

This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a "legal holiday" in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. "Legal holiday" is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of "holiday" in 11 USC § 1(18); also 5 USC § 86a; Executive Order No. 10358, "Observance of Holidays," June 9, 1952, 17 Fed Reg 5269. In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out

so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (b).

The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90-day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

Notes of Advisory Committee on 1966 amendments to Rules.

Subdivision (c).

PL 88-139, § 1, 77 Stat 248, approved on October 16, 1963, amended 28 USC § 138 to read as follows: "The district court shall not hold formal terms." Thus Rule 6(c) is rendered unnecessary, and it is rescinded.

Notes of Advisory Committee on 1968 amendments to Rules.

The amendment eliminates the references to Rule 73, which is to be abrogated.

Notes of Advisory Committee on 1971 amendments to Rules.

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, USC § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

Notes of Advisory Committee on 1983 amendments to Rules.

Subdivision (b).

The amendment confers finality upon the judgments of magistrates by foreclosing enlargement of the time for appeal except as provided in new Rule 74(a) (20 day period for demonstration of excusable neglect).

Preliminary draft of proposed amendment. A preliminary draft, dated August,

1988, proposed amendments to Rule 6 as follows:

> (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 8 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.
>
> (b)-(e) [Unchanged]

Notes of Advisory Committee on Aug. 1988 proposed amendments to Rules.

The amendment to the language concerning the exclusion of intervening weekends and legal holidays conforms this subdivision with similar proposed amendments to the Fed. R. App. P. 26(a), Fed. R. Crim. P. 45(a) and the Fed. R. Bankr. P. 9006(a).

Notes of Advisory Committee on 1985 amendments to Rules.

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in Federal Rule of Criminal Procedure 45(a), effective August 1, 1982.

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c)(2), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court. See Rule 6(b). If the exclusion of Saturdays, Sundays, and legal holidays will operate to cause excessive delay in urgent cases, the delay can be obviated by applying to the court to shorten the time. See Rule 6(b).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective in 1986, has been added to the list of legal holidays enumerated in the Rule.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 7

HISTORY: (Amended eff. Mar. 19, 1948; July 1, 1963; Aug. 1, 1983.)

Notes of Advisory Committee on Rules.

1. A provision designating pleadings and defining a motion is common in the State practice acts. See Ill Rev Stat (1937), ch 110, § 156 (Designation and order of pleadings); 2 Minn Stat (Mason, 1927) § 9246 (Definition of motion); and NY CPA (1937) § 113 (Definition of motion). Former Equity Rules 18 (Pleadings--Technical Forms Abrogated), 29 (Defenses--How Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. Note to Subdivision (a). This preserves the substance of former Equity Rule 31 (Reply--When Required--When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O 23, r r 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O 21). See O 21, r r 1--14; O 27, r 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo Stat Ann (1935) § 66; Ore Code Ann (1930) §§ 1-614, 1-616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. NC Code Ann (1935) § 525; 1 SD Comp Laws (1929) § 2357. A reply to a counterclaim is usually required. Ark Civ Code (Crawford, 1934) §§ 123--125; Wis Stat (1935) §§ 263.20, 263.21. USC Title 28, former § 45 (District courts; practice and procedure in certain cases) is modified insofar as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words ”petition“, ”bill of complaint“, ”plea“, ”demurrer“, and other such terminology are modified in form by this rule.

Notes of Advisory Committee on 1946 amendments to Rules.

This amendment [to subdivision (a)] eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, Scope of Reply Where Defendant Has Pleaded Counterclaim, 1939,

1 Fed Rules Serv 672; Fort Chartres and Ivy Landing Drainage and Levee District No. Five v Thompson, ED Ill 1945, 8 Fed Rules Serv 13.32, Case 1.

Notes of Advisory Committee on 1963 amendments to Rules.

Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

Notes of Advisory Committee on 1983 amendments to Rules.

One of the reasons sanctions against improper motion practice have been employed infrequently is the lack of clarity of Rule 7. That rule has stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11, which have been amplified.

NOTES TO RULE 8

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

See former Equity Rules 25 (Bill of Complaint--Contents), and 30 (Answer--Contents--Counterclaim). Compare 2 Ind Stat Ann (Burns, 1933) §§ 2-1004, 2-1015; 2 Ohio Gen Code Ann (Page, 1926) §§ 11305, 11314; Utah Rev Stat Ann (1933), §§ 104-7-2, 104-9-1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (b).

1. This rule supersedes the methods of pleading prescribed in USC, Title 19, § 508 (Persons making seizures pleading general issue and proving special matter); USC, Title 35, former § 40d (Proving under general issue, upon notice, that a statement in application for an extended patent is not true), former § 69 (now § 282) (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, former Equity Rule 30 (Answer--Contents--Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn Practice Book (1934) §§ 107, 108, and 122; Conn Gen Stat

(1930) §§ 5508--5514. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r r 17--20.

Note to Subdivision (c).

This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r 15 and NYCPA (1937) § 242, with ”surprise“ omitted in this rule.

Note to Subdivision (d).

The first sentence is similar to former Equity Rule 30 (Answer--Contents--Counterclaim). For the second sentence see former Equity Rule 31 (Reply--When Required--When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r r 13, 18; and to the practice in the States.

Note to Subdivision (e).

This rule is an elaboration upon former Equity Rule 30 (Answer--Contents--Counterclaim), plus a statement of the actual practice under some codes. Compare also former Equity Rule 18 (Pleadings--Technical Forms Abrogated). See Clark, Code Pleading (1928), pp 171--4, 432--5; Hankin, Alternative and Hypothetical Pleading (1924), 33 Yale L J 365.

Note to Subdivision (f).

A provision of like import is of frequent occurrence in the codes. Ill Rev Stat (1937) ch 110, § 157(3); 2 Minn Stat (Mason, 1927) § 9266; NY CPA (1937) § 275; 2 ND Comp Laws Ann (1913) § 7458.

Notes of Advisory Committee on 1966 amendments to Rules.

The change here is consistent with the broad purposes of unification.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 9

HISTORY: (Amended July 1, 1966; July 1, 1968; July 1, 1970; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

Compare former Equity Rule 25 (Bill of Complaint--Contents) requiring disability to be stated; Utah Rev Stat Ann (1933) § 104-13-15, enumerating a number of situations where a general averment of capacity is sufficient. For

provisions governing averment of incorporation, see 2 Minn Stat (Mason, 1927) § 9271; NYRCP (1937) Rule 93; 2 ND Comp Laws Ann (1913) § 7981 et seq.

Note to Subdivision (b).

See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r 22.

Note to Subdivision (c).

The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r 14; 2 Minn Stat (Mason, 1927) § 9273; NYRCP (1937) Rule 92; 2 ND Comp Laws Ann (1913) § 7461; 2 Wash Rev Stat Ann (Remington, 1932) § 288.

Note to Subdivision (e).

The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark Civ Code (Crawford, 1934) § 141; 2 Minn Stat (Mason, 1927) § 9269; NYRCP (1937) Rule 95; 2 Wash Rev Stat Ann (Remington, 1932) § 287.

Notes of Advisory Committee on 1966 amendments to Rules.

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 USC § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in

rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman‘s action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader’s intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forgo mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

Notes of Advisory Committee on 1968 amendments to Rules.

The amendment eliminates the reference to Rule 73 which is to be abrogated and transfers to Rule 9(h) the substance of Subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. § 1292(a)(3).

Notes of Advisory Committee on 1970 amendments to Rules.

The reference to Rule 26(a) is deleted, in light of the transfer of that subdivision to Rule 30(a) and the elimination of the de bene esse procedure therefrom. See the Advisory Committee‘s note to Rule 30(a).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 10

Notes of Advisory Committee on Rules.

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint--Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn Gen Stat (1930) § 5513; Ill Rev Stat (1937) ch 110, § 157(2); NYRCP (1937) Rule 90. For incorporation by reference, see NYRCP (1937) Rule 90. For written instruments as exhibits, see Ill Rev Stat (1937) ch 110, § 160.

NOTES TO RULE 11

HISTORY: (Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O 19, r 4, and Great Australian Gold Mining Co. v Martin, L R, 5 Ch Div 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn Stat (Mason, 1927) § 9265; NYRCP (1937) Rule 91; 2 ND Comp Laws Ann (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

USC, Title 28 former:
§ 381 (Preliminary injunctions and temporary restraining orders).
§ 762 (Suit against the United States).

USC, Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa Stat Ann (Purdon, 1931) see 12 PS Pa, § 1222; for the rule in equity itself, see Greenfield v Blumenthal, 69 F2d 294 (CCA 3d, 1934).

Notes of Advisory Committee on 1983 amendments to Rules.

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64--65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice para. 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, (1980); Hall v. Cole, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer‘s certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977).

The words ”good ground to support“ the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., Heart Disease Research Foundation v. General Motors Corp., 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass‘n, 365 F.Supp. 975 (E.D.Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing

factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer‘s conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. See Haines v. Kerner, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, Honesty in Pleading and its Enforcement: Some ”Striking“ Problems with Fed. R. Civ. P. 11, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See Murchison v. Kirby, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word ”sanctions“ in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (per curiam). And the words ”shall impose“ in the last sentence focus the court’s attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary

action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney‘s or party’s actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See North American Trading Corp. v. Zale Corp., 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court‘s responsibility for securing the system’s effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969); 2A Moore, Federal Practice para. 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See Browning Debenture Holders‘ Committee v. DASA Corp., supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge’s participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to ”other papers“ in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Purpose of revision.

This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys‘ Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventative Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a).

Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is

no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). The subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to ”stop-and-think“ before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant’s obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as ”presenting to the court“ that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as ”presenting“--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that

contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) ”evidentiary support“ for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient ”evidentiary support“ for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes is subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are ”nonfrivolous.“ This establishes an objective standard, intended to eliminate any ”empty-head pure-heart“ justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the

Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney‘s fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys’ fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms,

or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney‘s fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party’s attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ------ U.S. ------ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ------ U.S. ------ (1991). This restriction does not limit the court‘s power to impose sanctions or remedial orders may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for

appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention). Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegations or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe

harbor“ period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney’s fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading the monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a ”safe harbor“ to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court‘s own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant’s response, the court concludes that a violation has occurred.

Subdivision (d).

Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result. Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney‘s fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ------ U.S. ------ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court’s inherent powers. Finally, it should be noted that Rule 11 does not

preclude a party from initiating an independent action for malicious prosecution or abuse of process.

NOTES TO RULE 12

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

1. Compare former Equity Rules 12 (Issue of Subpoena--Time for Answer) and 31 (Reply--When Required--When Cause at Issue); 4 Mont Rev Codes Ann (1935) §§ 9107, 9158; NYCPA (1937) § 263; NYRCP (1937) Rules 109--111.

2. USC, Title 28, former § 763 (now § 507) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See USC, Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of former Equity Rule 29 (Defenses--How Presented) and NYCPA (1937) § 283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally former Equity Rules 29 (Defenses--How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties--Resisting Objection), and 44 (Defect of Parties--Tardy Objection); NYCPA (1937) §§ 277--280; NYRCP (1937) Rules 106--112; English Rules Under the Judicature Act (The Annual Practice, 1937) O 25, rr 1--4; Clark, Code Pleading (1928) pp 371--381.

2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) O 25, rr 1--4; 1 Miss Code Ann (1930) §§ 378, 379. Compare former Equity Rule 29 (Defenses--How Presented); USC, Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). USC, Title 28, former § 45, substantially continued by this rule, provides: ”No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed.“

Compare Calif Code Civ Proc (Deering, 1937) § 433; 4 Nev Comp Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif Code Civ Proc (Deering, 1937) § 431; 4 Nev Comp Laws (Hillyer, 1929) § 8598.

3. Former Equity Rule 29 (Defenses--How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn Code Ann (Williams, 1934) § 8784; Ala Code Ann (Michie, 1928) § 9479; 2 Mass Gen Laws (Ter Ed, 1932) ch 231, §§ 15--18; Kansas Gen Stat Ann (1935) §§ 60-705, 60-706.

Note to Subdivision (c).

Compare former Equity Rule 33 (Testing Sufficiency of Defense); NYRCP (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare former Equity Rules 20 (Further and Particular Statement in Pleading May Be Required) and 21 (Scandal and Impertinence); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, rr 7, 7a, 7b, 8; 4 Mont Rev Codes Ann (1935) §§ 9166, 9167; NYCPA (1937) § 247; NYRCP (1937) Rules 103, 115, 116, 117; Wyo Rev Stat Ann (Courtright, 1931) §§ 89-1033, 89-1034.

Note to Subdivision (g).

Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; NM Rules of Pleading Practice and Procedure, 38 N M Rep vii [105--408] (1934); Wash Gen Rules of the Superior Courts, 1 Wash Rev Stat Ann (Remington, 1932) p 160, Rule VI (e) and (f).

Note to Subdivision (h).

Compare Calif Code Civ Proc (Deering, 1937) § 434; 2 Minn Stat (Mason, 1927) § 9252; NYCPA (1937) §§ 278 and 279; Wash Gen Rules of the Superior Courts, 1 Wash Rev Stat Ann (Remington, 1932) p. 160, Rule VI (e). This rule continues USC, Title 28, former § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while USC, Title 28, former § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

Notes of Advisory Committee on 1946 amendments to Rules.

Subdivision (a).

Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (b).

The addition of defense (7), "failure to join an indispensable party," cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, Manner of Raising Objection of Non-Joinder of Indispensable Party, 1940, 2 Fed Rules Serv 658 and, 1942, 5 Fed Rules Serv 820. In one case, United States v Metropolitan Life Ins. Co. ED Pa 1941, 36 F Supp 399, the failure to join an indispensable party was raised under Rule 12(c). Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. Samara v United States, CCA 2d, 1942, 129 F2d 594, cert den, 1942, 317 US 686, 63 S Ct 258; Boro Hall Corp. v General Motors Corp. CCA 2d, 1942, 124 F2d 822, cert den, 1943, 317 US 695, 63 S Ct 436. See also Kithcart v Metropolitan Life Ins. Co. CCA 8th, 1945, 150 F2d 997, affg 62 F Supp 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary

judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact, on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: Boro Hall Corp. v General Motors Corp. CCA 2d, 1942, 124 F2d 822, cert den 1943, 317 US 695, 63 S Ct 436; Gallup v Caldwell, CCA 3d, 1941, 120 F2d 90; Central Mexico Light & Power Co. v Munch, CCA 2d, 1940, 116 F2d 85; National Labor Relations Board v Montgomery Ward & Co. App DC 1944, 79 US App DC 200, 144 F2d 528, cert den 1944, [323 US 774, 89 L Ed 619,] 65 S Ct 134; Urquhart v American-La France Foamite Corp. App DC 1944, 79 US App DC 219, 144 F2d 542; Samara v United States, CCA 2d, 1942, 129 F2d 594; Cohen v American Window Glass Co. CCA 2d, 1942, 126 F2d 111; Sperry Products Inc. v Association of American Railroads, CCA 2d, 1942, 132 F2d 408; Joint Council Dining Car Employees Local 370 v Delaware, Lackawanna and Western R. Co. CCA 2d, 1946, 157 F2d 417; Weeks v Bareco Oil Co. CCA 7th, 1941, 125 F2d 84; Carroll v Morrison Hotel Corp. CCA 7th, 1945, 149 F2d 404; Victory v Manning, CCA 3d, 1942, 128 F2d 415; Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen‘s Association v Southern Pacific Co. CCA 5th, 1942, 131 F2d 605; Lucking v Delano, CCA 6th, 1942, 129 F2d 283; San Francisco Lodge No. 68 of International Association of Machinists v Forrestal, ND Cal 1944, 58 F Supp 466; Benson v Export Equipment Corp., N Mex 1945, 164 P2d 380, construing New Mexico rule identical with Rule 12(b)(6); F. E. Myers & Bros. Co. v Gould Pumps, Inc. WD NY 1946, 9 Fed Rules Serv 12b, 33 Case 2, 5 FRD 132. Cf. Kohler v Jacobs, CCA 5th, 1943, 138 F2d 440; Cohen v United States, CCA 8th, 1942, 129 F2d 733.

Under group (2) are: Sparks v England, CCA 8th, 1940, 113 F2d 579; Continental Collieries, Inc. v Shober, CCA 3d, 1942, 130 F2d 631; Downey v Palmer, CCA 2d, 1940, 114 F2d 116; DeLoach v Crowley’s Inc. CCA 5th, 1942, 128 F2d 378; Leimer v State Mutual Life Assurance Co. of Worcester, Mass. CCA 8th, 1940, 108 F2d 302; Rossiter v Vogel, CCA 2d, 1943, 134 F2d 908, compare s. c., CCA 2d, 1945, 148 F2d 292; Karl Kiefer Machine Co. v United States Bottlers Machinery Co. CCA 7th, 1940, 113 F2d 356; Chicago Metallic Mfg. Co. v Edward Katzinger Co. CCA 7th, 1941, 123 F2d 518; Louisiana Farmers‘ Protective Union, Inc. v Great Atlantic & Pacific Tea Co. of America, Inc. CCA 8th, 1942, 131 F2d 419; Publicity Bldg. Realty

Corp. v Hannegan, CCA 8th, 1943, 139 F2d 583; Dioguardi v Durning, CCA 2d, 1944, 139 F2d 774; Package Closure Corp. v Sealright Co., Inc. CCA 2d, 1944, 141 F2d 972; Tahir Erk v Glenn L. Martin Co. CCA 4th, 1941, 116 F2d 865; Bell v Preferred Life Assurance Society of Montgomery, Ala, 1943, 320 US 238, 64 S Ct 5.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Subdivision (c).

The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d).

The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e).

References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. Slusher v Jones, ED Ky 1943, 7 Fed Rules Serv 12e.231, Case 5, 3 FRD 168; Best Foods, Inc. v General Mills, Inc. D Del 1943, 7 Fed Rules Serv 12e.231, Case 7, 3 FRD 275; Braden v Callaway, ED Tenn 1943, 8 Fed Rules Serv 12e.231, Case 1 (" . . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20-day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial. Rule 12 (e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized

by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's Federal Practice, 1938, Cum. Supplement, § 12.07, under "Page 657"; also, Holtzoff, New Federal Procedure and the Courts, 1940, 35--41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; Sun Valley Mfg. Co. v Mylish, ED Pa 1944, 8 Fed Rules Serv 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); Walling v American Steamship Co. WD NY 1945, 4 FRD 355, 8 Fed Rules Serv 12e.244, Case 8 (" . . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay."). The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"--eliminated by the proposed amendment--have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See Walling v Alabama Pipe Co. WD Mo 1942, 3 FRD 159, 6 Fed Rules Serv 12e.244, Case 7; Fleming v Mason & Dixon Lines, Inc. ED Tenn 1941, 42 F Supp 230; Kellogg Co. v National Biscuit Co. D NJ 1941, 38 F Supp 643; Brown v H. L. Green Co. SD NY 1943, 7 Fed Rules Serv 12e.231, Case 6; Pedersen v Standard Accident Ins. Co. WD Mo 1945, 8 Fed Rules Serv 12e.231, Case 8; Bowles v Ohse, D Neb 1945, 4 FRD 403, 9 Fed Rules Serv 12e.231, Case 1; Klages v Cohen, ED NY 1945, 9 Fed Rules Serv 8a.25, Case 4; Bowles v Lawrence, D Mass 1945, 8 Fed Rules Serv 12e.231, Case 19; McKinney Tool Fed Rules Serv 12e.231, Case 4, 2 FRD 40. See also Bowles v Gabel, WD Mo 1946, 9 Fed Rules Serv 12e.244, Case 10 ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f).

This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See Dysart v Remington-Rand, Inc. D Conn 1939, 31 F Supp 296; Eastman Kodak Co. v McAuley, SD NY 1941, 4 Fed Rules Serv 12f.21, Case 8, 2 FRD 21; Schenley Distillers Corp. v Renken, ED SC 1940, 34 F Supp 678; Yale Transport Corp. v Yellow Truck & Coach Mfg. Co. SD NY 1944, 3 FRD 440; United States v Turner Milk Co. ND Ill 1941, 4 Fed Rules Serv 12b.51, Case 3, 1 FRD 643; Teiger v Stephan Oderwald, Inc. SD NY 1940, 31 F Supp 626; Teplitsky v Pennsylvania R. Co. ND Ill 1941, 38 F Supp 535; Gallagher v Carroll, ED NY 1939, 27 F Supp 568; United States v Palmer, SD NY 1939, 28 F Supp 936. And see Indemnity Ins. Co. of North America v Pan American Airways, Inc. SD NY

1944, 58 F Supp 338; Commentary, Modes of Attacking Insufficient Defenses in the Answer, 1939, 1 Fed Rules Serv 669, 1940, 2 Fed Rules Serv 640.

Subdivision (g).

The change in title conforms with the companion provision in subdivision (h).

The alteration of the ”except“ clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (h).

The addition of the phrase relating to indispensable parties is one of necessity.

Notes of Advisory Committee on 1963 amendments to Rules.

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee‘s Note to amended Rule 4(b).

Notes of Advisory Committee on 1966 amendments to Rules.

Subdivision (b)(7).

The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee’s Note to Rule 19, as amended, especially the third paragraph therein before the caption ”Subdivision (c).“

Subdivision (g).

Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h).

The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of ” . . . defenses and objections which he

[defendant] does not present . . . by motion . . . or, if he has made no motion, in his answer . . . ." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see Keefe v Derounian, 6 FRD 11 (ND Ill 1946); Elbinger v Precision Metal Workers Corp. 18 FRD 467 (ED Wis 1956); see also Rensing v Turner Aviation Corp. 166 F Supp 790 (ND Ill 1958); P. Beiersdorf & Co. v Duke Laboratories, Inc. 10 FRD 282 (SD NY 1950); Neset v Christensen, 92 F Supp 78 (ED NY 1950). Opposing waiver, see Phillips v Baker, 121 F2d 752 (9th Cir 1941); Crum v Graham, 32 FRD 173 (D Mont 1963) (regretfully following the Phillips case); see also Birnbaum v Birrell, 9 FRD 72 (SD NY 1948); Johnson v Joseph Schlitz Brewing Co. 33 F Supp 176 (ED Tenn 1940); cf. Carter v American Bus Lines, Inc. 22 FRD 323 (D Neb 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)--(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivisions (h)(2) and (3).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

NOTES TO RULE 13

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

1. This is substantially former Equity Rule 30 (Answer--Contents--Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O 19, rr 2 and 3, and O 21, rr 10--17; Beddall v Maitland, LR 17 Ch Div 174, 181, 182 (1881).

3. Certain States have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark Civ Code (Crawford, 1934) §§ 117 (as amended) and 118; NJ Comp Stat (2 Cum Supp 1911--1924), NYCPA (1937) §§ 262, 266, 267 (all as amended, Laws of 1936, ch 324), 268, 269, and 271; Wis Stat (1935) § 263.14 (1) (c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, Code Pleading (1928), p. 486. Ky Codes (Carroll, 1932) Civ Pract § 98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82

(Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, Some Jurisdictional Limitations in Federal Procedure (1936), 45 Yale LJ 393, 410 et seq.

6. This rule does not affect such statutes of the United States as USC, Title 28, former § 41(1) (now §§ 1332, 1345, 1359) (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See American Mills Co. v American Surety Co. 260 US 360, 43 S Ct 149 (1922); Marconi Wireless Telegraph Co. v National Electric Signalling Co. 206 Fed 295 (ED NY, 1913); Hopkins, Federal Equity Rules (8th ed, 1933), p. 213; Simkins, Federal Practice (1934), p. 663.

8. For allowance of credits against the United States see USC, Title 26, § 3772(a)(1)(2)(b)(Suits for refunds of internal revenue taxes--limitations); USC, Title 28, former § 774 (now § 2406) (Suits by United States against individuals; credits), former § 775 (Suits under postal laws; credits); USC, Title 31, § 227 (Offsets against judgments and claims against United States).

Notes of Advisory Committee on 1946 amendments to Rules.

Subdivision (a).

The use of the word ”filing“ was inadvertent. The word ”serving“ conforms with subdivision (e) and with usage generally throughout the rules.

The removal of the phrase ”not the subject of a pending action“ and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in Prudential Insurance Co. of America v Saxe, App DC 1943, 77 US App DC 144, 134 F2d 16, 33--34, cert den, 1943, 319 US 745, 63 S Ct 1033. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

Subdivision (g).

The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

Subdivision (i).

The change clarifies the interdependence of Rules 13(i) and 54(b).

Notes of Advisory Committee on 1963 amendments to Rules.

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

Notes of Advisory Committee on 1966 amendments to Rules.

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee‘s Note to Rule 19, as amended; cf. 3 Moore’s Federal Practice, par. 13.39 (2d ed 1963), and Supp thereto; 1A Barron & Holtzoff, Federal Practice and Procedure § 399 (Wright ed 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized ”ancillary“ Federal jurisdiction over counterclaims and cross-claims and ”ancillary“ venue as to parties to these claims.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 14

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the Federal admiralty courts, and in some American State jurisdictions. See English Rules Under the Judicature Act (The Annual Practice, 1937) O 16A, rr 1--13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa Stat Ann (Purdon, 1936) Title 12, § 141; Wis Stat (1935) §§ 260.19, 260.20; NYCPA (1937) §§ 193(2), 211(a). Compare La Code Pract (Dart, 1932) §§ 378--388. For the practice in Texas as developed by judicial decision, see Lottman v Cuilla, 288 SW 123, 126 (Tex, 1926). For a treatment of this subject see Gregory, Legislative Loss Distribution in Negligence Actions (1936); Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale LJ 393, 417, et seq.

Third-party impleader under the former conformity act has been applied in actions at law in the Federal courts. Lowry and Co., Inc. v National City Bank of New York, 28 F2d 895 (SD NY, 1928); Yellow Cab Co. of Philadelphia v Rodgers, 61 F2d 729 (CCA 3d, 1932).

Notes of Advisory Committee on 1946 amendments to Rules.

The provisions in Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. Satink v Holland Township, D NJ 1940, 31 F Supp 229, noted, 1940, 88 U Pa L Rev 751; Connelly v Bender, ED Mich 1941, 46 F Supp 368; Whitmire v Partin (Milton), ED Tenn 1941, 2 FRD 83, 5 Fed Rules Serv 14a.513, Case 2; Crim v Lumbermen‘s Mutual Casualty Co. D DC 1939, 26 F Supp 715; Carbola Chemical Co., Inc. v Trundle, SD NY 1943, 3 FRD 502, 7 Fed Rules Serv 14a.224, Case 1; Roadway Express, Inc. v Automobile Ins. Co. of Hartford, Conn (Providence Washington Ins. Co.), ND Ohio 1945, 8 Fed Rules Serv 14a.513, Case 3. In Delano v Ives, ED Pa 1941, 40 F Supp 672, the court said: ”. . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff.“ Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See Satink v Holland Township, supra; Malkin v Arundel Corp. D Md 1941, 36 F Supp 948; also Koenigsberger, Suggestions for Changes

in the Federal Rules of Civil Procedure, 1941, 4 Fed Rules Serv 1010. But cf. Atlantic Coast Line R. Co. v United States Fidelity & Guaranty Co. MD Ga 1943, 52 F Supp 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. Hoskie v Prudential Ins. Co. of Ame Corp.), WD Mo 1943, 7 Fed Rules Serv 14a.11, Case 2; Saunders v Baltimore & Ohio R. Co. SD W Va 1945, 9 Fed Rules Serv 14a.62, Case 2; Hull v United States Rubber Co. (Johnson, Larsen & Co.), ED Mich 1945, 9 Fed Rules Serv 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in People of State of Illinois for use of Trust Co. of Chicago v Maryland Casualty Co. CCA 7th, 1942, 132 F2d 850, 853. Contra: Sklar v Hayes (Singer), ED Pa 1941, 4 Fed Rules Serv 14a.511, Case 2, 1 FRD 594. Discussion of the problem will be found in Commentary, Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant, 1942, 5 Fed Rules Serv 811; Commentary, Federal Jurisdiction in Third-Party Practice, 1943, 6 Fed Rules Serv 766; Holtzoff, Some Problems Under Federal Third-Party Practice, 1941, 3 La L Rev 408, 419--420; 1 Moore's Federal Practice, 1938, Cum Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of Rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original 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. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See Atlantic Coast Line R. Co. v United States Fidelity & Guaranty Co. MD Ga, 1943, 52 F Supp 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counter-claims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state

the effect of a judgment.

The elimination of the words ”the third-party plaintiff, or any other party“ from the second sentence of Rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

Notes of Advisory Committee on 1963 amendments to Rules.

Under the amendment of the initial sentences of the subdivision, a defendant as third-party plaintiff may freely and without leave of court bring in a third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff‘s claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn L Rev 115 (1958); cf. Pa R Civ P 2252--53 (60 days after service on the defendant); Minn R Civ P 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, Federal Practice & Procedure 649--50 (Wright Ed 1960); Comment, 58 Colum L Rev 532, 546 (1958); cf. NY Civ Prac Act § 193-a; Me R Civ P 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

Notes of Advisory Committee on 1966 Amendments to Rules.

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party

defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the amended rule a third party could not be impleaded on the basis that he might be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of a suit in admiralty is clearly desirable.

Preliminary draft of proposed amendment. A preliminary draft, dated September, 1989, proposed amendments to Rule 14 as follows:

> (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. A copy of all previous pleadings in the action shall accompany the third party complaint or be provided promptly after service. 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, the claimant of the property arrested.

(b), (c) [Unchanged]

Notes of Advisory Committee on 1989 proposed amendments to Rule.

The revision assures the third party defendant of a copy of all pleadings previous to the third party complaint without necessity for a request of the clerk's office. Some local rules and some state rules have required that all previous pleadings be attached to the third party complaint at the time of service. Failure to attach every such instrument should not, however, be a condition of effective timely service of the third party complaint. The revised rule therefore allows separate transmission of the additional documents.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 15

HISTORY: (Amended July 1, 1963; July 1, 1966, Aug. 1, 1987; Dec. 1, 1991; Dec. 9, 1991, P.L. 102-198, § 11(a), 105 Stat. 1626; Dec. 1, 1993.)

AMENDMENTS: 1991. Act Dec. 9, 1991, in subsec. (c)(3), substituted "Rule 4(j)" for "Rule 4(m)".

Notes of Advisory Committee on Rules.

See generally for the present federal practice, former Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills--Form); USC, Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) and former § 777 (Defects of Form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O 28, rr 1--13; O 20, r 4; O 24, rr 1--3.

Note to Subdivision (a).

The right to serve an amended pleading once as of course is common. 4 Mont

Rev Codes Ann (1935) § 9186; 1 Ore Code Ann (1930) § 1-904; 1 SC Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O 28, r 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading (1928) pp. 498, 509.

Note to Subdivision (b).

Compare former Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice" (e. g., Ark Civ Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e. g., NM Stat Ann (Courtright, 1929) §§ 105--601, 105--602).

Note to Subdivision (c).

"Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala Code Ann (Michie, 1928) § 9513; Ill Rev Stat (1937) ch 110, § 170(2); 2 Wash Rev Stat Ann (Remington, 1932) § 308-3(4). See USC, Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d).

This is an adaptation of Equity Rule 34 (Supplemental Pleading).

Notes of Advisory Committee on 1963 amendments to Rules.

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See Bonner v Elizabeth Arden, Inc. 177 F2d 703 (2d Cir 1949); Bowles v Senderowitz, 65 F Supp 548 (ED Pa), revd on other grounds, 158 F2d 435 (3d Cir 1946), cert denied, Senderowitz v Fleming, 330 US 848, 67 S Ct 1091, 91 L Ed 1292 (1947); cf. LaSalle Nat. Bank v 222 East Chestnut St. Corp. 267 F2d 247 (7th Cir), cert denied, 361 US 836, 80 S Ct 88, 4 L Ed 2d 77 (1959). But see Camilla Cotton Oil Co. v Spencer Kellogg & Sons, 257 F2d 162 (5th Cir 1958); Genuth v National Biscuit Co. 81 F Supp 213 (SD NY 1948), app dism, 177 F2d 962 (2d Cir 1949); 3 Moore's Federal Practice para.15.01 [5] (Supp 1960); 1A Barron & Holtzoff, Federal Practice & Procedure 820--21 (Wright ed 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading

despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. Blau v Lamb, 191 F Supp 906 (SD NY 1961); Lendonsol Amusement Corp. v B. & Q. Assoc., Inc. 23 FR Serv 15d.3, Case 1 (D Mass 1957).

Notes of Advisory Committee on 1966 amendments to Rules.

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 USC § 405(g) (Supp III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provisions . . . that suit be brought within sixty days . . . ." Cohn v Federal Security Adm. 199 F Supp 884, 885 (WD NY 1961); see also Cunningham v United States, 199 F Supp 541 (WD Mo 1958); Hall v Department of HEW, 199 F Supp 833 (SD Tex 1960); Sandridge v Folsom, Secretary of HEW, 200 F Supp 25 (MD Tenn 1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 USC § 405(g). See 29 Fed Reg 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo LJ 19, 42--43 (1964); see also Simmons v United States Dept. HEW, 328 F2d 86 (3d Cir 1964).]

Analysis in terms of "new proceeding" is traceable to Davis v L. L. Cohen & Co. 268 US 638 (1925), and Mellon v Arkansas Land & Lumber Co. 275 US 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the Davis and Mellon cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period--in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv L Rev 40 (1963); see also Ill Civ P Act § 46(4).

Much the same question arises in other types of actions against the government (see Byse, supra, at 45 n 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, Federal Practice & Procedure § 451 (Wright ed 1960); 1 id § 186 (1960); 2 id § 543 (1961); 3 Moore's Federal Practice, par 15.15 (Cum Supp 1962); Annot, Change in Party After Statute of Limitations Has Run, 8 ALR2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct . . . set forth . . . in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that 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 for correction of the defect in the manner there stated.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally, the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. Walker v. Armco Steel Corp., 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. E.g., Board of Regents v. Tomanio, 446 U. S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. E.g., West v. Conrail, Inc. 107 S. Ct. 1538 (1987). Cf. Burlington Northern R. Co. v. Woods, 480 U. S. 1 (1987); Stewart Organization v. Ricoh, 108 S. Ct. 2239 (1988). Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim. Accord, Marshall v. Mulrenin, 508 F. 2d 39 (1st cir. 1974). If Schiavone v. Fortune, 106 S. Ct. 2379 (1986) implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in Schiavone v. Fortune, supra, with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in Schiavone v. Fortune that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure, 63 NOTRE DAME L. REV. 720 (1988); Brussack, Outrageous Fortune: The Case for Amending Rule 15(c) Again, 61 S. CAL. L. REV. 671 (1988); Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 86 MICH. L. REV. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in Gardner v. Gartman, 880 F. 2d 797 (4th cir. 1989), Rys v. U. S. Postal Service, 886 F. 2d 443 (1st cir. 1989), Martin's Food & Liquor, Inc. v. U. S. Dept. of Agriculture, 14 F. R. S. 3d 86 (N. D. Ill. 1988). But cf. Montgomery v. United States Postal Service, 867 F. 2d 900 (5th cir. 1989), Warren v. Department of the Army, 867 F. 2d 1156 (8th cir. 1989); Miles v. Department of the Army, 881 F. 2d 777 (9th cir. 1989), Barsten v. Department of the Interior, 896 F. 2d 422 (9th cir. 1990); Brown v. Georgia Dept. of Revenue, 881 F. 2d 1018 (11th cir. 1989).

Notes of Advisory Committee on 1993 amendments to Rules.

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

NOTES TO RULE 16

HISTORY: (Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimizing Calendar Delay in Jury Cases (Dec. 1936--published by The New York Law Society); Pre-Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207--243; Report of the Commission on the Administration of Justice in New York State (1934), pp. (288)--(290). See also Pre-Trial Procedure in the Wayne Circuit Court, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63--75; and Sunderland, The Theory and Practice of Pre-Trial Procedure (Dec. 1937) 36 Mich L Rev 215--226, 21 J Am Jud Soc 125. Compare the English procedure known as the "summons for directions," English Rules Under the Judicature Act (The Annual Practice, 1937) O 38a; and a similar procedure in New Jersey, NJ Comp Stat (2 Cum Supp 1911--1924); NJ Supreme Court Rules, 2 NJ Misc Rep (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 NJ Misc Rep (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment--Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master's Report; In Jury Actions).

Notes of Advisory Committee on 1983 amendments to Rules.

Introduction Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1522 (1971). However, in other respects particularly with regard to case management, the rule has not always been as helpful as it might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation. See Report of the National Commission for the Review of Antitrust Laws and Procedures (1979).

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, Pretrial Procedures More Effectively Handled, 65 F.R.D. 475 (1974). This is especially likely to be true when pretrial proceedings occur long before trial. At the other end of the spectrum, the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

Four sources of criticism of pretrial have been identified. First, conferences often are seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently is nothing but a formal agreement on minutiae. Third, the conferences are seen as unnecessary and time-consuming in cases that will be settled before trial. Fourth, the meetings can be ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations. See generally McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976); Pollack, Pretrial Procedures More Effectively Handled, 65 F.R.D. 475 (1974); Rosenberg, The Pretrial Conference and Effective Justice 45 (1964).

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference, he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case.

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the

challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, Case Management and Court Management in United States District Courts 17, Federal Judicial Center (1977). Thus, the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

Discussion Subdivision (a); Pretrial Conferences: Objectives.

The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery. In addition, the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed. Rule 16 thus will be a more accurate reflection of actual practice.

Subdivision (b); Scheduling and Planning.

The most significant change in Rule 16 is the mandatory scheduling order described in Rule 16(b), which is based in part on Wisconsin Civil Procedure Rule 802.10. The idea of scheduling orders is not new. It has been used by many federal courts. See, e.g., Southern District of Indiana, Local Rule 19.

Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation, it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. See Eastern District of Virginia, Local Rule 12(1). Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

A scheduling conference may be requested either by the judge, a magistrate when authorized by district court rule, or a party within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term ”judge“ in subdivision (b) reflects the Advisory Committee‘s judgment that it is preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636(c). While personal supervision by the trial judge is preferred, the rule, in recognition of the impracticality or difficulty of complying with such a

requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order, the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)--(3). As indicated in Rule 16(b)(4)--(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the same time, at least when a scheduling conference is held.

Item (1) assures that at some point both the parties and the pleadings will be fixed, by setting a time within which joinder of parties shall be completed and the pleadings amended.

Item (2) requires setting time limits for interposing various motions that otherwise might be used as stalling techniques.

Item (3) deals with the problem of procrastination and delay by attorneys in a context in which scheduling is especially important--discovery. Scheduling the completion of discovery can serve some of the same functions as the conference described in Rule 26(f).

Item (4) refers to setting dates for conferences and for trial. Scheduling multiple pretrial conferences may well be desirable if the case is complex and the court believes that a more elaborate pretrial structure, such as that described in the Manual for Complex Litigation, should be employed. On the other hand, only one pretrial conference may be necessary in an uncomplicated case.

As long as the case is not exempted by local rule, the court must issue a written scheduling order even if no scheduling conference is called. The order, like pretrial orders under the former rule and those under new Rule 16(c), normally will ”control the subsequent course of the action.“ See Rule 16(e). After consultation with the attorneys for the parties and any unrepresented parties--a formal motion is not necessary--the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a ”manifest injustice“ or ”substantial hardship“ test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery. Moreover, changes in the court’s calendar sometimes will oblige the judge or magistrate when authorized by district court rule to modify the scheduling order.

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited

to the individual case than a standard order, without taking the time that would be required by a formal conference. Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first. Report of the National Commission for the Review of Antitrust Laws and Procedures 28 (1979).

Thus, except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 120 days after the complaint is filed that notifies the attorneys that the case will be moving toward trial. Subdivision (b) is reenforced by subdivision (f), which makes it clear that the sanctions for violating a scheduling order are the same as those for violating a pretrial order.

Subdivision (c); Subjects to be Discussed at Pretrial Conferences.

This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, Case Management and Court Management in United States District Courts, Federal Judicial Center (1977). See also Report of the National Commission for the Review of Antitrust Laws and Procedures (1979).

The reference in Rule 16(c)(1) to ”formulation“ is intended to clarify and confirm the court‘s power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. See generally Meadow Gold Prods. Co. v. Wright, 278 F.2d 867 (D.C. Cir. 1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases it may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the

court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

Clause (6) acknowledges the widespread availability and use of magistrates. The corresponding provision in the original rule referred only to masters and limited the function of the reference to the making of "findings to be used as evidence" in a case to be tried to a jury. The new text is not limited and broadens the potential use of a magistrate to that permitted by the Magistrate's Act.

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's Federal Practice para.16.17; 6 Wright & Miller, Federal Practice and Procedure: Civil § 1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. See Flanders, Case Management and Court Management in the United States District Courts, 39, Federal Judicial Center (1977). Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

A settlement conference is appropriate at any time. It may be held in conjunction with a pretrial or discovery conference, although various objectives of pretrial management, such as moving the case toward trial, may not always be compatible with settlement negotiations, and thus a separate settlement conference may be desirable. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1522, at p. 571 (1971).

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in Green, Marks & Olson, Settling Large Case Litigation: An Alternative Approach, 11 Loyola of L.A. L.Rev. 493 (1978). Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts, 4 Just. Sys. J. 135 (1976). Clause 10 provides an explicit authorization for such

procedures and encourages their use. No particular techniques have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the Manual for Complex Litigation.

The rule simply identifies characteristics that make a case a strong candidate for special treatment. The four mentioned are illustrative, not exhaustive, and overlap to some degree. But experience has shown that one or more of them will be present in every protracted or difficult case and it seems desirable to set them out. See Kendig, Procedures for Management of Non-Routine Cases, 3 Hofstra L.Rev. 701 (1975).

The last sentence of subdivision (c) is new. See Wisconsin Civil Procedure Rule 802.11(2). It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to ”authority“ is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

Subdivision (d); Final Pretrial Conference.

This provision has been added to make it clear that the time between any final pretrial conference (which in a simple case may be the only pretrial conference) and trial should be as short as possible to be certain that the litigants make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. An optimum time of 10 days to two weeks has been suggested by one federal judge. Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts, 4 Just. Sys. J. 135, 141 (1976). The Committee, however, concluded that it would be inappropriate to fix a precise time in the rule, given the numerous variables that could bear on the matter. Thus the timing has been left to the court’s discretion.

At least one of the attorneys who will conduct the trial for each party must be present at the final pretrial conference. At this late date there should be no doubt as to which attorney or attorneys this will be. Since the agreements and stipulations made at this final conference will control the trial, the presence of lawyers who will be involved in it is especially useful to assist the judge in structuring the case, and to lead to a more effective trial.

Subdivision (e); Pretrial Orders.

Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of

the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, Federal Practice and Procedure: Civil §§ 1521--30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words ”to prevent manifest injustice,“ which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff‘s attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and others leave it to the court. See Note, Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts, 64 Va.L.Rev. 467 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See Handbook for Effective Pretrial Procedure, 37 F.R.D. 225 (1964).

Subdivision (f); Sanctions.

Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the rule. However, courts have not hesitated to enforce it by appropriate measures. See, e.g., Link v. Wabash R. Co., 370 U.S. 628 (1962) (district court’s dismissal under Rule 41(b) after plaintiff‘s attorney failed to appear at a pretrial conference upheld); Admiral Theatre Corp. v. Douglas Theatre, 585 F.2d 877 (8th Cir. 1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order).

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court’s inherent power to regulate litigation, cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S.

197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 65--67, 80--84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reenforces the rule's intention to encourage forceful judicial management. Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

As is true under Rule 37(b)(2), the imposition of sanctions may be sought by either the court or a party. In addition, the court has discretion to impose whichever sanction it feels is appropriate under the circumstances. Its action is reviewable under the abuse-of-discretion standard. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (b).

One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12 or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take

into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

Subdivision (c).

The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony

under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed or, under revised Rule 56(g)(3), enter a show cause order that initiates the process.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. $ $ 473(a)(6), 473(b)(4), 651-68; Section 104(b)(2), Pub.L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be

no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court‘s inherent powers, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives ”with authority to bind [parties] in settlement discussions“ be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

NOTES TO RULE 17

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; July 1, 1966; Aug. 1, 1987; Aug. 1, 1988; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7049, 102 Stat. 4401.)

AMENDMENTS: 1988. Act Nov. 18, 1988, in subsec. (a), purported to delete ”with him“, but this amendment was not executed because ”with him“ did not appear in the existing text.

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

The real party in interest provision, except for the last clause which is new, is taken verbatim from former Equity Rule 37 (Parties Generally--Intervention), except that the word "expressly" has been omitted. For similar provisions see NYCPA (1937) § 210; Wyo Rev Stat Ann (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, r 8. See also Equity Rule 41 (Suit to Execute Trusts of Will--Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see USC, Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts . . . may sue on a payment bond, "in the name of the United States for the use of the person suing"); and USC, Title 25, § 201 (Penalties under laws relating to Indians--how recovered). Compare USC, Title 26, § 3745(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b).

For capacity see generally Clark and Moore, A New Federal Civil Procedure--II. Pleadings and Parties, 44 Yale LJ 1291, 1312--1317 (1935) and specifically Coppedge v Clinton, 72 F2d 531 (CCA 10th, 1934) (natural person); David Lupton's Sons Co. v Automobile Club of America, 225 US 489, 32 S Ct 711, 56 L Ed 1177, Ann Cas 1914A, 699 (1912) (corporation); Puerto Rico v Russell & Co., 288 US 476, 53 S Ct 447, 77 L Ed 903 (1933) (unincorporated assn.); United Mine Workers of America v Coronado Coal Co. 259 US 344, 42 S Ct 570, 66 L Ed 975, 27 ALR 762 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare Moffat Tunnel League v United States, 289 US 113, 53 S Ct 543, 77 L Ed 1069 (1933). See note to Rule 23, clause (1).

Note to Subdivision (c).

The provision for infants and incompetent persons is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, rr 16--21.

Notes of Advisory Committee on 1946 amendments to Rules.

The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

Notes of Advisory Committee on 1948 amendments to Rules.

The amendment effective October 20, 1949, deleted the words "Rule 66" at the end of subdivision (b) and substituted the words "Title 28, USC, §§ 754 and 959 (a)."

Notes of Advisory Committee on 1966 Amendments to Rules.

The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right).

The rule adds to the illustrative list of real parties in interest a bailee--meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word ”bailee“ is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. Gulf Oil Corp. v Gilbert, 330 US 501, (1947).

The provision that 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 the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed--in both maritime and nonmaritime cases. See Levinson v Deupree, 345 US 648 (1953); Link Aviation, Inc. v Downs, 325 F2d 613 (DC Cir 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed

by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice--in short, to codify in broad terms the salutary principle of Levinson v Deupree, 345 US 648 (1953), and Link Aviation, Inc. v Downs, 325 F2d 613 (DC Cir 1963).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes on Advisory Committee on 1988 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 18

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

1. Recent development, both in code and common-law states, has been toward unlimited joinder of actions. See Ill Rev Stat (1937) ch 110, § 168; NJSA 2:27--37, as modified by NJ Sup Ct Rules, Rule 21, 2 NJ Misc 1208 (1924); NYCPA (1937) § 258 as amended by Laws of 1935, ch 339.

2. This provision for joinder of actions has been patterned upon former Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O 18, rr 1--9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See NYCPA § 258 before amended in 1935; Compare Kan Gen Stat Ann (1935) § 60-601; Wis Stat (1935) § 263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale LJ 393, 397--410. For separate trials of joined claims, see Rule 42(b).

Note to Subdivision (b).

This rule is inserted to make it clear that in a single action a party should be

accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in former Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (Braun v American Laundry Mach. Co. 56 F2d 197 (SD NY 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv L Rev 404, 444 (1933).

Notes of Advisory Committee on 1966 amendments to Rules.

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W Va L Q 5, 13 (1938); see Clark, Code Pleading 58 (2d ed 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a)--"if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied"--has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In Federal Housing Admr. v Christianson, 26 F Supp 419 (D Conn 1939), the indorsee of two notes sued the three co-makers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, Federal Practice & Procedure, § 533.1 (Wright ed 1961); 3 Moore's Federal Practice, par 18.04 [3] (2d ed 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn L Rev 580, 605--06 (1952). Thus if it

could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a ”series,“ and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id at 198 n 60.4; cf. 3 Moore’s Federal Practice, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, § 533.1; Wright, supra, 36 Minn L Rev at 604--11; Developments in the Law--Multiparty Litigation in the Federal Courts, 71 Harv 874, 970--71 (1958); Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 FR Serv 822 (1942). It is instructive to note that the court in the Christianson case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F Supp 419. Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See Noland Co. Inc. v Graver Tank & Mfg. Co. 301 F2d 43, 49--51 (4th Cir 1962); but cf. C. W. Humphrey Co. v Security Alum. Co. 31 FRD 41 (ED Mich 1962). This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee‘s Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The amendment accordingly provides for the inclusion in the rule of maritime claims as well as those which are legal and equitable in character.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 19

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

The first sentence with verbal differences (e.g., "united" interest for "joint" interest) is to be found in former Equity Rule 37 (Parties Generally--Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo Rev Stat Ann (Courtright, 1931) § 89-515 (immediately followed by "class suit" provisions, § 89-516). See also former Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see Independent Wireless Telegraph Co. v Radio Corp. of America, 269 US 459, 46 S Ct 166, 70 L Ed 357 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b).

For the substance of this rule see former Equity Rule 39 (Absence of Persons Who Would Be Proper Parties) and USC, Title 28, former § 111 (now § 1391) (When part of several defendants cannot be served); Camp v Gress, 250 US 308, 39 S Ct 478, 63 L Ed 997 (1919). See also the second and third sentences of former Equity Rule 37 (Parties Generally--Intervention).

Note to Subdivision (c).

For the substance of this rule see the fourth subdivision of former Equity Rule 25 (Bill of Complaint--Contents).

Notes of Advisory Committee on 1966 amendments to Rules.

General Considerations. Whenever feasible, the persons materially interested in the subject of an action--see the more detailed description of these persons in the discussion of new subdivision (a) below--should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished--a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue--the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the

parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule. The foregoing propositions were well understood in the older equity practice, see Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum L Rev 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.--(1) The expression "persons . . . who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision(b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons. (2) The word "indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). See United States v Washington Inst. of Tech., Inc. 138 F2d 25, 26 (3d Cir 1943); cf. Chidester v City of Newark, 162 F2d 598 (3d Cir 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich L Rev 327, 356 ff, 483 (1957). (3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling. (4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part [y]" itself deprived the court of the power to adjudicate as between the parties already joined. See Samuel Goldwyn, Inc. v United Artists Corp. 113 F2d 703, 707 (3d

Cir 1940); McArthur v Rosenbaum Co. of Pittsburgh, 180 F2d 617, 621 (3d Cir 1949); cf. Calcote v Texas Pac. Coal & Oil Co. 157 F2d 216 (5th Cir 1946), cert denied, 329 US 782 (1946), noted in 56 Yale LJ 1088 (1947); Reed, supra, 55 Mich L Rev at 332--34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general, analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of Shields v Barrow, 17 How 130 (US, 1854), appears at 55 Mich L Rev, p 340 ff); Hazard, supra; NY Temporary Comm on Courts, First Preliminary Report, Legis Doc 1957, No. 6(b), pp 28, 233; NY Judicial Council, Twelfth Ann Rep, Legis Doc 1946, No. 17, p 163; Joint Comm on Michigan Procedural Revision, Final Report, Pt III, p 69 (1960); Note, Indispensable Parties in the Federal Courts, 65 Harv L Rev 1050 (1952); Developments in the Law--Multiparty Litigation in the Federal Courts, 71 Harv L Rev 874, 879 (1958); Mich Gen Court Rules, R 205 (effective Jan 1, 1963); NY Civ Prac Law & Rules, § 1001 (effective Sept. 1, 1963).

The Amended Rule. New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich L Rev at 330, 338; Note, supra, 65 Harv L Rev at 1052--57; Developments in the Law, supra, 71 Harv L Rev at 881--85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests--"joint," "united," "separable," or the like. See NY Temporary Comm on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party

to an action against another with like liability. See 3 Moore‘s Federal Practice 2153 (2d ed 1963); 2 Barron & Holtzoff, Federal Practice & Procedure § 513.8 (Wright ed 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).

--When a person as described in subdivision (a)(1)--(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See Roos v Texas Co. 23 F2d 171 (2d Cir 1927), cert den, 277 US 587 (1928); Niles-Bement-Pond Co. v Iron Moulders’ Union, 254 US 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. A. L. Smith Iron Co. v Dickson, 141 F2d 3 (2d Cir 1944); Caldwell Mfg. Co. v Unique Balance Co. 18 FRD 258 (SD NY 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The ”shaping of relief“ is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. Ward v Deavers, 203 F2d 72 (DC Cir 1953); Miller & Lux, Inc. v Nickel, 141 F Supp 41 (ND Calif 1956). On the use of ”protective provisions,“ see Roos v Texas Co., supra, Atwood v Rhode Island Hosp. Trust Co. 275 Fed 513, 519 (1st Cir 1921), cert den 257 US 661, 66 L Ed 422, 42 S Ct 270 (1922); cf. Stumpf v Fidelity Gas Co. 294 F2d 886 (9th Cir 1961); and the general statement in National Licorice Co. v NLRB, 309 US 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a

position to bring the latter into the action by defensive interpleader. See Hudson v Newell, 172 F2d 848, 852 mod, 176 F2d 546 (5th Cir 1949); Gauss v Kirk, 198 F2d 83, 86 (DC Cir 1952); Abel v Brayton Flying Service, Inc. 248 F2d 713, 716 (5th Cir 1957) (suggestion of possibility of counter-claim under Rule 13(h)); cf. Parker Rust-Proof Co. v Western Union Tel. Co. 105 F2d 976 (2d Cir 1939), cert denied, 308 US 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra, 71 Harv L Rev at 882; Annot, Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 ALR 335 (1941); Johnson v Middleton, 175 F2d 535 (7th Cir 1949); Kentucky Nat. Gas Corp. v Duggins, 165 F2d 1011 (6th Cir 1948); McComb v McCormack, 159 F2d 219 (5th Cir 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court‘s informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor--whether an ”adequate“ judgment can be rendered in the absence of a given person--calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the ”shaping of relief“ mentioned under the second factor. Cf. Kroese v General Steel Castings Corp. 179 F2d 760 (3d Cir 1949), cert den 339 US 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See Fitzgerald v Haynes, 241 F2d 417, 420 (3d Cir 1957); Fouke v Schenewerk, 197 F2d 234, 236 (5th Cir 1952); cf. Warfield v Marks, 190 F2d 178 (5th Cir 1951).

The subdivision uses the word ”indispensable“ only in a conclusory sense, that is, a person is ”regarded as indispensable“ when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court’s initiative (see Rule 21(3)); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be

deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in Johnson v Kirkland, 290 F2d 440, 446--47 (5th Cir 1961) (stressing the practical orientation of the decisions); Shaughnessy v Pedreiro, 349 US 48, 54 (1955). Recent legislation, P. L. 87-748, 76 Stat 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, USC, vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19.

In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 20

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

With this rule compare also former Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally--Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

The provisions of this rule for the joinder of parties are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (a).

The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, r 1. Compare Calif Code Civ Proc (Deering, 1937) §§ 378, 379a; Ill Rev Stat (1937) ch 110, §§ 147--148; NJ Comp Stat (2 Cum Supp, 1911--1924), NYCPA (1937) §§ 209, 211. The second sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, r 4. The third sentence is derived from O 16, r 5, and the fourth from O 16, rr 1 and 4.

Note to Subdivision (b).

This is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, rr 1 and 5.

Notes of Advisory Committee on 1966 amendments to Rules.

See the amendment of Rule 18 (a) and the Advisory Committee‘s Note thereto. It has been thought that a lack of clarity in the antecedent of the word ”them,“ as it appeared in two places in Rule 20(a), contributed to the view, taken by some courts, that this rule limited the joinder of claims in certain situations of permissive party joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, Federal Practice & Procedure 202 (Wright ed 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to ”any vessel,“ etc.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 21

Notes of Advisory Committee on Rules.

See English Rules Under the Judicature Act (The Annual Practice, 1937) O 16, r 11. See also Equity Rules 43 (Defect of Parties--Resisting Objection) and 44 (Defect of Parties--Tardy Objection).

For separate trials see Rules 13 (i) (Counterclaims and Cross-Claims: Separate

Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

NOTES TO RULE 22

HISTORY: (Amended Oct. 20, 1949; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare John Hancock Mutual Life Insurance Co. v Kegan et al. 22 F Supp 326 (DC Md, 1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as USC, Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; USC, Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, The Federal Interpleader Act of 1936: I and II (1936), 45 Yale L J 963, 1161.

Notes of Advisory Committee on 1948 amendments to Rules.

--The amendment effective October 20, 1949, substituted the reference to "Title 28, USC, §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), for the reference to "Section 24(26) of the Judicial Code, as amended, USC, Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 23

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 570 et seq. (1937); Moore and Cohn, Federal Class Actions, 32 Ill L Rev 307 (1937); Moore and Cohn, Federal Class Actions--Jurisdiction and Effect of Judgment, 32 Ill L Rev 555--567 (1938); Lesar, Class Suits and the Federal Rules, 22 Minn L Rev 34 (1937); cf. Arnold and James, Cases on Trials, Judgments and Appeals (1936) 175; and see Blume, Jurisdictional Amount in Representative Suits, 15 Minn L Rev 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be ”one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,“ is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del Ch Rule 113; Fla Comp Gen Laws Ann (Supp, 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala Code Ann (Michie, 1928) § 5701; 2 Ind Stat Ann (Burns, 1933) § 2-220; NYCPA (1937) § 195; Wis Stat (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See Garfein v Stiglitz, 260 Ky 430, 86 SW2d 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a ”common or general interest“. Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, The ”Common Questions“ Principle in the Code Provision for Representative Suits, 30 Mich L Rev 878 (1932). For discussion of what constitutes ”numerous persons“ see Wheaton, Representative Suits Involving Numerous Litigants, 19 Corn L Q 399 (1934); Note, 36 Harv L Rev 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See Oster v Brotherhood of Locomotive Firemen and Enginemen, 271 Pa 419, 114 A 377 (1921); Pickett v Walsh, 192 Mass 572, 78 NE 753, 6 LRA NS 1067 (1906); Colt v Hicks, 97 Ind App 177, 179 NE 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; United Mine Workers of America v Coronado Coal Co. 259 US 344, 66 L Ed 975, 42 S Ct 570, 27 ALR 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil

Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see Smith v Swormstedt, 16 How 288, 14 L Ed 942 (US 1853). Compare Christopher et al. v Brusselback, 302 US 500, 82 L Ed 388, 58 S Ct 350 (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see Supreme Tribe of Ben Hur v Cauble, 255 US 356, 41 S Ct 338, 65 L Ed 673 (1921). See also Terry v Little, 101 US 216, 25 L Ed 864 (1880); John A. Roebling‘s Sons Co. v Kinnicutt, 248 F 596 (DC NY, 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see Ashwander v Tennessee Valley Authority, 297 US 288, 80 L Ed 688, 56 S Ct 466 (1936); Glenn, The Stockholder’s Suit--Corporate and Individual Grievances, 33 Yale L J 580 (1924); McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder‘s Suit, 46 Yale L J 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder’s Action; Note, 15 Minn L Rev 453 (1931).

Clause (2). A creditor‘s action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor’s action.

Clause (3). See Everglades Drainage League v Napoleon Broward Drainage Dist. 253 F 246 (DC Fla, 1918); Gramling v Maxwell, 52 F2d 256 (DC NC, 1931), approved in 30 Mich L Rev 624 (1932); Skinner v Mitchell, 108 Kan 861, 197 P 569 (1921); Duke of Bedford v Ellis (1901) AC 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, The ”Common Questions“ Principle in the Code Provision for Representative Suits, 30 Mich L Rev 878 (1932).

Note to Subdivision (b).

This is former Equity Rule 27 (Stockholder‘s Bill) with verbal changes. See also Hawes v Oakland, 104 US 450, 26 L Ed 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 US IX.

Note to Subdivision (c).

See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder’s Suit, 46 Yale L J 421 (1937).

Supplementary Note of Advisory Committee regarding this Rule.

Note. Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under Erie R. Co. v Tompkins, clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the Courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In Hawes v Oakland, 1882, 104 US 450, 26 L Ed 827, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in Swift v Tyson, 1842, 16 Peters 1, 10 L Ed 865, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until Erie R. Co. v Tompkins in 1938, concerned with the question whether Hawes v Oakland dealt with substantive right or procedure.

Following the decision in Hawes v Oakland, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from Rule 23 FRCP. The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In City of Quincy v Steel, 1887, 120 US 241, 245, 30 L Ed 624, 7 S Ct 520, the Court referring to Hawes v Oakland said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in Erie R. Co. v Tompkins are Dimpfel v Ohio & Miss. R.R. 1884, 110 US 209, 28 L Ed 121, 3 S Ct 573; Illinois Central R. Co. v Adams, 1901, 180 US 28, 34, 45 L Ed 410, 21 S Ct 251; Venner v Great Northern Ry. 1908, 209 US 24, 30, 52 L Ed 666, 28 S Ct 328; Jacobson v General Motors Corp. SD NY 1938, 22 F Supp 255, 257. These cases generally treat Hawes v Oakland as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has

no ”title“ and results in a dismissal ”for want of equity.“

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See Pollitz v Gould, 1911, 202 NY 11, 94 NE 1088.

The first case arising after the decision in Erie R. Co. v Tompkins, in which this problem was involved, was Summers v Hearst, SD NY 1938, 23 F Supp 986. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: ”The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law.“ He quoted Pollitz v Gould, 1911, 202 NY 11, 94 NE 1088, as saying that the United States Supreme Court ”seems to have been more concerned with establishing this rule as one of practice than of substantive law“ but that ”whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.“

He then concluded that, although the federal decisions treat the equity rule as ”stating a principle of substantive law“, if former ”Equity Rule 27 is to be modified or revoked in view of Erie R. Co. v Tompkins, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.“

Some other federal decisions since 1938 touch the question.

In Picard v Sperry Corporation, SD NY 1941, 36 F Supp 1006, 1009--10, affirmed without opinion, CCA 2d, 1941, 120 F2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was ”a matter of practice,“ not substance, and applied in New York where the state law was otherwise, despite Erie R. Co. v Tompkins. In York v Guaranty Trust Co. of New York, CCA 2d, 1944, 143 F2d 503, rev‘d on other grounds, 1945, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, the court said: ”Restrictions on the bringing of stockholders’ actions, such as those imposed by FRCP 23(b) or other state statutes are procedural,“ citing the Picard and other cases.

In Gallup v Caldwell, CCA 3d, 1941, 120 F2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that ”under the circumstances the proper course was to follow Rule 23(b).“

In Mullins v DeSoto Securities Co. WD La 1942, 45 F Supp 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In Toebelman v Missouri-Kansas Pipe Line Co. D Del 1941, 41 F Supp 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss Erie R. Co. v Tompkins, or its effect on the rule.

In Perrott v United States Banking Corp. D Del 1944, 53 F Supp 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying: ”

It seems to me the rule does not go beyond procedure. . . . Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court.“

In Bankers Nat. Corp. v Barr, SD NY 1945, 9 Fed Rules Serv 23b 11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in Pollitz v Gould, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that ”in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law.“ At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney‘s fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b). These provisions are aimed at so-called ”strike“ stockholders’ suits and their attendant abuses. Shielcrawt v Moffett, Ct App 1945, 294 NY 180, 61 NE 2d 435, revg 51 NYS 2d 188, affg 49 NYS 2d 64; Noel Associates, Inc. v Merrill, Sup Ct 1944, 184 Misc 646, 63 NYS 2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. Klum v Clinton Trust Co. Sup Ct 1944, 183 Misc 340, 48 NYS 2d 267; Noel Associates, Inc. v Merrill, supra. In the latter case the court pointed out that ”The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . .“ There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See Klum v Clinton Trust Co., supra (applicable); Noel Associates, Inc. v Merrill, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, Noel Associates, Inc. v Merrill, supra, it has been held that even though the statute is procedural in nature--a matter not definitely decided--the Legislature evinced no intent that the provision should apply to actions pending when it

became effective. Shielcrawt v Moffett, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See Wolf v Atkinson, Sup Ct 1944, 182 Misc 675, 49 NYS 2d 703 (constitutional); Citron v Mangel Stores Corp. Sup Ct 1944, 50 NYS 2d 416 (unconstitutional); Zlinkoff, The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law, 1945, 54 Yale LJ 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P.L. 1945, Ch 131, R S Cum Supp 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. Shielcrawt v Moffett, Sup Ct NY 1945, 184 Misc 1074, 56 NYS 2d 134.

See also generally, 2 Moore‘s Federal Practice, 1938, 2250--2253, and Cum. Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

Notes of Advisory Committee on 1966 Amendments to Rules.

Difficulties with the original rule.

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called ”true“ category was defined as involving ”joint, common, or secondary rights“; the ”hybrid“ category, as involving ”several“ rights related to ”specific property“; the ”spurious“ category, as involving ”several“ rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which

would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in ”true“ and ”hybrid“ class actions would extend to the class (although in somewhat different ways); the judgment in a ”spurious“ class action would extend only to the parties including intervenors. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo LJ 551, 570--76 (1937).

In practice the terms ”joint,“ ”common,“ etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, Some Problems of Equity, 245--46, 256--57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn LQ 327, 329--36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv L Rev 874, 931 (1958); Advisory Committee’s Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., Gullo v Veterans‘ Coop. H. Assn. 13 FRD 11 (DDC 1952); Shipley v Pittsburgh & L.E.R. Co. 70 F Supp 870 (WD Pa 1947); Deckert v Independence Shares Corp. 27 F Supp 763 (ED Pa 1939), revd, 108 F2d 51 (3d Cir 1939), revd 311 US 282, 85 L Ed 189, 61 S Ct 229 (1940), on remand, 39 F Supp 592 (ED Pa 1941), revd sub nom Pennsylvania Co. for Ins. on Lives v Deckert, 123 F2d 979 (3d Cir 1941) (see Chafee, supra, at 264--65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as ”true“ or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word ”several“ of coherent meaning. See, e.g., System Federation No. 91 v Reed, 180 F2d 991 (6th Cir 1950); Wilson v City of Paducah, 100 F Supp 116 (WD Ky 1951); Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944); Redmond v Commerce Trust Co. 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L ed 620, 65 S Ct 188 (1944); United States v American Optical Co. 97 F Supp 66 (ND Ill 1951); National Hairdressers’ & C. Assn. v Philad Co. 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940), affd mem, 129 F2d 1020 (3d Cir 1942). Second, we find cases classified by the courts as ”spurious“ in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., Knapp v Bankers Sec. Corp. 17 FRD 245 (ED Pa 1954), affd 230 F2d 717 (3d Cir 1956); Giesecke v Denver Tramway Corp. 81 F Supp 957 (D Del 1949); York v Guaranty Trust Co. 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, reh den 326 US 806, 90 L Ed 491, 66 S Ct 7 (1945) (see Chafee, supra, at 208); cf. Webster Eisenlohr, Inc. v Kalodner, 145 F2d 316, 320 (3d Cir 1944), cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945). But cf. the early decisions, Duke of Bedford v Ellis, [1901] AC 1; Sheffield Waterworks v Yeomans, LR 2 Ch App 8 (1866); Brown v Vermuden, 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The ”spurious“ action envisaged by original Rule 23 was in any event an

anomaly because, although denominated a ”class“ action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the ”spurious“ category that it would invite decisions that a member of the ”class“ could, like a member of the class in a ”true“ or ”hybrid“ action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore‘s Federal Practice, pars 23.10 [1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); but cf. P. W. Husserl, Inc. v Newman, 25 FRD 264 (SD NY 1960); Athas v Day, 161 F Supp 916 (D Colo 1958). On ancillary intervention, see Amen v Black, 234 F2d 12 (10th Cir 1956), cert granted 352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956), dism on stip 355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958); but cf. Wagner v Kemper, 13 FRD 128 (WD Mo 1952). The results, however, can hardly depend upon the mere appearance of a ”spurious“ category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230--31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv L Rev at 937--38; Note, Binding Effect of Class Actions, 67 Harv L Rev 1059, 1062--65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum L Rev 818, 833--36 (1946); Mich Gen Court R 208.4 (effective Jan. 1, 1963); Idaho R Civ P 23 (d); Minn R Civ P 23.04; N Dak R Civ P 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a)

states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L Rev 433, 458--59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351--52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., Giordano v Radio Corp. of Am. 183 F2d 558, 560 (3d Cir

1950); Zachman v Erwin, 186 F Supp 681 (SD Tex 1959); Baim & Blank, Inc. v Warren-Connelly Co., Inc. 19 FRD 108 (SD NY 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1).

The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum L Rev 1254, 1259--60 (1961); cf. 3 Moore, supra, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962); see Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 366--67, 65 L Ed 673, 41 S Ct 338 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See Maricopa County Mun. Water Con. Dist. v Looney, 219 F2d 529 (9th Cir 1955); Rank v Krug, 142 F Supp 1, 154--59 (SD Calif 1956), on app, State of California v Rank, 293 F2d 340, 348 (9th Cir 1961); Gart v Cole, 263 F2d 244 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959); cf. Martinez v Maverick Cty. Water Con. & Imp. Dist., 219 F2d 666 (5th Cir 1955); 3 Moore, supra, par 23.11 [2], at 3458--59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of

an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); Waybright v Columbian Mut. Life Ins. Co., 30 F Supp 885 (WD Tenn 1939); cf. Smith v Swormstedt, 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See Knapp v Bankers Securities Corp., 17 FRD 245 (ED Pa 1954), affd, 230 F2d 717 (3d Cir 1956); Giesecke v Denver Tramway Corp., 81 F Supp 957 (D Del 1949); Zahn v Transamerica Corp., 162 F2d 36 (3d Cir 1947); Speed v Transamerica Corp., 100 F Supp 461 (D Del 1951); Sobel v Whittier Corp., 95 F Supp 643 (ED Mich 1951), app dism, 195 F2d 361 (6th Cir 1952); Goldberg v Whittier Corp., 111 F Supp 382 (ED Mich 1953); Dann v Studebaker-Packard Corp., 288 F2d 201 (6th Cir 1961); Edgerton v Armour & Co., 94 F Supp 549 (SD Calg v Chicago T. & T. Co., 128 F2d 245 (7th Cir 1942); Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944); Redmond v Commerce Trust Co., 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 187 (1944); cf. York v Guaranty Trust Co., 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. Dickinson v Burnham, 197 F2d 973 (2d Cir 1952), cert den 344 US 875, 97 L Ed 678, 73 S Ct 169 (1952); 3 Moore, supra, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See Heffernan v Bennett & Armour, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. City & County of San Francisco v Market Street Ry., 95 Cal App 2d 648, 213 P2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may

disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie ”clearances and runs“ nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. United States v Paramount Pictures, Inc., 66 F Supp 323, 341--46 (SD NY 1946); 334 US 131, 144--48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2).

This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief ”corresponds“ to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v Flax, 313 F2d 284 (5th Cir 1963); Bailey v Patterson, 323 F2d 201 (5th Cir 1963), cert den 376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964); Brunson v Board of Trustees of School District No. 1, Clarendon Cty., S.C., 311 F2d 107 (4th Cir 1962), cert den 373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963); Green v School Bd. of Roanoke, Va., 304 F2d 118 (4th Cir 1962); Orleans Parish School Bd. v Bush, 242 F2d 156 (5th Cir 1957), cert den 354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957); Mannings v Board of Public Inst. of Hillsborough County, Fla., 277 F2d 370 (5th Cir 1960); Northcross v Board of Ed. of City of Memphis, 302 F2d 818 (6th Cir 1962), cert den 370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962); Frasier v Board of Trustees of Univ. of N.C., 134 F Supp 589 (MD NC 1955, 3-judge court), affd, 350 US 979, 100 L Ed 848, 76 S Ct 467 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented

machine, to test the legality of the ”tying“ condition.

Subdivision (b)(3).

In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See Oppenheimer v F. J. Young & Co., Inc., 144 F2d 387 (2d Cir 1944); Miller v National City Bank of N. Y., 166 F2d 723 (2d Cir 1948); and for like problems in other contexts, see Hughes v Encyclopaedia Britannica, 199 F2d 295 (7th Cir 1952); Sturgeon v Great Lakes Steel Corp., 143 F2d 819 (6th Cir 1944). A ”mass accident“ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See Pennsylvania R.R. v United States, 111 F Supp 80 (DNJ 1953); cf. Weinstein, supra, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); cf. Weeks v Bareco Oil Co., 125 F2d 84

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L Rev at 438--54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced

by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is ”superior“ to the others in the particular circumstances.

Factors (A)--(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See Weeks v Bareco Oil Co., 125 F2d 84, 88--90, 93--94 (7th Cir 1941) (anti-trust action); see also Pentland v Dravo Corp., 152 F2d 851 (3d Cir 1945), and Chafee, supra, at 273--75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 USC § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 USC § 216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1).

In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A

determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3).

As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3).

The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with

respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a ”limited fund,“ the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par 23.11 [4].

Hitherto, in a few actions conducted as ”spurious“ class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called ”one-way“ intervention in ”spurious“ actions, the conflicting views expressed in Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); York v Guaranty Trust Co., 143 F2d 503, 529 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945); Pentland v Dravo Corp., 152 F2d 851, 856 (3d Cir 1945); Speed v Transamerica Corp., 100 F Supp 461, 463 (D Del 1951); State Wholesale Grocers v Great Atl. & Pac. Tea Co., 24 FRd 510 (ND Ill 1959); Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp., 28 F Supp 386, 390 (ND Ala 1939); Tolliver v Cudahy Packing Co., 39 F Supp 337, 339 (ED Tenn 1941); Kalven & Rosenfield, supra, 8 U of Chi L Rev 684 (1941); Comment, 53 Nw UL Rev 627, 632--33 (1958); Developments in the Law, supra, 71 Harv L Rev at 935; 2 Barron & Holtzoff, supra, § 568; but cf. Lockwood v Hercules Powder Co., 7 FRD 24, 28--29 (WD Mo 1947); Abram v Sam Joaquin Cotton Oil Co., 46 F Supp 969, 976--77 (SD Calif 1942); Chafee, supra, at 280, 285; 3 Moore, supra, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L Rev at 460.

Subdivision (c)(4).

This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action

may retain its ”class“ character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d)

is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2)

sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in ”limited fund“ cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see United States v American Optical Co., 97 F Supp 66 (ND Ill 1951), and 1950--51 CCH Trade Cases 64573--74 (par 62869); cf. Weeks v Bareco Oil Co., 125 F2d 84, 94 (7th Cir 1941), and notice may encourage interventions to improve the representation of the class. Cf. Oppenheimer v F. J. Young & Co., 144 F2d 387 (2d Cir 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in Sam Fox Publishing Co. v United States, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961).

Subdivision (d)(2)

does not require notice at any stage, but rather calls attention to its availability and invokes the court‘s discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which

the class action procedure is of course subject. See Hansberry v Lee, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940); Mullane v Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950); cf. Dickinson v Burnham, 197 F2d 973, 979 (2d Cir 1952), and studies cited at 979 n 4; see also All American Airways, Inc. v Elderd, 209 F2d 247, 249 (2d Cir 1954); Gart v Cole, 263 F2d 244, 248--49 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230--31; Brendle v Smith, 7 FRD 119 (SD NY 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally ”for the protection of the members of the class or otherwise for the fair conduct of the action“ and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in Cherner v Transitron Electronic Corp., 201 F Supp 934 (D Mass 1962); Hormel v United States, 17 FRD 303 (SD NY 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3)

reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e)

requires approval of the court, after notice, for the dismissal or compromise of any class action.

OTHER PROVISIONS:

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 23.1

HISTORY: (Added July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on 1966 amendments to Rules.

A derivative action by a shareholder of a corporation or by a member of an

unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par 23.08 (2d ed 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 23.2

HISTORY: (Added July 1, 1966.)

Notes of Advisory Committee on 1966 amendments to Rules.

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, Pleading and Procedure: State and Federal 718 (1962); 3 Moore's Federal Practice, par 23.08 (2d ed 1963); Story, J. in West v Randall, 29 Fed Cas 718, 722--23, No. 17,424 (CCDRI 1820); and, for examples, Gibbs v Buck, 307 US 66, 83 L Ed 1111 (1939); Tunstall v Brotherhood of Locomotive F. & E. 148 F2d 403 (4th Cir 1945); Oskoian v Canuel, 269 F2d 311 (1st Cir 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

NOTES TO RULE 24

HISTORY: (Amended Mar. 19, 1948; Oct. 20, 1949; July 1, 1963; July 1, 1966; Aug. 1, 1987; Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

USC, Title 28, former: § 45a (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws) § 48 (Suits to be against United States; intervention by United States § 401 (Intervention by United States; constitutionality of Federal statute)

USC, Title 40: § 276a-2 (b) (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials.)

Compare with the last sentence of former Equity Rule 37 (Parties Generally--Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, Federal Intervention: The Right to Intervene and Reorganization (1936), 45 Yale LJ 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen. Code Ann (Page, 1926) § 11263; Wyo Rev Stat Ann (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo Stat Ann (1935) Code Civ Proc § 22; La Code Pract (Dart, 1932) Arts 389--394; Utah Rev Stat Ann (1933) § 104-3-24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r 24 (admiralty), r 25 (land), r 23 (probate); O. 57, r 12 (execution); J. A. (1925) §§ 181, 182, 183(2) (divorce); In re Metropolitan Amalgamated Estates, Ltd. (1912) 2 Ch 497 (receivership); Wilson v Church, 9 Ch D 552 (1878) (representative action). For the discretionary right see O. 16, r 11 (nonjoinder) and Re Fowler, 142 L. T. Jo. 94 (Ch 1916), Vavasseur v Krupp, 9 Ch D 351 (1878) (persons out of the jurisdiction).

Notes of Advisory Committee on 1946 and 1948 amendments to Rules.

Note. Subdivision (a).

The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency--such as the Secretary of the Treasury--but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (b).

The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see Matter of Bender Body Co., Ref. Ohio 1941, 47 F Supp 224, aff'd as moot, ND Ohio 1942, 47 F Supp 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, Securities and Exchange Commission v United States Realty & Improvement Co. 1940, 310 US 434, 84 L Ed 1293, 60 S Ct 1044, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in Securities and Exchange Commission v Long Island Lighting Co., CCA 2d, 1945, 148 F2d 252,

judgment vacated as moot and case remanded with direction to dismiss complaint, 1945, 325 US 833, 89 L Ed 1961, 65 S Ct 1085. For discussion see Commentary, Nature of Permissive Intervention Under Rule 24b, 1940, 3 Fed Rules Serv 704; Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 1940, 50 Yale L. J. 65.

Regarding the construction of subdivision (b)(2), see Allen Calculators, Inc. v National Cash Register Co., 1944, 322 US 137, 88 L Ed 1188, 64 S Ct 905.

Notes of Advisory Committee on 1963 amendments to Rules.

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee‘s Note to that amendment.

Notes of Advisory Committee on 1966 amendments to Rules.

Subdivision (a).

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision. Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: ”The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action.“ 4 Moore’s Federal Practice, par 24.09 [3], at 55 (2d ed 1962), and see, e.g., Formulabs, Inc. v Hartley Pen Co. 275 F2d 52 (9th Cir 1960). This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal 749--50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee‘s

representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this created difficulties with intervention in class actions. If the "bound" language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See Hansberry v Lee, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be "bound" by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See Sam Fox Publishing. Co. v United States, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961); cf. Sutphen Estates, Inc. v United States, 342 US 19, 96 L Ed 19, 72 S Ct 14 (1951). This reasoning might be linquistically justified by original Rule 24 (a)(2); but it could lead to poor results. Compare the discussion in International M. & I. Corp. v Von Clemm, 301 F2d 857 (2d Cir 1962); Atlantic Refining Co. v Standard Oil Co. 304 F2d 387 (DC Cir 1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See International M. & I. Corp. v Von Clemm, and Atlantic Refining Co. v Standard Oil Co., both supra; Wolpe v Poretsky, 144 F2d 505 (DC Cir 1944), cert den 323 US 777, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1944); cf. Ford Motor Co. v Bisanz Bros., 249 F2d 22 (8th Cir 1957); and

generally, Annot, 84 ALR2d 1412 (1962).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

Subdivision (c).

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

NOTES TO RULE 25

HISTORY: (Amended Oct. 20, 1949; July 19, 1961; July 1, 1963; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

1. The first paragraph of this rule is based upon former Equity Rule 45 (Death of Party--Revivor) and USC, Title 28, former § 778 (Death of parties; substitution of executor or administrator). The scire facias procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81(b). Paragraph two states the content of USC, Title 28, former § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r r 1--10.

2. This rule modifies USC, Title 28, former §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) insofar as they differ from it.

Note to Subdivisions (b) and (c). These are a combination and adaptation of NYCPA (1937) § 83 and Calif Code Civ Proc (Deering, 1937) § 385; see also 4 Nev Comp Laws (Hillyer, 1929) § 8561.

Note to Subdivision (d).

With the first and last sentences compare USC, Title 28, former § 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare Ex parte La Prade, 289 US 444, 53 S Ct 682, 77 L Ed 1311 (1933).

Notes of Advisory Committee on 1949 amendments to Rules.

1948--The amendment effective October 19, 1949, inserted the words, ”the Canal Zone, a territory, an insular possession,“ in the first sentence of subdivision (d), and, in the same sentence, after the phrase ”or other governmental agency,“ deleted the words, ”or any other officer specified in the act of February 13, 1925, ch 229, § 11 (43 Stat 941), formerly section 780 of this title“.

Notes of Advisory Committee on 1961 amendments to Rules.

Subdivision (d)(1).

Present Rule 25(d) is generally considered to be unsatisfactory. 4 Moore’s Federal Practice para. 25.01 [7] (2d ed 1950); Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand L Rev 521, 529 (1954); Developments in the Law--Remedies Against the United States and Its Officials, 70 Harv L Rev 827, 931--34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see Snyder v Buck, 340 US 15, 19, 95 L Ed 15 (1950), with the penalty of dismissal of the action, ”makes a trap for unsuspecting litigants which seems unworthy of a great government.“ Vibra Brush Corp. v Schaffer, 256 F2d 681, 684 (2d Cir 1958). Although courts have on occasion found means of undercutting the rule, e.g. Acheson v Furusho, 212 F2d 284 (9th Cir 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has operated harshly in many instances, e.g. Snyder v Buck, supra; Poindexter v Folsom, 242 F2d 516 (3d Cir 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term ”public officer“ is used in preference to the enumeration

which appears in the present rule. It comprises Federal, State, and local officers.

The expression ”in his official capacity“ is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, cf. Philadelphia Co. v Stimson, 223 US 605, 56 L Ed 570 (1912), or from enforcing unconstitutional enactments, cf. Ex parte Young, 209 US 123, 52 L Ed 714 (1908); Ex parte La Prade, 289 US 444, 77 L Ed 1311 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. Cf. Land v Dollar, 330 US 731, 91 L Ed 1209, (1947); Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see Barr v Matteo, 360 US 564, 3 L Ed 2d 1434 (1959); § 2006, 4 Moore, supra, para. 25.05, p 531; but see 28 USC § 1346(a)(1) authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus any defense of immunity from suit will remain in the case despite a substitution.

When the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast Ex parte La Prade, supra; Allen v Regents of the University System, 304 US 439, 82 L Ed 1448 (1938); McGrath v National Assn. of Mfgrs. 344 US 804, 97 L Ed 627 (1952); Danenberg v Cohen, 213 F2d 944 (7th Cir 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period

to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2).

This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individual's name, this may be done upon motion or on the court's initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see Annot, 102 ALR 943, 948--52; Comment, 50 Mich L Rev 443, 450 (1952); cf. 26 USC § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, supra, para. 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

Notes of Advisory Committee on 1963 amendments to Rules.

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, e.g., Anderson v Yungkau, 329 US 482, 67 S Ct 428, 91 L Ed 436 (1947); Iovino v Waterson, 274 F2d 41 (1959), cert denied Carlin v Sovino, 362 US 949, 80 S Ct 860, 4 L Ed 2d 867 (1960); Perry v Allen, 239 F2d 107 (5th Cir 1956); Starnes v Pennsylvania R. R. 26 FRD 625 (ED NY), affd per curiam 295 F2d 704 (2d Cir 1961), cert denied 369 US 813, 82 S Ct 688, 7 L Ed 2d 612 (1962); Zdanok v Glidden Co. 28 FRD 346 (SD NY 1961). See also 4 Moore's Federal Practice para. 25.01 [9] (Supp 1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 621, at 420--21 (Wright ed 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by means of a suggestion of death upon the record, i.e. service of a statement of the fact of the death. Cf. Ill Ann Stat, c. 110, § 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official

Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule (”the court may order“) it may be denied by the court in the exercise of a sound discretion if made long after the death--as can occur if the suggestion of death is not made or is delayed--and circumstances have arisen rendering it unfair to allow substitution. Cf. Anderson v Yungkau, supra, 329 US at 485, 486, 91 L Ed 436, 67 S Ct at 430, 431, where it was noted under the present rule that settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 26

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; July 1, 1970; Aug. 1, 1980; Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

Preceding Rule 26. Advisory Committee‘s explanatory statement concerning 1970 amendments of the discovery rules.

This statement is intended to serve as a general introductionto the amendments of Rules 26--37, concerning discovery, as well as relatedamendments of other rules. A separate note of customary scope is appended toamendments proposed for each rule. This statement provides a framework for theconsideration of individual rule changes.

Changes in the Discovery Rules.

The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These

amendments make substantial changes in the discovery rules. Those summarized here are among the more important changes

Scope of Discovery.

New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of ”trial preparation“ materials other than a party’s discovery of his own statement and a witness‘ discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial. (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 38(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a))

Mechanics of Discovery.

A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2)Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below) finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be

examined in the privacy of his person was recently stressed by the Supreme Courtin Schlagenhauf v Holder, 379 US 104 (1964). The court emphasized the trial judge's responsibility to assure that the medical examination was justified, particularly as to its scope.

Rearrangement of Rules.

A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement, and the details are set out in a table at the end of this statement.

Optional Procedures.

In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the depositions of a corporation or other organization (Rule 30(b)(6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

Other Changes.

This summary of changes is by no means exhaustive. Various changes have been made in order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule.

A Field Survey of Discovery Practice.

Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment.

Since discovery is in large measure extrajudicial, however, even these disputes may be enlightened by a study of discovery "in the field." And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases

The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report tothe Committee entitled "Field Survey of Federal Pretrial Discovery" (hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking

and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

Rearrangement of the Discovery Rules.

The present discovery rules a restructured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself todiscovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its

subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out below.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrified. Revisions of treatises and other reference works is burdensome and costly. Moreover, many States have adopted the existing pattern, as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration byStates following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties descibed are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No.New Rule No.
27(a)30(a), 31(a)
26(c)30(c)
26(d)32(a)
26(e)32(b)
26(f)32(c)
30(a)30(b)
30(b)26(c)
3232(d)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the

trial or hearing as are deemed advisable. See Ark Civ Code (Crawford, 1934) §§ 606--607; Calif Code Civ Proc (Deering, 1937) § 2021; 1 Colo Stat Ann (1935) Code Civ Proc § 376; Idaho Code Ann (1932) § 16-906; Ill Rules of Pract, Rule 19 (Ill Rev Stat (1937) ch 110, § 259.19); Ill Rev Stat (1937) ch 51, § 24; 2 Ind Stat Ann (Burns, 1933) §§ 2-1501, 2-1506; Ky Codes (Carroll, 1932) Civ Pract § 557; 1 Mo Rev Stat (1929) § 1753; 4 Mont Rev Codes Ann (1935) § 10645; Neb Comp Stat (1929) ch 20, §§ 1246--7; 4 Nev Comp Laws (Hillyer, 1929) § 9001; 2 NH Pub Laws (1926) ch 337, § 1; NC Code Ann (1935) § 1809; 2 ND Comp Laws Ann (1913) §§ 7889--7897; 2 Ohio Gen Code Ann (Page, 1926) §§ 11525--6; 1 Ore Code Ann (1930) Title 9, § 1503; 1 SD Comp Laws (1929) §§ 2713--16; Tex Stat (Vernon, 1928) arts 3738, 3752, 3769; Utah Rev Stat Ann (1933) § 104-51-7; Wash Rules of Practice adopted by the Supreme Ct. Rule 8, 2 Wash Rev Stat Ann (Remington, 1932) § 308-8; W Va Code (1931) ch 57, art 4, § 1. Compare Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867--Cross-Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under USC, Title 28, former §§ 639 (Depositions de bene esse; when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under dedimus potestatem and in perpetuam), 646 (Deposition under dedimus potestatem; how taken). These statutes are superseded insofar as they differ from this and subsequent rules. USC, Title 28, former § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark Civ Code (Crawford, 1934) §§ 606--607; 1 Idaho Code Ann (1932) § 16-906; Ill Rules of Pract, Rule 19 (Ill Rev Stat (1937) ch 110, § 259.19); Ill Rev Stat (1937) ch 51, § 24; 2 Ind Stat Ann (Burns, 1933) § 2-1501; Ky Codes (Carroll, 1932) Civ Pract §§ 554--558; 2 Md Ann Code (Bagby, 1924) Art 35, § 21; 2 Minn Stat (Mason, 1927) § 9820; 1 Mo Rev Stat (1929) §§ 1753, 1759; Neb Comp Stat (1929) ch 20, §§ 1246--7; 2 NH Pub Laws (1926) ch 337, § 1; 2 ND Comp Laws Ann (1913) § 7897; 2 Ohio Gen Code Ann (Page, 1926) §§ 11525--6; 1 SD Comp Laws (1929) §§ 2713--16; Tex Stat (Vernon, 1928) arts 3738, 3752, 3769; Utah Rev Stat Ann (1933) § 104-51-7; Wash Rules of Practice adopted by Supreme Ct, Rule 8, 2 Wash Rev Stat Ann (Remington, 1932) § 308-8; W Va Code (1931) ch 57, art 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif Code Civ Proc (Deering, 1937) § 2031; 2 Fla Comp Gen Laws Ann (1927) §§ 4405--7; 1 Idaho Code Ann

(1932) § 16-902; Ill Rules of Pract, Rule 19 (Ill Rev Stat (1937) ch 110, § 259.19); Ill Rev Stat (1937) ch 51, § 24; 2 Ind Stat Ann (Burns, 1933) § 2-1502; Kan Gen Stat Ann (1935) § 60-2827; Ky Codes (Carroll, 1932) Civ Pract § 565; 2 Minn Stat (Mason, 1927) § 9820; 1 Mo Rev Stat (1929) § 1761; 4 Mont Rev Codes Ann (1935) § 10651; Nev Comp Laws (Hillyer, 1929) § 9002; NC Code Ann (1935) § 1809; 2 ND Comp Laws Ann (1913) § 7895; Utah Rev Stat Ann (1933) § 104-51-8.

Note to Subdivision (b).

While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala Code Ann (Michie, 1928) §§ 7764--7773; 2 Ind Stat Ann (Burns, 1933) §§ 2-1028, 2-1506, 2-1728--2-1732; Iowa Code (1935) § 11185; Ky Codes (Carroll, 1932) Civ Pract §§ 557, 606(8); La Code Pract (Dart, 1932) arts 347--356; 2 Mass Gen Laws (Ter Ed, 1932) ch 231, §§ 61--67; 1 Mo Rev Stat (1929) §§ 1753, 1759; Neb Comp Stat (1929) §§ 20-1246, 20-1247; 2 NH Pub Laws (1926) ch 337, § 1; 2 Ohio Gen Code Ann (Page, 1926) §§ 11497, 11526; Tex Stat (Vernon, 1928) arts 3738, 3753, 3769; Wis Stat (1935) § 326.12; Ontario Consol Rules of Pract (1928) Rules 237--347; Quebec Code of Civ Proc (Curran, 1922) §§ 286--290.

Note to Subdivisions (d), (e), and (f).

The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in USC, Title 28, former § 641, for depositions taken, de bene esse, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O 37, r 18 (with additional provision permitting use of deposition by consent of the parties). See also former Equity Rule 64 (Former Depositions, Etc., May be Used Before Master); and 2 Minn Stat (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

Notes of Advisory Committee on 1946 amendments to Rules.

Note. Subdivision (a).

The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the

defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See, e. g., 8 Mo Rev Stat Ann, 1939, § 1917; 2 Burns‘ Ind Stat Ann, 1933, § 2-1506.

Subdivision (b).

The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. Engl v Aetna Life Ins. Co. CCA2d, 1943, 139 F2d 469; Mahler v Pennsylvania R. Co. ED NY 1945, 8 Fed Rules Serv 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. Lewis v United Air Lines Transportation Corp. D Conn, 1939, 27 F Supp 946; Engl v Aetna Life Ins. Co., supra; Mahler v Pennsylvania R. Co., supra; Bloomer v Sirian Lamp Co. D Del 1944, 8 Fed Rules Serv 26b.31, Case 3; Rosseau v Langley, SD NY 1945, 9 Fed Rules Serv 34.41, Case 1 (Rule 26 contemplates ”examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial.“); Olson Transportation Co. v Socony-Vacuum Co. ED Wis 1944, 8 Fed Rules Serv 34.41, Case 2 (”. . . the Rules . . . permit ’fishing‘ for evidence as they should.“); Note, 1945, 45 Col L Rev 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word ”relevant“ and better view, however, has often been stated. See e.g., Engl v Aetna Life Ins. Co., supra; Stevenson v Melady, SD NY 1940, 3 Fed Rules Serv 26b.31, Case 1, 1 FRD 329; Lewis v United Air Lines Transport Corp., supra; Application of Zenith Radio Corp. ED Pa 1941, 4 Fed Rules Serv 30b.21, Case 1, 1 FRD 627; Steingut v Guaranty Trust Co. of New York, SD NY 1941, 1 FRD 723, 4 Fed Rules Serv 26b.5, Case 2; DeSeversky v Republic Aviation Corp. ED NY 1941, 2 FRD 183, 5 Fed Rules Serv 26b.31, Case 5; Moore v George A. Hormel & Co. SD NY 1942, 6 Fed Rules Serv

30b.41, Case 1, 2 FRD 340; Hercules Powder Co. v Rohm & Haas Co. D Del 1943, 7 Fed Rules Serv 45b.311, Case 2, 3 FRD 302; Bloomer v Sirian Lamp Co., supra; Crosby Steam Gage & Valve Co. v Manning, Maxwell & Moore, Inc. D Mass 1944, 8 Fed Rules Serv 26b.31, Case 1; Patterson Oil Terminals, Inc. v Charles Kurz & Co., Inc. ED Pa 1945, 9 Fed Rules Serv 33.321, Case 2; Pueblo Trading Co. v Reclamation Dist. No. 1500, ND Cal 1945, 9 Fed Rules Serv 33.321, Case 4, 4 FRD 471. See also discussion as to the broad scope of discovery in Hoffman v Palmer, CCA2d, 1942, 129 F2d 976, 995--997, affd on other grounds, 1942, 318 US 109, 87 L Ed 645, 63 S Ct 477; Note, 1945, 45 Col L Rev 482.

Notes of Advisory Committee on 1963 amendments to Rules.

Subdivision (e).

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

Notes of Advisory Committee on 1966 amendments to rules.

Subdivision (a).

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions de bene esse, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice, to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

Notes of Advisory Committee on 1970 amendments to Rules.

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing subdivisions (d)(e), and (f) of Rule 26 are transferred to Rule 32. Revisions of the

transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery devices.

This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)--Scope of discovery.

This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, Federal Practice and Procedure § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., Wiesenberger v W. E. Hutton & Co., 35 FRD 556 (SDNY 1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In general.

The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. Cf. 4 Moore's Federal Practice para. 26-16 [1] (2d ed 1966).

Subdivision (b)(2)--Insurance policies.

Both the cases and commentators are sharply in conflict on the question

whether defendant‘s liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: Cook v Welty, 253 F Supp 875 (DDC 1966) (cases cited); Johanek v Aberle, 27 FRD 272 (D Mont 1961); Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases, 10 Ala L Rev 355 (1958); Thode, Some Reflections on the 1957 Amendments to the Texas Rules, 37 Tex L Rev 33, 40--42 (1958). Examples of Federal cases refusing disclosure and supporting comments: Bisserier v Manning, 207 F Supp 476 (D NJ 1962); Cooper v Stender, 30 FRD 389 (ED Tenn 1962); Frank, Discovery and Insurance Coverage, 1959 Ins LJ 281; Fournier, Pre-Trial Discovery of Insurance Coverage and Limits, 28 Ford L Rev 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, Federal Practice and Procedure § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See Bisserier v Manning, supra. Some note also that facts about a defendant’s financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant‘s financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In Clauss v Danker, 264 F Supp 246 (SD NY 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant’s financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer ”may be liable“ on part of all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons ”carrying on an insurance business“ and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. Cf. NY Ins. Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial preparation: Materials.

Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the ”good cause“ requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of Hickman v Taylor, 329 US 495 (1947). Both demand a showing of justification before production can be had, the one of ”good cause“ and the other variously described in the Hickman case: ”necessity or justification,“ ”denial . . . would unduly prejudice the preparation of petitioner‘s case,“ or ”cause hardship or injustice“ 329 US at 509--510.

In deciding the Hickman case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the Hickman decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether ”good cause“ is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity,

(2) confusion and disagreement as to the scope of the Hickman work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the ”good cause“ required by Rule 34 and the ”necessity or justification“ of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic standard. Since Rule 34 in terms requires a showing of ”good cause“ for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate ”good cause“ to a showing that the documents are relevant to the subject matter of the action. E.G., Connecticut Mutual Life Ins. Co. v Shields, 17 FRD 273 (SD NY 1959), with cases cited; Houdry Process Corp. v Commonwealth Oil Refining Co., 24 FRD 58 (SD NY 1955); see Bell v Commercial Ins. Co., 280 F2d 514, 517 (3d Cir 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of ”good cause“, although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). E.g., Lauer v Tankrederi, 39 FRD 334 (ED Pa 1966).

As to trial-preparation materials, however, the courts are increasingly interpreting ”good cause“ as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by Hickman. But even as to the preparatory work of non-lawyers, while some courts ignore work-product and equate ”good cause“ with relevance, e.g., Brown v New York, N.H. & H. R.R., 17 FRD 324 (SD NY 1955), the more recent trend is to read ”good cause“ as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In Guilford Nat’l Bank v Southern Ry., 297 F2d 921 (4th Cir 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and ”good cause“; the court declined to rule on whether the statements were work-product. The court‘s treatment of ”good cause“ is quoted at length and with approval in Schlagenhauf v Holder, 379 US 104, 117--118 (1964). See also Mitchell v Bass, 252 F2d 513 (8th Cir 1958); Hawger v Chicago, R.I. & Pac. R.R., 216 F2d 501 (7th Cir 1954); Burke v United States, 32 FRD 213 (ED NY 1963). While the opinions dealing with ”good cause“ do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of ”good cause“ from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of ”good cause“ whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made; substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side’s informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, Maine Civil Practice 264 (1959).

Elimination of a ”good cause“ requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the Hickman case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in Southern Ry. v Lanham, 403 F2d 119 (5th Cir 1968), while it naturally addressed itself to the ”good cause“ requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. Lanham, supra at 127--128; Guilford, supra at 926. Or he may be reluctant or hostile. Lanham, supra at 128--129; Brookshire v

Pennsylvania R.R., 14 FRD 154 (ND Ohio 1953); Diamond v Mohawk Rubber Co., 33 FRD 264 (D Colo 1963). Or he may have a lapse of memory. Tannenbaum v Walker, 16 FRD 570 (ED Pa 1954). Or he may probably be deviating from his prior statement. Cf. Hauger v Chicago, R. I. & Pac. R.R., 216 F2d 501 (7th Cir 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator‘s reports. Lanham, supra at 131--133; Pickett v L. R. Ryan, Inc., 237 F Supp 198 (ED SC 1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. Goosman v A. Duie Pyle, Inc., 320 F2d 45 (4th Cir 1963); cf. United States v New York Foreign Trade Zone Operators, Inc., 304 F2d 792 (2d Cir 1962). No change is made in the existing doctrine, noted in the Hickman case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of lawyers; special protection of mental impressions, conclusions, opinions, and legal theories concerning the litigation. The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The Hickman case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals, compare Alltmont v United States, 177 F2d 971, 976 (3d Cir 1949), cert denied, 339 US 967 (1950) (Hickman applied to statements obtained by FBI agents on theory it should apply to ”all statements of prospective witnesses which a party has obtained for his trial counsel’s use“), with Southern Ry. v Campbell, 309 F2d 569 (5th Cir 1962) (statements taken by claim agents not work-product), and Guilford Nat‘l Bank v Southern Ry., 297 F2d 921 (4th Cir 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 ”good cause“). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., Brown v New York, N. H. & H. R.R., 17 FRD 324 (SD NY 1955) with Hanke v Milwaukee Electric Ry. & Transp. Co., 7 FRD 540 (ED Wis 1947); investigators, compare Burke v United States, 32 FRD 213 (ED NY 1963) with Snyder v United States, 20 FRD 7 (ED NY 1956); and insurers, compare Gottlieb v Bresler, 24 FRD 371 (DDC 1959) with Burns v Mulder, 20 FRD 605 (ED Pa 1957). See 4 Moore’s Federal Practice para. 26.23 [8.1] (2d ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.2 (Wright ed 1961).

A complication is introduced by the use made by courts of the ”good cause“ requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer‘s work and yet hold that they are not producible because ”good cause“ has not been shown. Cf. Guilford Nat’l Bank v Southern Ry., 297 F2d 921 (4th Cir 1962), cited and described above. When the decisions on ”good cause“ are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure

production. Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The Hickman opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers‘ mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party’s right to own statement. An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, e.g., Safeway Stores, Inc. v Reynolds, 176 F2d 476 (DC Cir 1949); Shupe v Pennsylvania R.R., 19 FRD 144 (WD Pa 1956); with, e.g. New York Central R.R. v Carr, 251 F2d 433 (4th Cir 1957); Belback v Wilson Freight Forwarding Co., 40 FRD 16 (WD Pa 1966).

Courts which treat a party‘s statement as though it were that of any witness overlook the fact that the party’s statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. E.g., Smith v Central Linen Service Co., 39 FRD 15 (D Md 1966); McCoy v General Motors Corp., 33 FRD 354 (WD Pa 1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 Moore‘s Federal Practice para. 26.23 [8.4] (2d

ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.3 (Wright ed 1961); see also Note, Developments in the Law--Discovery, 74 Harv L Rev 940, 1039 (1961). The following states have by statute or rule taken the same position: Statutes: Fla Stat Ann § 92.33; Ga Code Ann § 38-2109(b); La Stat Ann RS 13:3732; Mass Gen Laws Ann c. 271, § 44; Minn Stat Ann § 602.01; NYCPLR § 3101(e). Rules: Mo RCP 56.01(a); N Dak RCP 34(b); Wyo RCP 34(b); cf. Mich GCR 306.2

In order to clarify and tighten the provision on statements by a party, the term ”statement“ is defined. The definition is adapted from 18 USC § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' right to own statement. A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party‘s right to obtain his statement apply also to the nonparty witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial preparation: Experts.

This is a new provision dealing with the discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, e.g., United States v Nysco Laboratories, Inc., 26 FRD 159, 162 (ED NY 1960) (food and drug); E. I. du Pont de Nemours & Co. v Phillips Petroleum Co., 24 FRD 416, 421 (D Del 1959) (patent); Cold Metal Process Co. v Aluminum Co. of America, 7 FRD 425 (ND Ohio 1947), affd, Sachs v Aluminum Co. of America, 167 F2d 570 (6th Cir 1948) (same); United States v 50.34 Acres of Land, 13 FRD 19 (ED NY 1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently can not anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, Some Practical Problems in Proof of Economic, Scientific, and Technical Facts, 23 FRD 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy--and often fruitless--cross-examination during trial," and recommends pretrial exchange of such material. Calif. Law Rev. Comm'n, Discovery in Eminent Domain Proceedings 707--710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. Franks v National Dairy Products Corp., 41 FRD 234 (WD Tex 1966); United States v 23.76 Acres, 32 FRD 593 (D Md 1963) see also an unpublished opinion of Judge Hincks, quoted in United States v 48 Jars, etc., 23 FRD 192, 198 (D DC 1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. E.g., United States v Certain Parcels of Land, 25 FRD 192 (ND Cal 1959); United States v Certain Acres, 18 FRD 98 (MD Ga 1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in Knighton v Villian & Fassio, 39 FRD 11 (D Md 1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan L Rev 455, 485--488 (1962). Long, Discovery and Experts under the Federal Rules of Civil Procedure, 38 FRD 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses

will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only by 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.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert‘s information privileged simply because of his status as an expert, e.g., American Oil Co. v Pennsylvania Petroleum Products Co., 23 FRD 680, 685--686 (D RI 1959). See Louisell, Modern California Discovery 315--316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See United States v McKay, 372 F2d 174, 176--177 (5th Cir 1967). The provisions adopt a form of the more recently developed doctrine of ”unfairness“. See e.g., United States v 23.76 Acres of Land, 32 FRD 593, 597 (D Md 1963); Louisell, supra, 317--318; 4 Moore's Federal Practice para. 26.24 (2d ed 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order

until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert‘s work for which the other side has paid, often a substantial sum. E.g., Lewis v United Air Lines Transp. Corp., 32 F Supp 21 (WD Pa 1940); Walsh v Reynolds Metal Co., 15 FRD 376 (D NJ 1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. Boynton v R. J. Reynolds Tobacco Co., 36 F Supp 593 (D Mass 1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party’s preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party‘s case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective orders.

The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give its application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to ”time“ as well as to ”place“ or may not safeguard against ”undue burden or expense.“

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, e.g., Covey Oil Co. v Continental Oil Co., 340 F2d 993 (10th Cir 1965); Julius M. Ames Co. v Bostitch, Inc., 235 F Supp 856 (SD NY 1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See

Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col L Rev 480, 492--493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and priority.

This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary‘s taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. E.g., E. I. du Pont de Nemours & Co. v Phillips Petroleum Co., 23 FRD 237 (D Del 1959); but cf. Sturdevant v Sears Roebuck & Co., 32 FRD 426 (WD Mo 1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See Caldwell-Clements, Inc. v McGraw-Hill Pub. Co., 11 FRD 156 (SD NY 1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, e.g., Kaeppler v James H. Mathews & Co., 200 F Supp 229 (ED Pa 1961); Park & Tilford Distillers Corp. v Distillers Co., 19 FRD 169 (SD NY 1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for ”the most obviously compelling reasons.“ 2A Barron & Holtzoff, Federal Practice and Procedure 44--47 (Wright ed 1961); see also Younger, Priority of Pretrial Examination in the Federal Courts--A Comment, 34 NYUL Rev 1271 (1959); Freund, The Pleading and Pretrial of an Antitrust Claim, 46 Corn LQ 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comment, 59 Yale LJ 117, 134--136 (1949); Yudkin, Some Refinements in Federal Discovery

Procedure, 11 Fed BJ 289, 296--297 (1951); Developments in the Law-Discovery, 74 Harv L Rev 940, 954--958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale LJ 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so ”concurrently.“ In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alteration in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See Caldwell-Clements, Inc. v McGraw-Hill Pub. Co., 11 FRD 156 (SD NY 1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 Moore's Federal Practice 1154 (2d ed 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of responses.

The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 Moore's Federal Practice para. 33.25 [4] (2d ed 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. E.g., ED Pa R 20(f), quoted in Taggart v Vermont Transp. Co. 32 FRD 587 (ED Pa 1963); D Me R 15(c). Others have imposed the burden by decision. E.g., Chenault v Nebraska Farm Products, Inc. 9 FRD 529, 533 (D Neb 1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See Novick v Pennsylvania R.R. 18 FRD 296, 298 (WD Pa 1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv L Rev 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of

knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See Diversified Products Corp. v Sports Center Co. 42 FRD 3 (D Md 1967).

Another exception is made for the situation in which a party or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuous, or other action, as the court may deem appropriate.

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (f).

This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connoly, E. Holleman, & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

Effective date of 1980 amendments to Rule 26.Section 2 of the Order of April 29, 1980, -- US --, 64 L Ed 2d No. 2, v., -- S Ct --, which adopted the 1980 amendments to this Rule, provided "That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."

Notes of Advisory Committee on 1983 Amendments to Rules.

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses, American Bar Foundation (1980); Connolly, Holleman & Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery, Federal Judicial Center (1978); Ellington, A Study of Sanctions for Discovery Abuse, Department of Justice (1979); Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 Ariz. St. L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, The Adversary Character of Civil Discovery: A Critque and Proposals for Change, 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods.

The deletion of the last sentence of Rule 26(a)(1), which provided that unless

the court ordered otherwise under Rule 26(c) ”the frequency of use“ of the various discovery methods was not to be limited, is an attempt to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits.

Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See e.g., Carlson Cos. v. Sperry & Hutchinson Co., 374 F.Supp. 1080 (D. Minn. 1974); Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971); Mitchell v. American Tobacco Co., 33 F.R.D. 262 (M.D.Pa. 1963); Welty v. Clute, 1 F.R.D. 446 (W.D.N.Y. 1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, e.g., Apco Oil Co. v. Certified Transp., Inc., 46 F.R.D. 428 (W.D.Mo. 1969). See generally 8 Wright & Miller, Federal Practice and Procedure: Civil §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of

discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections.

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term ”response“ includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a ”reasonable inquiry“ is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See

also Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F.Supp. 975 (E.D. Pa. 1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances. Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. ACF Industries, Inc. v. EEOC, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976). See also Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses, American Bar Foundation (1980); Ellington, A Study of Sanctions for Discovery Abuse, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See Roadway Express, Inc., v. Piper, 447 U.S. 752 (1980); Martin v. Bell Helicopter Co., 85 F.R.D. 654, 661-62 (D. Col. 1980); Note, Sanctions

Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (a).

Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L.

Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery

that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than prescribe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence ”relevant to disputed facts alleged with particularity in the pleadings.“ There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the

obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance

the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts and summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement

for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, Rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was ”without substantial justification“ and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a

single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide ”foundation“ testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion ”in limine“ and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection for non-parties of documents and premises without the need for a deposition.

Subdivision (b).

This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new

paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product production. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the

need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items ”otherwise discoverable.“ If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c).

The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d).

This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e).

This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f).

This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive

motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g,. actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g).

Paragraph (1) is added to require signatures on disclosures, a requirement that

parallels the provisions of paragraph (2) with resect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

NOTES TO RULE 27

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; July 1, 1971; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See Arizona v. California, 292 U.S. 341, 54 S.Ct. 735, 78 L.Ed. 1298 (1934); Todd Engineering Dry Dock and Repair Co. v. United States, 32 F.2d 734 (C.C.A.5th, 1929); Hall v. Stout, 4 Del. ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§ 666--670; Calif.Code Civ.Proc. (Deering, 1937) 2083--2089; Ill.Rev.Stat. (1937) ch. 51, §§ 39--46; Iowa Code (1935) §§ 11400--11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, § 46-63; N.Y.C.P.A. (1937) § 295; Ohio Gen.Code Ann. (Throckmorton, 1936) § 12216--12222; Va.Code Ann. (Michie, 1936) § 6235; Wisc.Stat. (1935) §§ 326.27--326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b).

This follows the practice approved in Richter v. Union Trust Co., 115 U.S. 55, 5 S.Ct. 1162, 29 L.Ed. 345 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c).

This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, former § 644 (Depositions under dedimus potestatem and in perpetuam) as an alternate method.

Notes of Advisory Committee on 1946 amendments to Rules.

Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

Notes of Advisory Committee on 1949 amendments to Rules.

An amendment [effective October 1949] substituted the words ”United States district court“ in subdivision (a)(1) and (4) for ”district court of the United States“.

Notes of Advisory Committee on 1971 amendments to Rules.

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 28

HISTORY: (Amended March 19, 1948; July 1, 1963; Aug. 1, 1980; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

In effect this rule is substantially the same as U.S.C., Title 28, former § 639 (Depositions de bene esse; when and where taken; notice). U.S.C., Title 28, former § 642 (Depositions, acknowledgements, and affidavits taken by notaries public) does not conflict with subdivision (a).

Notes of Advisory Committee on 1946 amendments to Rules.

Note. The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. Consolidated Fastener Co. v Columbian Button & Fastener Co. CC ND NY 1898, 85 Fed 54; Mathieson Alkali Works v Arnold Hoffman & Co. CCA 1st, 1929, 31 F2d 1.

Notes of Advisory Committee on 1963 amendments to Rules.

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the

United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally Symposium Letters Rogatory (Grossman ed 1956); Doyle, Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, Proc ABA, Sec Int'l & Comp L 37 (1959); Heilpern, Procuring Evidence Abroad, 14 Tul L Rev 29 (1939); Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale LJ 515, 526--29 (1953); Smit, International Aspects of Federal Civil Procedure, 61 Colum L Rev 1031, 1056--58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., United States v Matles, 154 F Supp 574 (ED NY 1957); The Edmund Fanning, 89 F Supp 282 (ED NY 1950); Branyan v Koninklijke Luchtvaart Maatschappij, 13 FRD 425 (SD NY 1953). See also Ali Akber Kiachif v Philco International Corp. 10 FRD 277 (SD NY 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See United States v Paraffin Wax, 2255 Bags, 23 FRD 289 (ED NY 1959). In many noncommon-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See Jones, supra, at 530--32; Doyle, supra, at 39--41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See The Mandu, 11 F Supp 845 (ED NY 1935). But cf. Nelson v United States, 17 Fed Cas 1340 (No. 10,116) (CCD Pa 1816);

Winthrop v Union Ins. Co. 30 Fed Cas 376 (No. 17,901) (CCD Pa 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, cf. Uebersee Finanz-Korporation, A. G. v Brownell, 121 F Supp 420 (DDC 1954); Danisch v Guardian Life Ins. Co. 19 FRD 235 (SD NY 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 Moore‘s Federal Practice paras. 28.05--28.08 (2d ed 1950).

Notes of Advisory Committee on 1980 amendments to Rules.

The amendments are clarifying.

Effective date of 1980 amendments. Section 2 of the Order of April 29, 1980, 446 US 995, 64 L Ed 2d, xlv, -- S Ct --, which adopted the 1980 amendments to this Rule, provided ”That the foregoing amendments to the Federal Rules of

Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.“

Preliminary draft of proposed amendment. A preliminary draft, dated September, 1989, proposed amendments to Rule 28 as follows:

(a) [Unchanged]

(b) In Foreign Countries. Subject to the provisions of Rule 26(a), 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 in which 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 his 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 by 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 for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) [Unchanged]

Notes of Advisory Committee on 1989 proposed amendments to Rule.

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties which the United States may enter into in the future, as sources of additional methods for taking depositions abroad. Pursuant to revised Rule 26(a), the party taking the deposition is obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. The term ”letter of request“ has been substituted in the rule for the former term, ”letter rogatory“ because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).

The term ”letter of request“ has been substituted in the rule for the term ”letter rogatory“ because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other

alterations.

NOTES TO RULE 29

HISTORY: (Amended July 1, 1970; Dec. 1, 1993.)

Notes of Advisory Committee on 1970 amendments to Rules.

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

Notes of Advisory Committee on 1993 amendments to Rules.

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

NOTES TO RULE 30

HISTORY: (Amended July 1, 1963; July 1, 1970; July 1, 1971; July 1, 1975; Aug. 1, 1980; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This is in accordance with common practice. See USC, Title 28, former § 639 (Depositions de bene esse; when and where taken; notice), the relevant

provisions of which are incorporated in this rule; Calif Code Civ Proc (Deering, 1937) § 2031; and statutes cited in respect to notice in the Note to Rule 26(a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d).

These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

Note to Subdivisions (c) and (e).

These follow the general plan of former Equity Rule 51. (Evidence Taken Before Examiners, Etc.) and USC, Title 28, former § 640 (Depositions de bene esse; mode of taking), and former § 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also former Equity Rule 50 (Stenographer--Appointment--Fees).

Note to Subdivision (f).

Compare former Equity Rule 55 (Depositions Deemed Published When Filed).

Note to Subdivision (g).

This is similar to 2 Minn Stat (Mason, 1927) § 9833, but is more extensive.

Notes of Advisory Committee on 1963 amendments to Rules.

This amendment corresponds to the change in Rule 4(d)(4). See the Advisory Committee‘s Note to that amendment.

Notes of Advisory Committee on 1970 amendments to Rules.

Subdivision (a).

This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. Cf. Ill S Ct R 19-1, S-H Ill Ann

Stat § 101.19-1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron and Holtzoff, Federal Practice and Procedure 455--456 (Wright ed 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admiralty and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions de bene esse may continue to be taken as to admiralty and maritime claims within the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43--44 (1966).

The changes in Rule 30(a) and the new Rule 30(b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions de bene esse. They authorize an early deposition without leave of court where the witness is about to depart and, unless his

deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. Cf. S. S. Hai Chang, 1966 AMC 2239 (SD NY 1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are to be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the de bene esse provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(e). See also SD NY Civ R 5(a). Some parts of the de bene esse provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

Subdivision (b).

Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

Subdivision (b)(1).

If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

Subdivision (b)(2).

This subdivision is discussed in the note to subdivision (a), to which it relates.

Subdivision (b)(3).

This provision is derived from existing Rule 30(a), with a minor change of language.

Subdivision (b)(4).

In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means--e.g., by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

Subdivision (b)(5).

A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron and Holtzoff, Federal Practice and Procedure § 644.1 n 83.2, § 792 n 16 (Wright ed 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. Cf. NY CPLR § 3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rule 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

Subdivision (b)(6).

A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. Cf. Alberta Sup Ct R 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation--for example, in a personal injury case--can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L Rev 1006--1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. Cf. Haney v Woodward &

Lothrop, Inc. 330 F2d 940, 944 (4th Cir 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., United States v Gahagan Dredging Corp. 24 FRD 328 (SD NY 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

Subdivision (c).

A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court‘s discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

Subdivision (d).

The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

Subdivision (e).

The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

Subdivision (f)(1).

A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and

he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. Cf NY CPLR § 3116(c).

Notes of Advisory Committee on 1971 amendments to Rules.

Subdivision (b)(6).

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a non-party organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a non-party organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

Notes of Advisory Committee on 1972 amendment to Rules.

Subdivision (c).

Existing Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e. g. Privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30. 1975 effective date of 1972 amendment. The amendment of this rule was embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975; see Act Jan. 2, 1975, P.L. 93-595, § 3, 88 Stat. 1959, which appears as 28 USCS § 2071 note.

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (b)(4).

It has been proposed that electronic recording of depositions be authorized as a matter of course, subject to the right of a party to seek an order that a deposition be recorded by stenographic means. The Committee is not satisfied that a case has been made for a reversal of present practice. The amendment is made to encourage parties to agree to the use of electronic recording of

depositions so that conflicting claims with respect to the potential of electronic recording for reducing costs of depositions can be appraised in the light of greater experience. The provision that the parties may stipulate that depositions may be recorded by other than stenographic means seems implicit in Rule 29. The amendment makes it explicit. The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath. See Rules 28(a) and 29.

Subdivision (b)(7).

Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties. The amendment authorizes that method by order of the court. The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions are propounded.

Subdivision (f)(1).

For the reasons set out in the Note following the amendment of Rule 5(d), the court may wish to permit the parties to retain depositions unless they are to be used in the action. The amendment of the first paragraph permits the court to so order.

The amendment of the second paragraph is clarifying. The purpose of the paragraph is to permit a person who produces materials at a deposition to offer copies for marking and annexation to the deposition. Such copies are a ”substitute“ for the originals, which are not to be marked and which can thereafter be used or even disposed of by the person who produces them. In the light of that purpose, the former language of the paragraph had been justly termed ”opaque.“ Wright & Miller, Federal Practice and Procedure: Civil § 2114.

Effective date of 1980 amendments. Section 2 of the Order of April 29, 1980, 446 US 995, 64 L Ed 2d, xlv, -- S Ct --, which adopted the 1980 amendments to this Rule, provided ”That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (a).

Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and fourth sentences are relocated.

Paragraph (2) collect all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

Subdivision (b).

The primary change in subdivision (b) is that parties will be authorized to

record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Subdivision (c).

Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 61 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5)

when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

Subdivision (d).

The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is

unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

Subdivision (e).

Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f).

Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

NOTES TO RULE 31

HISTORY: (Amended July 1, 1970; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26(a).

Notes of Advisory Committee on 1970 amendments to Rules.

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

Subdivision (a).

A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

Subdivision (d).

Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (a).

The first paragraph of subdivision (a) is divided into two subparagraphs, with

provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

NOTES TO RULE 32

HISTORY: (Amended July 1, 1970; July 1, 1975; Aug. 1, 1980; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26.

Notes of Advisory Committee on 1970 amendments to Rules.

As part of the rearrangement of the discovery rules, existing subdivisions (d), (e), and (f) of Rule 26 are transferred to Rule 32 as new subdivisions (a), (b), and (c). The provisions of Rule 32 are retained as subdivision (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial byproduct of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent‘s testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear. Note present Rule 26(e), transferred to Rule 32(b); see 2A Barron and Holtzoff, Federal Practice and Procedure 164--166 (Wright ed 1961).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

A change is made in the standard under which a party offering part of a deposition in evidence may be required to introduce additional parts of the deposition. The new standard is contained in a proposal made by the Advisory Committee on Rules of Evidence. See Rule 1-07 and accompanying Note, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates

21--22 (March, 1969).

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

Notes of Advisory Committee on 1972 amendments to Rules.

Subdivision (c).

The concept of "making a person one's own witness" appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party-witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

Effective date of 1975 amendment. Act Jan. 2, 1975, P.L. 93-595, 88 Stat. 1926, provided in § 3 that the amendment to Rule 32 [abrogation of subsec. c] "shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [enacted Jan. 2, 1975].".

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (a)(1).

Rule 801(d) of the Federal Rules of Evidence permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. And Rule 801(d)(2) makes the statement of an agent or servant admissible against the principal under the circumstances described in the Rule. The language of the present subdivision is, therefore, too narrow.

Subdivision (a)(4).

The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it. See Wright & Miller, Federal Practice and Procedure: Civil § 2150. The final sentence is added to reflect the fact that the Federal Rules of Evidence permit a broader use of depositions previously taken under certain circumstances. For example, Rule 804(b)(1) of the Federal Rules of Evidence provides that if a witness is unavailable, as that term is defined by the rule, his deposition in any earlier proceeding can be used against a party to the prior proceeding who had an opportunity and similar motive to develop the testimony of the witness.

Effective date of 1980 amendments. Section 2 of the Order of April 29, 1980,

446 US 995, 64 L Ed 2d xlv, -- S Ct --, which adopted the 1980 amendments to this Rule, provided "That the foregoing amendments to the Federal Rules of

Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.".

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

Subdivision (a).

The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Subdivision (c).

This new subdivision, inserted at the location of a subdivision previously abrogated, is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b). Under this rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use nonstenographic deposition testimony as substantive evidence is required to provide other parties with a transcript in advance of trial.

NOTES TO RULE 33

HISTORY: (Amended Mar. 19, 1948; July 1, 1970; Aug. 1, 1980; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

This rule restates the substance of former Equity Rule 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness), with modifications to conform to these rules.

Notes of Advisory Committee on 1946 amendments to Rules.

The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26(a). United States v American Solvents & Chemical Corp. of California (D Del (1939)) 30 F Supp 107; Sheldon v Great Lakes Transit Corp. (WD NY 1942) 2 FRD 272, 5 Fed Rules Serv 33.11, Case 3; Musher Foundation, Inc. v Alba Trading Co. (SD NY 1941), 42 F Supp 281; 2 Moore's Federal Practice (1938), 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See Hoffman v Wilson Line, Inc. ED Pa 1946, 9 Fed Rules Serv 33.514, Case 2;

Brewster v Technicolor, Inc. (SD NY 1941), 2 FRD 186, 5 Fed Rules Serv 33.319, Case 3; Kingsway Press, Inc. v Farrell Publishing Corp. (SD NY 1939), 30 F Supp 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See Auer v Hershey Creamery Co. D NJ 1939, 2 Fed Rules Serv 33.31, Case 2, 1 FRD 14; Tudor v Leslie, D Mass 1940, 1 FRD 448, 4 Fed Rules Serv 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See Knox v Alter, WD Pa 1942, 2 FRD 337, 6 Fed Rules Serv 33.352, Case 1; Byers Theaters, Inc. v Murphy, WD Va 1940, 3 Fed Rules Serv 33.31, Case 3, 1 FRD 286; Coca-Cola Co. v Dixi-Cola Laboratories, Inc. D Md 1939, 30 F Supp 275. See also comment on these restrictions in Holtzoff, Instruments of Discovery Under Federal Rules of

Civil Procedure, 1942, 41 Mich L Rev 205, 216--217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sas been stricken. In J. Schoeneman, Inc. v Brauer, WD Mo 1940, 1 FRD 292, 3 Fed Rules Serv 33.31, Case 2, the court said: "Rule 33 . . . has been interpreted . . . as being just as broad in its implications as in the case of depositions . . . . It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain." To the same effect, see Canuso v City of Niagara Falls, WD NY 1945, 8 Fed Rules Serv 33.352, Case 1; Hoffman v Wilson Line, Inc., supra.

By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, e. g., Bailey v New England Mutual Life Ins. Co. SD Cal 1940, 1 FRD 494, 4 Fed Rules Serv 33.46, Case 1.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. Howard v State Marine Corp. SD NY 1940, 4 Fed Rules Serv 33.62, Case 1, 1 FRD 499; Stevens v Minder Construction Co. SD NY 1943, 3 FRD 498, 7 Fed Rules Serv 30b.31, Case 2. But objections have been sustained to interrogatories served after the oral deposition of a party had been taken. McNally v Simons, SD NY 1940, 3 Fed Rules Serv 33.61, Case 1, 1 FRD 254; Currier v Currier, SD NY 1942, 3 FRD 21, 6 Fed Rules Serv 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after

interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30(b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

Notes of Advisory Committee on 1970 amendments to Rules.

Subdivision (a).

The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speck, the Use of Discovery in the United States District Courts, 60 Yale L J 1132, 1144, 1151 (1951); Note, 36 Minn L Rev 364, 379 (1952).

The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories--15 days for answers and 10 days for objections--are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speck, supra, 60 Yale L J 1132, 1144. The time pressures tend to encourage objections as a means of gaining time to answer.

The time for objections is even shorter than for answers, and the party runs the risk that if he fails to object in time he may have waived his objections. E.g., Cleminshaw v Beech Aircraft Corp. 21 FRD 300 (D Del 1957); see 4 Moore's Federal Practice, para. 33.27 (2d ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 372--373 (Wright ed 1961). It often seems easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposes no sanction of expenses on a party whose objections are clearly unjustified. Rule 33 assures that the objections will lead directly to court, through its requirement that they be served with a notice of hearing. Although this procedure does not preclude an out-of-court resolution of the dispute, the procedure tends to discourage informal negotiations. If answers are served and they are thought inadequate, the interrogating party may move under Rule 37(a) for an order compelling adequate answers. There is no assurance that the hearing on objections and that on inadequate answers will be heard together.

The amendment improves the procedure of Rule 33 in the following respects: (1) The time allowed for response is increased to 30 days and this time period applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or

all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted. (2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement--that defendant have time to obtain counsel before a response must be made--is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons and complaint upon him.

Some would urge that the plaintiff nevertheless not be permitted to serve interrogatories with the complaint. They fear that a routine practice might be invited, whereby form interrogatories would accompany most complaints. More fundamentally, they feel that, since very general complaints are permitted in present-day pleading, it is fair that the defendant have a right to take the lead in serving interrogatories. (These views apply also to Rule 36.) The amendment of Rule 33 rejects these views, in favor of allowing both parties to go forward with discovery, each free to obtain the information he needs respecting the case. (3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. E.g., Pressley v Boehlke, 33 FRD 316 (WD NC 1963). If the discovering party asserts that an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation, and the court may by local rule require it.

The proposed changes are similar in approach to those adopted by California in 1961. See Calif Code Civ Proc § 2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories. Rhode Island takes a similar approach. See R 33, RIR Civ Proc Official Draft, p 74 (Boston Law Book Co.).

A change is made in subdivision (a) which is not related to the sequence of procedures. The restriction to “adverse” parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings--even though the parties may have conflicting interests. E.g., Mozeika v Kaufman Construction Co. 25 FRD 233 (ED Pa 1960) (plaintiff and third-party defendant); Biddle v Hutchinson, 24 FRD 256 (MD Pa 1959) (co-defendants). The resulting distinctions have often been highly technical. In Schlagenhauf v Holder, 379

US 104 (1964), the Supreme Court rejected a contention that examination under Rule 35 could be had only against an "opposing" party, as not in keeping "with the aims of a liberal, nontechnical application of the Federal Rules." 379 US at 116. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in subdivision (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

Subdivision (b).

There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions. Compare, e.g., Payer, Hewitt & Co. v Bellanca Corp. 26 FRD 219 (D Del 1960) (opinions bad); Zinsky v New York Central R.R. 36 FRD 680 (ND Ohio 1964) (factual opinion or contention good, but legal theory bad); United States v Carter Products, Inc. 28 FRD 373 (SD NY 1961) (factual contentions and legal theories bad) with Taylor v Sound Steamship Lines, Inc. 100 F Supp 388 (D Conn 1951) (opinions good); Bynum v United States, 36 FRD 14 (ED La 1964) (contentions as to facts constituting negligence good). For lists of the many conflicting authorities, see 4 Moore's Federal Practice para. 33.17 (2d ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 768 (Wright ed 1961). Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. See Diversified Products Corp. v Sports Center Co. 42 FRD 3 (D Md 1967); Moore, supra; Field & McKusick, Maine Civil Practice § 26.18 (1959). On the other hand, under the new language interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case. Cf. United States v Maryland & Va. Milk Producers Assn., Inc. 22 FRD 300 (D DC 1958).

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, The Revival of Bills of Particulars under the Federal Rules, 71 Harv L Rev 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See, e.g., McElroy v United Air Lines, Inc. 21 FRD 100 (WD Mo 1967); Pressley v Boehlke, 33 FRD 316, 317 (WD NC 1963). Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, e.g., Zielinski v Philadelphia Piers, Inc. 139 F Supp 408 (ED Pa 1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance. The rule does not affect the power of a court to permit withdrawal or amendment of answers to interrogatories.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination. See 4 Moore's Federal Practice para.33.29 [1] (2d ed 1966).

Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the subdivision is thus simplified without any change of substance.

Subdivision (c).

This is a new subdivision, adapted from Calif Code Civ Proc § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louisell, Modern California Discovery, 124--125 (1963), and alleviates a problem which in the past has troubled Federal courts. See Speck, The Use of Discovery in United States District Courts, 60 Yale LJ 1132, 1142--1144 (1951). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection

available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

Notes of Advisory Committee on 1980 amendments to Rules.

Subdivision (c).

The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available, justifying the response by the option provided by this subdivision. Such practices are an abuse of the option. A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.

Effective date of 1980 amendments. Section 2 of the Order of April 29, 1980, 446 US 995, 64 L Ed 2d xlv, -- S Ct --, which adopted the 1980 amendments to this Rule, provided: "That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.".

Preliminary draft of proposed amendments. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 33, dated August 15, 1991.

"(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 15 in number including all 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).

"(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.

"(4) All grounds for an objection to an interrogatory shall be stated with specifity. Any ground not stated in a timely objection is waived unless the 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.

"(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.

"(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."

Committee notes. Purpose of Revision.

The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. To facilitate reference, subdivision (a) is divided into two paragraphs.

Subdivision (a).

Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject to its use to the control of the court consistent with the principles stated in Rule 26(b)(2).

Each party is allowed to serve 15 interrogatories, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation by using "subparts" seeking discrete information. As with the number of depositions authorized by Rule 30, leave to pursue additional discovery is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served unless the requesting party has made its initial disclosures under Rule 26(a)(1), nor prior to the time that such disclosures have been made, or are due, from the opposing party.

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which fifteen are to be answered, or resubmit interrogatories that comply with the rule. See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b).

A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are

waived. Note also the provisions of revised Rule 26(b)(5) which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g) authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

Notes of Advisory Committee on 1993 amendments to Rules.

Purpose of revision.

The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. For ease of reference, subdivision (a) is divided into two subdivisions and the remaining subdivisions renumbered.

Subdivision (a).

Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b).

A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g), authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

Subdivisions (c) and (d). The provisions of former subdivisions (b) and (c) are renumbered.

NOTES TO RULE 34

HISTORY: (Amended March 19, 1948; July 1, 1970; Aug. 1, 1980; Aug. 1, 1987; Dec. 1, 1991; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O 31, rr 14 et seq., or for the inspection of tangible property or for entry upon land, O 50, r 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich Court Rules Ann (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, Discovery Before Trial (1932), Appendix, p 267, setting out the statutes.

Compare former Equity Rule 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness) (fifth paragraph).

Notes of Advisory Committee on 1946 Amendments to Rules.

Note. The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in Olson Transportation Co. v Socony-Vacuum Oil Co. ED Wis 1944, 8 Fed Rules Serv 34.41, Case 2, ". . . Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. See Brown v United States, 1928, 276 US 134, 143, 72 L Ed 500, 48 S Ct 288 ("The subpoena . . . specifies . . . with reasonable particularity the subjects to which the documents called for related."); Consolidated Rendering Co. v Vermont, 1908, 207 US 541, 543--544, 52 L Ed 327, 28 S Ct 178 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

Notes of Advisory Committee on 1970 Amendments to Rules.

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a).

--Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation material makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, i.e., something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34--it will conform to it in most cases--it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. Cf. Mich Gen Ct R 310.1(1) (1963) (testing authorized).

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many

instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Subdivision (b).

--The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Subdivision (c).

--Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

Notes of Advisory Committee on 1980 Amendments to Rules.

Subdivision (b).

The Committee is advised that, "It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (1977) 22. The sentence added by this subdivision follows the recommendation of the Report.

Effective date of Notes of Advisory Committee on 1980 Amendments to Rules. Section 2 of the Order of April 29, 1980, -- US --, 64 L Ed 2d No. 2, v., -- S Ct --, which adopted the 1980 amendments to this Rule, provided "8. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then

pending.”.

Notes of Advisory Committee on 1987 AmendmNotes of Advisory Committee on 1987 Amendments to Rules.ents to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.

Notes of Advisory Committee on 1993 Amendments to Rules.

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties‘ meeting. See Rule 81(c), providing that these rules govern procedures after removal.

NOTES TO RULE 35

HISTORY: (Amended July 1, 1970; Aug. 1, 1987; Nov. 18, 1988.) (Amended Dec. 1, 1991.)

AMENDMENTS: 1988. Act Nov. 18, 1988, in subsec. (a), substituted “physical examination by a physician, or mental examination by a physician or psychologist” for “physical or mental examination by a physician”; in subsec. (b), inserted “or psychologist” in the heading and in paras. (1) and (3) of the text wherever appearing; and added subsec. (c).

Notes of Advisory Committee on Rules.

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz Rev Code Ann (Struckmeyer, 1928) § 4468; Mich Court Rules Ann (Searl, 1933) Rule 41, § 2; 2 NJ Comp Stat (1910), NY CPA (1937) § 306; 1 SD Comp Laws (1929) § 2716A; 3 Wash Rev Stat Ann (Remington, 1932) § 1230-1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch 491-F1. See McCash, The Evolution of the Doctrine of Discovery and Its Present Status in Iowa, 20 Ia L Rev 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in Lyon v Manhattan Railway Co. 142 NY 298, 37 NE 113 (1894), and McGovern v Hope, 63 NJL 76, 42 Atl 830 (1899). In Union Pacific Ry. Co. v Botsford, 141 US 250, 11 S Ct 1000, 35 L Ed 734 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in Camden and Suburban Ry. Co. v Stetson, 177 US 172, 20 L Ed 617, 44 L Ed 721 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, ch 651, USC, Title 28, former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and former § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court).

Notes of Advisory Committee on 1970 Amendments to Rules.

Subdivision (a).

--Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to "produce" the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See Beach v Beach, 114 F2d 479 (DC Cir 1940). Provisions similar to the amendment have been adopted in at least 10 states: Calif Code Civ Proc § 2032; Ida R Civ P 35; Ill S-H Ann c 110A, § 215; Md R P 420; Mich Gen Ct R 311; Minn R Civ P 35; Mo Vern Ann R Civ P 60.01; N Dak R Civ P 35; NY CPL § 3121; Wyo R Civ P 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be "in controversy" and "good cause" must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in Schlagenhauf v Holder, 379 US 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1).

--This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physicians' report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La Stat Ann, Civ Proc art 1495 (1960); Utah R Civ P 35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3).

--This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 Moore's Federal Practice para.35.06, n 1 (2d ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 823, n 22 (Wright ed 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. Sher v De Haven, 199 F2d 777 (DC Cir 1952), cert denied 345 US 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)--such as Rules 34 or 26(b)(3) or (4)--discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, e.g., Galloway v National Dairy Products Corp. 24 FRD 362 (ED Pa 1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. E.g., Leszynski v Russ, 29 FRD 10, 12 (D Md 1961) and cases cited. The question was recently given full consideration in Buffington v Wood, 351 F2d 292 (3d Cir 1965), holding that Rule 35(b) is not preemptive.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical pyschologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

The requirement that the examiner be suitably licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2234 (1986 Supp.). The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications.

The court‘s responsibility to determine the suitability of the examiner’s qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

NOTES TO RULE 36

HISTORY: (Amended March 19, 1948; July 1, 1970; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Compare similar rules: Former Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judicature Act (The Annual Practice, 1937) O 32; Ill Rev Stat (1937) ch 110, § 182 and Rule 18 (Ill Rev Stat (1937) ch 110, § 259.18); 2 Mass Gen Laws (Ter Ed, 1932) ch 231, § 69; Mich Court Rules Ann (Searl, 1933) Rule 42; NJ Comp Stat (2 Cum Supp 1911--1924) NYCPA (1937) §§ 322, 323; Wis Stat (1935) § 327.22.

Notes of Advisory Committee on 1946 Amendments to Rules.

Note. The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served,

bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In Smyth v Kaufman, CCA2d 1940, 114 F2d 40, it was held that the word "therein", now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Notes to Rules 13(a) and 33 herein. The substitution [in said subdivision] of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (1) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, Methods of Objecting to Notice to Admit, 1942, 5 Fed Rules Serv 835; International Carbonic Engineering Co. v Natural Carbonic Products, Inc. SD Cal 1944, 57 F Supp 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

Notes of Advisory Committee on 1970 Amendments to Rules.

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale LJ 371 (1962).

Subdivision (a).

--As revised, the subdivision provides that a request may be made to admit

any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. As to "opinion," compare, e.g., Jackson Buff Corp. v Marcelle, 20 FRD 139 (ED NY 1957); California v The S. S. Jules Fribourg, 19 FRD 432 (ND Calif 1955), with e.g., Photon, Inc. v Harris Intertype, Inc., 28 FRD 327 (D Mass 1961); Hise v Lockwood Grader Corp. 153 F Supp 276 (D Nebr 1957). As to "mixed law and fact" the majority of courts sustain objections, e.g., Minnesota Mining and Mfg. Co. v Norton Co. 36 FRD 1 (ND Ohio 1964), but McSparran v Hanigan, 225 F Supp 628 (ED Pa 1963) is to the contrary.

Not only is it difficult as a practical matter to separate "fact" from "opinion," see 4 Moore's Federal Practice para. 36.04 (2d ed 1966); cf. 2A Barron & Holtzoff, Federal Practice and Procedure 317 (Wright ed 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In McSparran v Hanigan, supra, plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F Supp at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to requests for admission as to matters which that party regards as "in dispute." Compare, e.g., Syracuse Broadcasting Corp. v Newhouse, 271 F2d 910, 917 (2d Cir 1959); Driver v Gindy Mfg. Corp. 24 FRD 473 (ED Pa 1959); with, e.g., McGonigle v Baxter, 27 FRD 504 (ED Pa 1961); United States v Ehbauer, 13 FRD 462 (WD Mo 1952). The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a

failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests. See, e.g., Syracuse Broadcasting Corp. v Newhouse, supra.

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. E.g., Jackson Buff Corp. v Marcelle, 20 FRD 139 (ED NY 1957); Sladek v General Motors Corp. 16 FRD 104 (SD Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. E.g., Hise v Lockwood Grader Corp. 153 F Supp 276 (D Nebr 1957); E. H. Tate Co. v Jiffy Enterprises, Inc. 16 FRD 571 (ED Pa 1954); Finman, supra, 71 Yale LJ 371, 404--409; 4 Moore's Federal Practice para. 36.04 (2d ed 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 509 (Wright ed 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The

statement that objection may be made to any request which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules sets forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows: (1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it. (2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34. (3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4). (4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule--for example, a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. E.g., Southern Ry. v Crosby, 201 F2d 878 (4th Cir 1953); United States v Laney, 96 F Supp 482 (ED SC 1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. E.g., Woods v Stewart, 171 F2d 544 (5th Cir 1948); SEC v Kaye, Real & Co. 122 F Supp 639 (SD NY 1954); Sieb's Hatcheries, Inc. v Lindley, 13 FRD 113 (WD Ark 1952). The rule as revised conforms to the latter practice.

Subdivision (b).

--The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. E.g., Ark-Tenn Distributing Corp. v Breidt, 209 F2d 359 (3d Cir

1954); United States v Lemons, 125 F Supp 686 (WD Ark 1954); 4 Moore's Federal Practice para. 36.08 (2d ed 1966 Supp). At least in some jurisdictions a party may rebut his own testimony, e.g., Alamo v Del Rosario, 98 F2d 328 (DC Cir 1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in Ark-Tenn and Lemons, supra, reasoned in this way, although the results reached may be supported on different grounds. In McSparran v Hanigan, 225 F Supp 628, 636--637 (ED Pa 1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to evidentiary admission of a party. Louisell, Modern California Discovery § 8.07 (1963); 2A Barron & Holtzoff, Federal Practice and Procedure § 838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field & McKusick, Maine Civil Practice § 36.4 (1959); Finman, supra, 71 Yale LJ 371, 418--426; Comment, 56 NW U L Rev 679, 682--683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. Cf. Moosman v Joseph P. Blitz, Inc. 358 F2d 686 (2d Cir 1966).

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 Amendments to Rules.

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

NOTES TO RULE 37

HISTORY: (Amended Oct. 20, 1949; July 1, 1970; Aug. 1, 1980; Oct. 21, 1980; Aug. 1, 1987; Dec. 1, 1993.)

AMENDMENTS: 1980. Act Oct. 21, 1980 (effective 10181, as provided by § 208 of such Act), deleted subsec. (f) which read: Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the

United States under this rule.“.

Notes of Advisory Committee on Rules.

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with Hammond Packing Co. v Arkansas, 212 US 322, 29 S Ct 370, 53 L Ed 530, 15 Ann Cas 645 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in Hovey v Elliott, 167 US 409, 17 S Ct 841, 42 L Ed 215 (1897), for the mere purpose of punishing for contempt.

Notes of Advisory Committee on 1949 Amendments to Rules.

1948--The amendment effective October 1949, substituted the reference to ”Title 28, USC, § 1783“ in subdivision (e) for the reference to ”the act of July 3, 1926, ch 762, § 1 (44 Stat 835), USC, Title 28, § 711.“

Notes of Advisory Committee on 1970 Amendments to Rules.

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col L Rev 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37. Rule 37 sometimes refers to a ”failure“ to afford discovery and at other times to a ”refusal“ to do so. Taking note of this dual terminology, courts have imported into ”refusal“ a requirement of ”wilfullness.“ See Roth v Paramount Pictures Corp., 8 FRD 31 (WD Pa 1948); Campbell v Johnson, 101 F Supp 705, 707 (SD NY 1951). In Societe Internationale v Rogers, 357 US 197 (1958), the Supreme Court concluded that the rather randum use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that ”refused“ in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in Societe, the court in Hinson v Michigan Mutual Liability Co., 275 F2d 537 (5th Cir 1960) once again ruled that ”refusal“ required wilfullness. Substitution of ”failure“ for ”refusal“ throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the Societe Internationale decision. See Rosenberg, supra, 58 Col L Rev 480, 489--490 (1958).

Subdivision (a).

Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being

made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1).

This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has ”inherent power“ to compel a party deponent to answer. Lincoln Laboratories, Inc. v Savage Laboratories, Inc., 27 FRD 476 (D Del 1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2).

This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3).

This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. E.g., Cone Mills Corp. v Joseph Bancroft & Sons Co., 33 FRD 318 (D Del 1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4).

This subdivision amends the provisions for award of expenses, including reasonable attorney‘s fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is

made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of ”substantial justification“ remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without ”substantial justification“ may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust--as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b).

This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled ”Contempt“ and ”Other Consequences,“ respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to reflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order ”to provide or permit discovery,“ including orders issued under Rules 37(a)

and 35. Various rules authorize orders for discovery--e.g., Rule 35(b)(1), Rule 20(c) as revised, Rule 37(d). See Rosenberg, supra, 58 Col L Rev 480, 484--486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. Cf. Societe Internationale v Rogers, 357 US 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See Societe Internationale v Rogers, 357 US 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. E.g., United Sheeplined Clothing Co. v Arctic Fur Cap Corp., 165 F Supp 193 (SD NY 1958); Austin Theatre, Inc. v Warner Bros. Pictures, Inc., 22 FRD 302 (SD NY 1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rule 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c).

Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper from, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial. Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to

admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party gives inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. Bertha Bldg. Corp. v National Theatres Corp. 15 FRD 339 (EDNY 1954). Another has held that the party should be treated as having admitted the request. Heng Hsin Co. v Stern, Morgenthau & Co., 20 Fed. Rules Serv. 36a.52, Case 1 (SDNY Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. United States Plywood Corp. v Hudson Lumber Co., 127 F Supp 489, 497--498 (SDNY 1954). See generally Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371, 426--430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d).

The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders ”as are just“; and the requirement that the failure to appear or respond be ”wilful“ is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. E.g., Gill v Stolow, 240 F2d 669 (2d Cir 1957); Saltzman v Birrell, 156 F Supp 538 (SDNY 1957); 2A Barron & Holtzoff, Federal Practice and Procedure 554--557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be ”wilful.“ The concept of ”wilful failure“ is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfulness. E.g., Milewski v Schneider Transportation Co. 238 F2d 397 (6th Cir 1956); Dictograph Products, Inc. v Kentworth Corp. 7 FRD 543 (WD Ky 1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel’s ignorance of Federal practice, cf. Dunn. v Pa RR., 96 F Supp 597 (N.D. Ohio 1951), or by his preoccupation with another aspect of the case, cf. Maurer-Neuer, Inc. v United Packinghouse Workers, 26 FRD 139 (D Kans

1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfulness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in Societe Internationale v Rogers, 357 US 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare Collins v Wayland, 139 F2d 677 (9th Cir. 1944), cert. den. 322 US 744; Bourgeois v El Paso Natural Gas Co. 20 FRD 358 (SDNY 1957); Loosley v Stone, 15 FRD 373 (SD Ill 1954), with Scarlatos v Kulukundis, 21 FRD 185 (SDNY 1957); Ross v True Temper Corp. 11 FRD 307 (ND Ohio 1951). Compare also Rosenberg supra, 58 Col. L. Rev. 480, 496 (1958) with 2A Barron & Holtzoff, Federal Practice and Procedure 530--531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, Federal Practice and Procedure 306--307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, Campbell v General Motors Corp., 13 FRD 331 (SD NY 1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. Cf. Societe Internationale v Rogers, 357 US 197 (1958).

Subdivision (e).

--The change in the caption conforms to the language of 28 USC § 1783, as amended in 1964.

Subdivision (f).

Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See HR Rep No. 1535, 89th Cong, 2d Sess, 2--3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron and Holtzoff, Federal Practice and Procedure 857 (Wright ed 1961).

A major change in the law was made in 1966, 80 Stat 308, 28 USC § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

Notes of Advisory Committee on 1980 Amendments to Rules.

Subdivision (b)(2).

New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

Subdivision (e).

Subdivision (e) is stricken. Title 28, U.S.C. § 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

Subdivision (g).

New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties, as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. § 2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an

appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

Effective Date of Notes of Advisory Committee on 1980 Amendments to Rules. Section 2 of the Order of April 29, 1980, -- US --, 64 L Ed 2d xli, -- S Ct --, which adopted the 1980 amendments to this Rule, provided "That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." Section 3 of such Order provided "That subsection (e) of Rule 37 of the Federal Rules of Civil Procedure is hereby abrogated, effective August 1, 1980.".

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 Amendments to Rules.

Subdivision (a).

This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase ”after opportunity for hearing“ is changed to ”after affording an opportunity to be heard“ to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c).

The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations ”without substantial justification,“ coupled with the exception for violations that are ”harmless,“ is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant‘s attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of

Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d).

This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g).

This subdivision is modified to conform to the revision of Rule 26(f).

NOTES TO RULE 38

HISTORY: (Amended July 1, 1966; Aug. 1, 1987; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat 1064, USC, Title 28, former § 723c (now § 2072)), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill Rev Stat (1937) ch 110, § 188; 6 Tenn Code Ann (Williams, 1934) § 8734; compare Wyo Rev Stat Ann (1931) § 89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn Gen Stat (1930) § 5624; Hawaii Rev Laws (1935) § 4101; 2 Mass Gen Laws (Ter Ed 1932) ch 231, § 60; 3 Mich Comp Laws (1929) § 14263; Mich Court Rules Ann (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r. r. 2 and 6; and Ontario Jud Act (1927) § 57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz Rev Code Ann (Struckmeyer, 1928) § 3802; Calif Code Civ Proc (Deering, 1937) § 631, par 4; Iowa Code (1935) § 10724; 4 Nev Comp Laws (Hillyer, 1929) § 8782; NM Stat Ann (Courtright, 1929) § 105-814; NYCPA (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); RI Pub Laws (1929), ch 1327, amending RI Gen Laws (1923) ch 337 § 6; Utah Rev Stat Ann (1933) § 104-23-6; 2 Wash Rev Stat Ann (Remington, 1932) § 316; England (4

days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) § 12, Rules, O. 33, r. 2; Alberta Rules of Ct (1914) 172, 183, 184; British Columbia Sup Ct Rules (1925) O. 36, r. r. 2, 6, 11, and 16; New Brunswick Jud Act (1927) O. 36, r. r. 2 and 5. See James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L J 1022. Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in USC, Title 28, formerly § 770 (now § 1873) (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies USC, Title 28, former § 773 (Trial of issues of fact; by court).

Notes of Advisory Committee on 1966 Amendments to Rules.

See note to Rule 9(h), supra.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Preliminary draft of proposed amendment. A preliminary draft, dated September, 1989, proposed amendments to Rule 38 as follows:

(a)-(c) [Unchanged]

(d) Waiver. The failure of a party to serve 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.

(e) [Unchanged]

Notes of Advisory Committee on 1989 Amendments to Rules.

The purpose of the amendment is to eliminate an uncertainty regarding the failure of a party to file a jury demand as required by Rule 5(d). The present text of subdivision (d) indicates that a waiver occurs if the party making the demand does not both serve and file the demand. Such a requirement is inconsistent with the text of subdivision (b), which requires a demand, but no filing. At least one court has held that a party filing but not serving a demand has not waived the right. Biesencamp v. Atlantic Richfield Company, 70 F.R.D. 365 (E.D. Pa. 1976). The amendment would harmonize the two subdivisions.

A party seeking a jury would still be required to demand it and the demand must be filed under Rule 5(d), but failure to file does not result in waiver of the right.

Notes of Advisory Committee on 1993 Proposed Amendments to Rule.

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

NOTES TO RULE 39

Notes of Advisory Committee on Rules.

The provisions for express waiver of jury trial found in USC, Title 28, former § 773 (Trial of issues of fact; by court) are incorporated in this rule. See Rule 38, however, which extends the provisions for waiver of jury. USC, Title 28, former § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See Liberty Oil Co. v Condon Nat. Bank, 260 US 235, 43 S Ct 118, 67 L Ed 232 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif Code Civ Proc (Deering, 1937) § 592; 1 Colo Stat Ann (1935) Code Civ Proc, ch 12, § 191; Conn Gen Stat (1930) § 5625; 2 Minn Stat (Mason, 1927) § 9288; 4 Mont Rev Codes Ann (1935) § 9327; NYCPA (1937) § 430; 2 Ohio Gen Code Ann (Page, 1926) § 11380; 1 Okla Stat Ann (Harlow, 1931) § 351; Utah Rev Stat Ann (1933) § 104-23-5; 2 Wash Rev Stat Ann (Remington, 1932) § 315; Wis Stat (1935) § 270.07. See Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and USC, Title 28, former § 772 (Trial of issues of fact; in equity in patent causes); Collecton Merc. Mfg. Co. v Savannah River Lumber Co. 280 Fed 358 (CCA4th, 1922); Fed. Res. Bk. of San Francisco v Idaho Grimm Alfalfa Seed Growers‘ Ass’n, 8 F2d 922 (CCA9th, 1925), cert den 270 US 646, 46 S Ct 347, 70 L Ed 778 (1926); Watt v Starke, 101 US 247, 25 L Ed 826 (1879).

NOTES TO RULE 40

Notes of Advisory Committee on Rules.

USC, Title 28, former § 769 (Notice of case for trial) is modified. See former Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also former Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see USC, Title 28, formerly § 47 (now §§ 1253, 2101, 2325) (Injunctions as to orders of Interstate Commerce Commission); formerly § 380 (now §§ 1253, 2101, 2284) (Injunctions alleged unconstitutionality of state statutes); formerly § 380a (now §§ 1253, 2101, 2284) (Same; Constitutionality of federal statute); former § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under interstate

commerce laws; expedition of suits).

NOTES TO RULE 41

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1966; July 1, 1968; Aug. 1, 1987.) (Amended Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

Compare Ill Rev Stat (1937) ch 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as USC, Title 8, § 164 (Jurisdiction of district courts in immigration cases) and USC, Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b).

This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

Notes of Advisory Committee on 1946 Amendments to Rules.

Note. Subdivision (a).

The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 Moore‘s Federal Practice, 1938, 3037--3038, n 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word ”generally“ has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

Subdivision (b).

In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. Young v United States, CCA9th, 1940, 111 F2d 823; Gary Theatre Co. v Columbia Pictures Corporation, CCA 7th, 1941, 120 F2d 891; Bach v Friden Calculating Machine Co., Inc. CCA6th, 1945, 148 F2d 407. Cf. Mateas v Fred Harvey, a Corporation, CCA9th, 1945, 146 F2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. Federal Deposit Insurance Corp. v Mason, CCA3d, 1940, 115 F2d 548; Schad v Twentieth Century-Fox Film Corp. CCA3d 1943, 136 F2d 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 Moore's Federal Practice, 1938, Cum Supplement § 41.03, under "Page 3045"; Commentary, The Motion to Dismiss in Non-Jury Cases, 1946, 9 Fed Rules Serv, Comm Pg 41b.14.

Notes of Advisory Committee on 1963 Amendments to Rules.

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally O'Brien v Westinghouse Electric Corp., 293 F2d 1, 5--10 (3d Cir 1961).

As indicated by the discussion in the O'Brien case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to non-jury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a

directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 Moore's Federal Practice para.59.08 [5] (2d ed 1954); cf. Cone v West Virginia Pulp & Paper Co., 330 US 212, 217, 67 S Ct 752, 91 L Ed 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as non-jury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See Costello v United States, 365 US 265, 284--288, 81 S Ct 534, 5 L Ed 2d 551 & n 5 (1961); Mallow v Hinde, 12 Wheat (25 US) 193, 6 L Ed 599 (1827); Clark, Code Pleading 602 (2d ed 1947); Restatement of Judgments § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

Notes of Advisory Committee on 1966 Amendments to Rules.

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

Notes of Advisory Committee on 1968 Amendments to Rules.

The amendment corrects an inadvertent error in the reference to amended Rule 23.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

NOTES TO RULE 42

HISTORY: (Amended July 1, 1966.)

Notes of Advisory Committee on Rules.

Subdivision (a) is based upon USC, Title 28, former § 734 (Orders to save costs, consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark Dig Stat (Crawford & Moses, 1921) § 1081; Calif Code Civ Proc (Deering, 1937) § 1048; NM Stat Ann (Courtright, 1929) § 105-828; NYCPA (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art 26.

For severance or separate trials see Calif Code Civ Proc (Deering, 1937) § 1048; NYCPA (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art 3, § 2 and Art 10, § 10. See also the third sentence of Equity Rule 29 (Defenses--How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

Notes of Advisory Committee on 1966 Amendments to Rules.

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, Routine Bifurcation of Negligence Trials, 14 V and L Rev 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See e.g., United Air Lines, Inc. v Wiener, 286 F2d 302 (9th Cir 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

NOTES TO RULE 43

HISTORY: (Amended July 1, 1966; July 1, 1975; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

The first sentence is a restatement of the substance of USC, Title 28, former § 635 (Proof in common-law actions), formerly § 637 (now §§ 2072, 2073) (Proof in equity and admiralty), and former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under former Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify USC, Title 28, formerly § 725 (now § 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure, 45 Yale LJ 622 (1936), and Same; 2, 47 Yale LJ 195 (1937). The last sentence modifies to the extent indicated USC, Title 28, § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (b).

See 4 Wigmore on Evidence (2d ed, 1923) §§ 1885 et seq.

Note to Subdivision (c).

See former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). With the last sentence compare Dowagiac v Lochren, 143 Fed 211 (CCA8th, 1906). See also Blease v Garlington, 92 US 1, 23 L Ed 521 (1876); Nelson v United States, 201 US 92, 114, 26 S Ct 358, 50 L Ed 673 (1906); Unkle v Wills, 281 Fed 29 (CCA8th, 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d).

See former Equity Rule 78 (Affirmation in Lieu of Oath) and USC, Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary Note of Advisory Committee Regarding Rules 43 and 44. Note. These rules have been criticized and suggested improvements offered by commentators. 1 Wigmore on Evidence, 3d ed 1940, 200--204; Green, the Admissibility of Evidence Under the Federal Rules, 1941, 55 Harv L Rev 197. Cases indicate, however, that the rule is working better than these commentators had expected. Boerner v United States, CCA2d, 1941, 117 F2d 387, cert den 1941, 313 US 587, 85 L Ed 1542, 61 S Ct 1120; Mosson v Liberty Fast Freight Co. CCA2d, 1942, 124 F2d 448; Hartford Accident & Indemnity Co. v Olivier, CCA5th, 1941, 123 F2d 709; Anzano v Metropolitan Life Ins. Co. of New York, CCA3d, 1941, 118 F2d 430; Franzen v E. I.

DuPont De Nemours & Co. CCA3d, 1944, 146 F2d 837; Fakouri v Cadais, CCA5th, 1945, 147 F2d 667; In re C. & P. Co. SD Cal 1945, 63 F Supp 400, 408. But cf. United States v Aluminum Co. of America, SD NY 1938, 1 Fed Rules Serv 43a.3, Case 1; Note, 1946, 46 Col L Rev 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, Proposed Amendments to Federal Rules of Civil Procedure, 4 FRD 124, 137--138.

Notes of Advisory Committee on 1966 Amendments to Rules.

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on 1975 Amendments to Rules.

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a).

The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b).

The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule611(c). Who may impeach is treated in Evidence Rule607, and scope of cross-examination is covered in Evidence Rule611(b). The subdivision is accordingly deleted.

Subdivision (c).

Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

Effective date of notes of Advisory Committee on 1975 Amendments to Rules. Act Jan. 2, 1975, P.L. 93-595, 88 Stat. 1926, provided in § 3 that the amendment of Rule 43 "shall take effect on the one hundred and eightieth day beginning after the date of enactment of this Act [Jan. 2, 1975].".

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendment is technical. No substantive change is intended.

Preliminary draft of proposed amendments. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 43, dated August 15, 1991.

"(a) Form. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. Subject to the right of cross-examination, the court, in a nonjury trial, may permit or require that the direct examination of a witness, or a portion therof, be presented through adoption by the witness of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness. The contents thereof are admissible to the same extent as if the witness testified orally with respect thereto.".

"(b)-(f) [Unchanged]

Committee notes. Rule 43 is revised to dispel any doubts as to the power of the court under Rule 611(a) of the Federal Rules of Evidence to permit or require in appropriate circumstances that the direct examination of a witness, or a portion thereof, be presented in the form of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness.

Presentation of direct testimony in this manner can greatly expedite trial and may make the testimony more understandable without sacrifice to the benefits of the adversarial system, since the witness will be subject to cross-examination in the traditional manner with respect to the written statement.

This procedure is not appropriate for all cases or for all witnesses. The amendment applies only in nonjury cases, and even in such cases the primary usage will be with expert testimony or with "background" testimony from lay witnesses concerning matters not in substantial dispute.

The revision of Rule 43 is not intended to limit by implication the powers of the court under Rule 611(a) of the Federal Rules of Evidence, such as having a witness testify in a narrative fashion rather then in question-and-answer form.

Notes of Advisory Committee on 1996 Amendments to Rules.

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described

below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

NOTES TO RULE 44

HISTORY: (Amended July 1, 1966; Aug. 1, 1987.) (Amended Dec. 1, 1991.)

EXPLANATORY NOTES: These amendments were developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of September 2, 1958, 72 Stat 1743), and the Columbia Law School Project on International Procedure.

Notes of Advisory Committee on Rules.

This rule provides a simple and uniform method of proving public records, and

entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some of those statutes are:

USC, Title 28, former:
§ 661 (Copies of department or corporation records and papers; admissibility; seal)
§ 662 (Same; in office of General Counsel of the Treasury)
§ 663 (Instruments and papers of Comptroller of Currency; admissibility)
§ 664 (Organization certificates of national banks; admissibility)
§ 665 (Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666 (Same; certificate by Secretary or Assistant Secretary)
§ 670 (Admissibility of copies of statements of demands by Post Office Department)
§ 671 (Admissibility of copies of post office records and statement of accounts)
§ 672 (Admissibility of copies of records in General Land Office)
§ 673 (Admissibility of copies of records, and so forth, of Patent Office)
§ 674 (Copies of foreign letters patent as prima facie evidence)
§ 675 (Copies of specifications and drawings of patents admissible)
§ 676 (Extracts from Journals of Congress admissible when injunction of secrecy removed)
§ 677 (Copies of records in offices of United States consuls admissible)
§ 678 (Books and papers in certain district courts)
§ 679 (Records in clerks' offices, western district of North Carolina)
§ 680 (Records in clerks‘ offices of former district of California)
§ 681 (Original records lost or destroyed; certified copy admissible)
§ 682 (Same; when certified copy not obtainable)
§ 685 (Same; certified copy of official papers)
§ 687 (Authentication of legislative acts; proof of judicial proceedings of State)
§ 688 (Proofs of records in offices not pertaining to courts)
§ 689 (Copies of foreign records relating to land titles)
§ 695 (Writings and records made in regular course of business; admissibility)
§ 695e (Foreign documents on record in public offices; certification)

USC, Title 1:
§ 112 (Statutes at large; contents; admissibility in evidence)
§ 113 ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)
§ 204 (Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.)
§ 208 (Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original)

USC, Title 5: § 490 (Records of Department of Interior; authenticated copies as evidence)

USC, Title 6: § 7 (Surety Companies as sureties; appointment of agents; service of process)

USC, Title 8:
§ 9a (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings)
§ 1443 (Regulations for execution of naturalization records; authorization; admissibility as evidence)

USC, Title 11: § 44(d), (e), (f), (g) (Bankruptcy court proceedings and orders as evidence)

USC, Title 15:
§ 127 (Trade-mark records in Patent Office; copies as evidence)
§ 52 (Smithsonian Institution; evidence of title to site and buildings)

USC, Title 25: § 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)

USC, Title 31: § 46 (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)

USC, Title 38: § 11g (Seal of Veterans‘ Administration; authentication of copies of records)

USC, Title 40:
§ 238 (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
§ 270c (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)
§§ 57--59 (Copies of land surveys, etc., in certain states and districts admissible as evidence)
§ 83 (General Land Office registers and receivers; transcripts of records as evidence)

USC, Title 46: § 823 (Records of Maritime Commissions; copies; publication of reports; evidence)

USC, Title 47:
§ 154(m) (Federal Communications Commission; copies of reports and decisions as evidence)
§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)

USC, Title 49:
§ 14(3) (Interstate Commerce Commission reports and decisions; printing and distribution of copies)
§ 16(13) (Copies of schedules, tariffs, etc., filed with Interstate Commerce Commission as evidence)

§ 19a(i) (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

Supplementary Note of Advisory Committee Regarding Rules 43 and 44. For supplementary note of Advisory Committee on this rule, see note under rule 43.

Notes of Advisory Committee on 1966 Amendments to Rules.

Subdivision (a)(1).

These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. Cf. Banco de Espana v Federal Reserve Bank, 114 F2d 438 (2d Cir 1940).

Subdivision (a)(2).

Foreign official records may be proved, as heretofore, by means of official publications thereof. See United States v Aluminum Co. of America, 1 FRD 71 (SD NY 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to prove greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure § 992 (Wright ed 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum L Rev 1031, 1063 (1961); 22 CFR § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were

beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See New York Life Ins. Co. v Aronson, 38 F Supp 687 (WD Pa 1941); 22 CFR § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v Grabina, 119 F2d 863 (2d Cir 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale LJ 515, 548--49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep of Comm on Comparative Civ Proc & Prac, Proc ABA, Sec Int'l & Comp L 123, 130--31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b).

This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c).

The amendment insures that international agreements of the United States are

unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art X, 20 Stat 725, TS No. 178 (Dept State 1878). See also 28 USC §§ 1740--42, 1745; Fakouri v Cadais, 149 F2d 321 (5th Cir 1945), cert den 326 US 742, 90 L Ed 443, 66 S Ct 54 (1945); 5 Moore's Federal Practice, par 44.05 (2d ed 1951).

Notes of Advisory Committee on proposed 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

The amendment to paragraph (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official records should be treated as domestic records.

The amendment to paragraph (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Moreover, it does not affect the former practice of attesting the records, but only changes the method of certifying the attestation.

The Hague Public Documents Convention provides that the requirement of a final certification is abolished and replaced with a model apostille, which is to be issued by officials of the country where the records are located. See Hague Public Documents Convention, Arts. 2-4. The apostille certifies the signature, official position, and seal of the attesting officer. The authority who issues the apostille must maintain a register or card index showing the serial number of the apostille and other relevant information recorded on it. A foreign court can then check the serial number and information on the apostille with the issuing authority in order to guard against the use of fraudulent apostilles. This system provides a reliable method for maintaining the integrity of the authentication process, and the apostille can be accorded greater weight than the normal authentication procedure because foreign officials are more likely to know the precise capacity under their law of the attesting officer than would an American official. See generally Comment, The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 11 HARV. INT'L L.J. 476, 482, 488 (1970).

NOTES TO RULE 44.1

HISTORY: (Amended July 1, 1966; July 1, 1975; Aug. 1, 1987.)

EXPLANATORY NOTES: This rule was developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat 1743), and the Columbia Law School Project on International Procedure.

Notes of Advisory Committee on 1966 Amendments to Rules.

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the first sentence of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded--compare Siegelman v Cunard White Star, Ltd. 221 F2d 189 (2d Cir 1955), and Pedersen v United States, 191 F Supp 95 (D Guam 1961), with Harrison v United Fruit Co. 143 F Supp 598 (SD NY 1956)--is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possibly wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial, and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The second sentence of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of

evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming, and expensive. See, generally, Nussbaum, Proving the Law of Foreign Countries, 3 Am J Comp L 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. NY Civ Prac Law & Rules, R 4511 (effective Sept. 1, 1963); 2 Va Code Ann tit 8, § 8-273; 2 W Va Code Ann § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, Comparative Law 142 (2d ed 1959); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv L Rev 1281, 1296 (1952); cf. Siegelman v Cunard White Star, Ltd., supra, 221 F2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif L Rev 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). Cf. Uniform Judicial Notice of Foreign Law Act § 3; Note, 72 Harv L Rev 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that " [t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, Conflict of Laws § 638 (1st ed 1834, 8th ed 1883); 1 Greenleaf, Evidence, § 468 (1st ed 1842, 16th ed 1899); 4 Wigmore, Evidence § 2558 (1st ed 1905); 9 id § 2558 (3d ed 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A ULA 318 (1957) (Suppl 1961, at 134); NY Civ Prac Law & Rules, R 4511 (effective Sept. 1, 1963); Wigmore, loc cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See Jansson v Swedish American Line, 185 F2d 212, 216 (1st Cir 1950); Bank of Nova Scotia v San Miguel, 196 F2d 950, 957 n 6 (1st Cir 1952); Liechti v Roche, 198 F2d 174 (5th Cir 1952); Daniel Lumber Co. v Empresas Hondurenas, S.A. 215 F2d 465 (5th Cir 1954).

Notes of Advisory Committee on 1975 Amendments to Rules.

Since the purpose of the provision is to free the judge, in determinating foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

Effective date on notes of Advisory Committee on 1975 amendments to Rules. Act Jan. 2, 1975, P.L. 93-595, 88 Stat. 1926, provided in § 3 that the amendment of Rule 44.1 "shall take effect on the one hundred and eightieth day beginning after the date of enactment of this Act [Jan. 2, 1975].".

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 45

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; July 1, 1970; Aug. 1, 1980; Aug. 1, 1985; Aug. 1, 1987.) (Amended Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but

provide that they may be served anywhere within the United States. Among such statutes are the following:

USC, Title 7, §§ 222 and 511n (Secretary of Agriculture)

USC, Title 15, § 49 (Federal Trade Commission)

USC, Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

USC, Title 16, §§ 797(g) and 825f (Federal Power Commission)

USC, Title 19, § 1333(b) (Tariff Commission)

USC, Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

USC, Title 26, § 1114 (Tax Court)

USC, Title 26, § 1523(a) (Internal Revenue Officers)

USC, Title 29, § 161 (Labor Relations Board)

USC, Title 33, § 506 (Secretary of Army)

USC, Title 35, § 24 (Patent Office proceedings)

USC, Title 38, § 133 (Veterans' Administration)

USC, Title 41, § 39 (Secretary of Labor)

USC, Title 45, § 157 Third (h) (Board of Arbitration under Railway Labor Act)

USC, Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

USC, Title 46, § 1124(b) (Maritime Commission)

USC, Title 47, § 409(c) and (d) (Federal Communications Commission)

USC, Title 49, § 12(2) and (3) (Interstate Commerce Commission)

USC, Title 49, § 173a (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in USC, Title 28, former § 655 (Witnesses; subpoena; form; attendance under); and broaden USC, Title 28, former § 636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena duces tecum, compare NYCPA (1937) § 411.

Note to Subdivision (c).

This provides for the simple and convenient method of service permitted under many state codes; e. g., NYCPA (1937) §§ 220, 404, J Ct Act, § 191; 3 Wash Rev Stat Ann (Remington, 1932) § 1218. Compare Equity Rule 15

(Process, by Whom Served).

FOR STATUTES GOVERNING FEES AND MILEAGE OF WITNESSES SEE:

USC, Title 28, former: § 600a (Per diem; mileage) § 600c (Amount per diem and mileage for witnesses; subsistence) § 600d (Fees and mileage in certain states) § 601 (Witnesses‘ fees; enumeration) § 602 (Fees and mileage of jurors and witnesses) § 603 (No officer of court to have witness fees)

Note to Subdivision (d).

The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See Henning v Boyle, 112 Fed 397 (SD NY, 1901). The requirement of an order for the issuance of a subpoena duces tecum is in accordance with USC, Title 28, former § 647 (Deposition under dedimus potestatem; subpoena duces tecum). The provisions of paragraph (2) are in accordance with common practice. See USC, Title 28, former § 648 (Deposition under dedimus potestatem; witnesses, when required to attend); NYCPA (1937) § 300; 1 NJ Rev Stat (1937) 2:27-174.

Note to Subdivision (e).

The first paragraph continues the substance of USC, Title 28, former § 654 (Witnesses; subpoenas; may run into another district). Compare USC, Title 11, § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

USC, Title 15: § 23 (Suits by United States; subpoenas for witnesses) (under antitrust laws)

USC, Title 38: § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans’ insurance contracts)

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See USC, Title 28, formerly § 711 (now § 1783) (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and former § 713 (Service of subpoena on witness in foreign country).

Note to Subdivision (f).

Compare former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

Notes of Advisory Committee on 1946 and 1948 Amendments to Rules.

Note. Subdivision (b).

The added words, "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

Subdivision (d).

The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)--to the effect that leave of court should be obtained for the issuance of such a subpoena--has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See Application of Zenith Radio Corp. ED Pa, 1941, 4 Fed Rules Serv 30b.21, Case 1, 1 FRD 627; Fox v House, ED Okla, 1939, 29 F Supp 673; United States of America for the Use of Tilo Roofing Co., Inc. v J. Slotnik Co., D Conn 1944, 3 FRD 408.

The changes in subdivision (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

Notes of Advisory Committee on 1970 Amendments to Rules.

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the subpoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that

applicable to Rule 34 and the other discovery rules.

Notes of Advisory Committee on 1980 Amendments to Rules.

Subdivision (d)(1).

The amendment defines the term "proof of service" as used in the first sentence of the present subdivision. For want of a definition, the district court clerks have been obliged to fashion their own, with results that vary from district to district. All that seems required is a simple certification on a copy of the notice to take a deposition that the notice has been served on every other party to the action. That is the proof of service required by Rule 25(d) of both the Federal Rules of Appellate Procedure and the Supreme Court Rules.

Subdivision (e)(1).

The amendment makes the reach of a subpoena of a district court at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held. Under the present rule the reach of a district court subpoena is often greater, since it extends throughout the district. No reason appears why it should be less, as it sometimes is because of the accident of district lines. Restrictions upon the reach of subpoenas are imposed to prevent undue inconvenience to witnesses. State statutes and rules of court are quite likely to reflect the varying degrees of difficulty and expense attendant upon local travel.

Effective date of notes of Advisory Committee on 1980 amendments to Rules. Section 2 of the Order of April 29, 1980,--US--, 64 L Ed 2d, No. 2, v.,--S Ct--, which adopted the 1980 amendments to this Rule, provided "8. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.".

Notes of Advisory Committee on 1985 Amendments to Rules.

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the county wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second

sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, or within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and nonresidents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

Purposes of Revision.

The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a).

This subdivision is amended in seven significant respects.

First, Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. This revision perhaps culminates an evolution. Subpoenas were long issued by specific order of the court. As this became a burden to the court, general orders were made authorizing clerks to issue subpoenas on request. Since 1948, they have been issued in blank by the clerk of any federal court to any lawyer, the clerk serving as stationer to the bar. In allowing counsel to issue the subpoena, the rule is merely a recognition of present reality.

Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions. In ICC v. Brimson, 154 U.S. 447 (1894), the Court upheld a statute directing federal courts to issue subpoenas to compel testimony before the ICC. In CAB v.

Hermann, 353 U.S. 322 (1957), the Court approved as established practice the issuance of administrative subpoenas as a matter of absolute agency right. And in NLRB v. Warren Co., 350 U.S. 107 (1955), the Court held that the lower court had no discretion to withhold sanctions against a contemnor who violated such subpoenas. The 1948 revision of Rule 45 put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute. Two courts of appeals have touched on the issue and have described lawyer-issued subpoenas as mandates of the court. Waste Conversion, Inc. v. Rollins Environmental Services (NJ), Inc., 893 F. 2d. 605 (3d cir, 1990); Fisher v. Marubent Cotton Corp., 526 F. 2d 1338, 1340 (8th cir., 1975). Cf. Young v. United States ex rel Vuitton et Fils S.A., 481 U. S. 787, 821 (1987) (Scalia, J., concurring). This revision makes the rule explicit that the attorney acts as an officer of the court in issuing and signing subpoenas.

Necessarily accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power. The latter development is reflected in the provisions of subdivision (c) of this rule, and also in the requirement imposed by paragraph (3) of this subdivision that the attorney issuing a subpoena must sign it.

Second, Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted pro haec vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks' offices some distance from the place at which the action proceeds. This change does not enlarge the burden on the witness.

Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished by the provisions of Paragraph (a)(1).

Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material

required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

Fifth, Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Sixth, Paragraph (a)(1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Subdivision (b).

Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes.

The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

Paragraph (b)(3) retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

Subdivision (c).

This provision is new and states the rights of witnesses. It is not intended to diminish rights conferred by Rules 26-37 or any other authority.

Paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. No change in existing law is thereby effected. Abuse of a subpoena is an actionable tort, Board of Ed. v. Farmingdale Classroom Teach. Ass'n, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is also embodied in Model Rule of Professional Conduct 4.4. The liability of the attorney is correlative to the expanded power of the attorney to issue subpoenas. The liability may include the cost of fees to collect attorneys' fees owed as a result of a breach of this duty.

Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short time periods under Rule 6 and to allow a bit more time for such objections to be made.

A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, e.g., United States v. Columbia Broadcasting Systems, Inc., 666 F.2d 364 (9th Cir. 1982).

Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power. It replaces and enlarges on the former subdivision (b) of this rule and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the witness who may read it on the subpoena, where it is required to be printed by the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed or modified. It restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1), with one important change. Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides.

This extension is subject to the qualification provided in the next paragraph, which authorizes the court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial. The traveling

non-party witness may be entitled to reasonable compensation for the time and effort entailed.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness. An additional circumstance in which such action is required is a request for costly production of documents; that situation is expressly governed by subparagraph (b)(2)(B).

Clause (c)(3)(B)(i) authorizes the court to quash, modify, or condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information. It corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4). A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, e.g., Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure, 19 GA.L.REV. 71 (1984); Note, Discovery and Testimony of Unretained Experts, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in United States v. Columbia Broadcasting Systems Inc., 666 F.2d 364 (9th Cir. 1982). See also Wright v. Jeep Corporation, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in Kaufman v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant

to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify. . . ."

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d).

This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5). Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The person claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e).

This provision retains most of the language of the former subdivision (f). "

Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. E.g., Walker v. City of Birmingham, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a

party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

NOTES TO RULE 46

HISTORY: (Amended Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Abolition of formal exceptions is often provided by statute. See Ill Rev Stat (1937), ch 110, § 204; Neb Comp Stat (1929) § 20-1139; NM Stat Ann (Courtright, 1929) § 105-830; 2 ND Comp Laws Ann (1913) § 7653; Ohio Code Ann (Throckmorton, 1936) § 11560; 1 SD Comp Laws (1929) § 2542; Utah Rev Stat Ann (1933) §§ 104-39-2, 104-24-18; Va Rules of Court, Rule 22, 163 Va v xii (1935); Wis Stat (1935) § 270.39. Compare NYCPA (1937) §§ 445, 446, and 583, all as amended by L 1936, ch 915. Rule 51 deals with objections to the court's instructions to the jury.

USC, Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) and former § 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 47

HISTORY: (Amended July 1, 1966.) (Amended Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn xxxiii (1932), 3 Minn Stat (Mason, Supp 1936) Appendix 4, p 1062.

Note to Subdivision (b).

The provision for an alternate juror is one often found in modern state codes. See NC Code (1935) § 2330(a); Ohio Gen Code Ann (Page, Supp 1926--1935) § 11419-47; Pa Stat Ann (Purdon Supp 1936) Title 17, § 1153; compare USC, Title 28, former § 417a (Alternate jurors in criminal trials); 1 NJ Rev

Stat (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in USC, Title 28, former:
§ 411 (Qualifications and exemptions)
§ 412 (Manner of drawing)
§ 413 (Apportioned in district)
§ 415 (Not disqualified because of race or color)
§ 416 (Venire; service and return)
§ 417 (Talesmen for petit jurors)
§ 418 (Special juries)
§ 423 (Jurors not serve more than once a year)
§ 424 (Challenges) and DC Code (1930) Title 18, §§ 341--360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

Notes of Advisory Committee on 1966 Amendments to Rules.

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number to a maximum of six in all cases. The Advisory Committee‘s Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds: “

The words ’or are found to be‘ are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn.”

Notes of Advisory Committee on December 1991 amendment of Rule.

Subdivision (b).

The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c).

This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

NOTES TO RULE 48

HISTORY: (Amended Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

For provisions in state codes, compare Utah Rev Stat Ann (1933) § 48-0-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash Rev Stat Ann (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

Notes of Advisory Committee on December 1991 amendment of Rule.

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. Cf. Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. Ray v. Parkside Surgery Center, 13 F. R. Serv. 585 (6th cir. 1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may

agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in Ballew v. Georgia, supra.

NOTES TO RULE 49

HISTORY: (Amended July 1, 1963; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. Victor American Fuel Co. v Peccarich, 209 Fed 568 (CCA 8th, 1913) cert den 232 US 727, 34 S Ct 603, 58 L Ed 817 (1914); Spokane and I. E. R. Co. v Campbell, 217 Fed 518 (CCA 9th, 1914), affd 241 US 497, 36 S Ct 683, 60 L Ed 1125 (1916); Simkins, Federal Practice (1934) § 186. The power of a territory to adopt by statute the practice under Subdivision (b) has been sustained. Walker v New Mexico and Southern Pacific R.R. 165 US 593, 17 S Ct 421, 41 L Ed 837 (1897); Southwestern Brewery and Ice Co. v Schmidt, 226 US 162, 33 S Ct 68, 57 L Ed 170 (1912).

Compare Wis Stat (1935) §§ 270.27, 270.28 and 270.30 Green, A New Development in Jury Trial (1927), 13 ABAJ 715; Morgan, A Brief History of Special Verdicts and Special Interrogatories, 1923, 32 Yale L J 575.

The provisions of USC, Title 28, formerly § 400(3) (now §§ 2201, 2202) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

Notes of Advisory Committee on 1946 Amendments to Rules.

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

Notes of Advisory Committee on 1963 Amendments to Rules.

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 50

HISTORY: (Amended July 1, 1963; Aug. 1, 1987; Dec. 1, 1991; Dec. 1, 1993; Dec. 1,

1995.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See Sampliner v Motion Picture Patents Co. 254 US 233, 41 S Ct 79, 65 L Ed 240 (1920); Union Indemnity Co. v United States, 74 F2d 645 (CCA 6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, Federal Practice (1934) § 189.

Note to Subdivision (b).

For comparable state practice upheld under the conformity act, see Baltimore and Carolina Line v Redman, 295 US 654, 55 S Ct 890, 79 L Ed 1636 (1935); compare Slocum v New York Life Ins. Co. 228 US 364, 33 S Ct 523, 57 L Ed 879, Ann Cas 1914D 1029 (1913).

See Northern Ry. Co. v Page, 274 US 65, 47 S Ct 491, 71 L Ed 929 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, Trial by Jury in United States Courts, 26 Harv L Rev 732 (1913). See also Thayer, Judicial Administration, 63 U of Pa L Rev 585, 600--601, and note 32 (1915); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv L Rev 669, 685 (1918); Comment, 34 Mich L Rev 93, 98 (1935).

Notes of Advisory Committee on 1963 Amendments to Rules.

Subdivision (a).

The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, Federal Practice & Procedure § 1072, at 367 (Wright ed 1961); Blume, Origin and Development of the Directed Verdict, 48 Mich L Rev 555, 582--85, 589--90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz R Civ P 50(c); cf. Fed R Crim P 29(a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (b).

A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the

evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n. o. v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c)

deals with the situation where a party joins a motion for a new trial with his motion for judgment n. o. v., or prays for a new trial in the alternative, and the motion for judgment n. o. v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in Montgomery Ward & Co. v Duncan, 311 US 243, 253, 61 S Ct 189, 85 L Ed 147 (1940), and have been further elaborated in later cases. See Cone v West Virginia Pulp & Paper Co. 330 US 212, 67 S Ct 752, 91 L Ed 849 (1947); Globe Liquor Co., Inc. v San Roman, 332 US 571, 68 S Ct 246, 92 L Ed 177 (1948); Fountain v Filson, 336 US 681, 69 S Ct 754, 93 L Ed 971 (1949); Johnson v New York, N. H. & H. R. Co. 344 US 48, 73 S Ct 125, 97 L Ed 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, subdivision (c)(1) requires that the court make a "conditional" ruling on the new-trial motion, i. e., a ruling which goes on the assumption that the motion for judgment n. o. v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n. o. v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n. o. v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See Bailey v Slentz, 189 F2d 406 (10th Cir 1951); Moist Cold Refrigerator Co. v Lou Johnson Co. 249 F2d 246 (9th Cir 1957), cert denied, 356 US 968, 78 S Ct 1008, 2 L Ed 2d 1074 (1958); Peters v Smith, 221 F2d 721 (3d Cir 1955); Dailey v Timmer, 292 F2d 824 (3d Cir 1961), explaining Lind v Schenley Industries, Inc., 278 F2d 79 (3d Cir 1960), cert denied 364 US 835, 81 S Ct 58, 5 L Ed 2d 60 (1960); Cox v Pennsylvania R. R. 120 A2d 214 (DC Mun Ct App 1956); 3 Barron & Holtzoff, Federal Practice & Procedure § 1302.1 at

346--47 (Wright 1d 1958); 6 Moore‘s Federal Practice para. 59.16 at 3915 n 8a (2d ed 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, “subsequent proceedings shall be in accordance with the order of the appellate court.” The party in whose favor judgment n. o. v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. Cf. Patterson v Pennsylvania R. R. 238 F2d 645, 650 (6th Cir 1956); Hughes v St. Louis Nat. L. Baseball Club, Inc. 359 Mo 993, 997, 224 SW2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee’s contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n. o. v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n. o. v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n. o. v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n. o. v. See Cone v West Virginia Pulp & Paper Co., supra, 330 US at 217, 218, 67 S Ct at 755, 756, 91 L Ed 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n. o. v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in Tribble v Bruin, 279 F2d 424 (4th Cir 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n. o. v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff‘s motion, conditional upon reversal of the judgment n. o. v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n. o. v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d)

deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n. o. v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial

court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See Weade v Dichmann, Wright & Pugh, Inc. 337 US 801, 69 S Ct 1326, 93 L Ed 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (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, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

Notes of Advisory Committee on 1987 Amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

Subdivision (a).

The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. Cf. Galloway v. United States, 319 U. S. 372 (1943).

The revision abandons the familiar terminology of direction of verdict for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. See generally Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court‘s duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party’s case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party‘s case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party’s proof that may have been overlooked until called to the party‘s attention by a late motion for judgment. Cf. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986) (“If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury”); Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986) (“the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case . . .); McLaughlin v. The Fellows Gear Shaper Co., 4 F.R.Serv. 3d 607 (3d Cir. 1986) (per Adams,

J., dissenting: ”This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury“). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. Slocum v New York Insurance Co., 228 U.S. 364 (1913). But cf. Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., Benson v. Allphin, 788 F. 2d. 268 (7th cir. 1986) (”this circuit has allowed something less than a formal motion for directed verdict to preserve a party’s right to move for judgment notwithstanding the verdict“). See generally 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b).

This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. MontgomeryWard & Co. v. Duncan, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. E.g., Kutner Buick, Inc. v. American Motors Corp., 848 F. 2d 614 (3d cir. 1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has

been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this requirement is to meet the requirements of F. R. App. P. 4(a)(4).

Subdivision (c).

Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d).

Revision of this subdivision conforms the language to that of the previous subdivisions.

Notes of Advisory Committee on 1993 amendments to Rules.

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which ”directed verdicts“ could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Notes of Advisory Committee on 1995 amendments to Rules.

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule -- no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the

parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ”no later than“ is used -- rather than ”within“ -- to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

NOTES TO RULE 51

HISTORY: (Amended Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

Notes of Advisory Committee on 1987 Amendments to Rules.

Although Rule 51 in its present form specifies that the court shall instruct the jury only after the arguments of the parties are completed, in some districts (typically those in states where the practice is otherwise) it is common for the parties to stipulate to instruction before the arguments. The purpose of the amendment is to give the court discretion to instruct the jury either before or after argument. Thus, the rule as revised will permit resort to the long-standing federal practice or to an alternative procedure, which has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. See generally Raymond, Merits and Demerits of the Missouri System of Instructing Juries, 5 St. Louis U. L. J. 317 (1959). Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court‘s instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

NOTES TO RULE 52

HISTORY: (Amended Mar. 19, 1948; Aug 1, 1983; Aug 1, 1985; Dec. 1, 1993; Dec. 1, 1995.)

1937 Adoption

See [former] Equity Rule 70 12 , as amended Nov. 25, 1935, (Findings of Fact and Conclusions of Law) and U.S.C.A., Title 28, [former] § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C.A., Title 28, [former] §§ 773 (Trial of issues of fact; by court) and [former] 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co., C.C.A.8, 1913, 204 F. 166, certiorari denied 33 S.Ct. 1051, 229 U.S. 624, 57 L.Ed. 1356; Warren v. Keep, 1894, 15 S.Ct. 83, 155 U.S. 265, 39 L.Ed. 144; Furrer v. Ferris, 1892, 12 S.Ct. 821, 145 U.S. 132, 36 L.Ed. 649; Tilghman v. Proctor, 1888, 8 S.Ct. 894, 125 U.S. 136, 149, 31 L.Ed. 664; Kimberly v. Arms, 1889, 9 S.Ct. 355, 129 U.S. 512, 524, 32 L.Ed. 764. Compare Kaeser & Blair Inc. v. Merchants' Ass'n, C.C.A.6, 1933, 64 F.2d 575, 576; Dunn v. Trefry, C.C.A.1, 1919, 260 F. 147.

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) ss 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §§ 8783-8784; New Jersey, Sup.Ct.Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §§ 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) §§ 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) §§ 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Derring, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, Johnson v. Kountze, 1895, 43 P. 445, 21 Colo. 486, semble; Illinois, Baker v. Hinricks, 1934, 194 N.E. 284, 359 Ill. 138; Weininger v. Metropolitan Fire Ins. Co., 1935, 195 N.E. 420, 359 Ill. 584, 98 A.L.R. 169; Minnesota, State Bank of Gibbon v. Walter,

1926, 208 N.W. 423, 167 Minn. 37; Waldron v. Page, 1934, 253 N.W. 894, 191 Minn. 302; New Jersey N.J.S.A. 2:27-241, 2:27-363, as interpreted in Bussy v. Hatch, 1920, 111 A. 546, 95 N.J.L. 56; New York, York Mortgage Corporation v. Clotar Const. Corp., 1930, 172 N.E. 265, 254 N.Y. 128; North Dakota, Comp.Laws Ann. (1913) § 7846, as amended by N.D.Laws 1933, c. 208; Milnor Holding Co. v. Holt, 1933, 248 N.W. 315, 63 N.D. 362, 370; Oklahoma, Wichita Mining and Improvement Co. v. Hale, 1908, 94 P. 530, 20 Okl. 159; South Dakota, Randall v. Burk Township, 4 S.D. 337, 57 N.W. 4 (1893); Texas, Custard v. Flowers, 1929, 14 S.W.2d 109; Utah, Rev.Stat.Ann. (1933) § 104-41-5; Vermont, Roberge v. Troy, 1933, 163 A. 770, 105 Vt. 134; Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§ 309-316; McCullough v. Puget Sound Realty Associates, 1913, 136 Pac. 1146, 76 Wash. 700, but see Cornwall v. Anderson, 1915, 148 P. 1, 85 Wash. 369; West Virginia, Kinsey v. Carr, 1906, 55 S.E. 1004, 60 W.Va. 449, semble; Wisconsin, Stat. (1935) § 251.09; Campbell v. Sutliff, 1927, 214 N.W. 374, 193 Wis. 370; Gessler v. Erwin Co., 1924, 193 N.W. 303, 182 Wis. 315.

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, Review of Findings of Fact, 4 U. of Chi.L.Rev. 190, 215 (1937).

1946 Amendment

Note to Subdivision (a).

The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 Moore's Federal Practice, 1938, 3119. Hurwitz v. Hurwitz, 1943, 136 F.2d 796, 78 U.S.App.D.C. 66.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, e.g., United States v. One 1941 Ford Sedan, S.D.Tex.1946, 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. Detective Comics, Inc. v. Bruns Publications, S.D.N.Y.1939, 28 F.Supp. 399; Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L.E.R. Co., S.D.Ohio 1941, 43 F.Supp. 5; United States v. Aluminum Co. of America, S.D.N.Y.1941, 2 F.R.D. 224, 5 Fed. Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see Wellman v. United States, D.Mass.1938, 25 F.Supp. 868; Cook v. United States, D.Mass.1939, 26 F.Supp. 253; Proctor v. White, D.Mass.1939, 28 F.Supp. 161; Green Valley Creamery, Inc. v. United States, C.C.A.1, 1939, 108 F.2d 342. See also Matton Oil Transfer Corp. v. The Dynamic, C.C.A.2, 1941, 123 F.2d 999; Carter Coal Co. v. Litz, C.C.A.4, 1944, 140 F.2d 934; Woodruff v. Heiser, C.C.A.10, 1945, 150 F.2d 869;

Coca Cola Co. v. Busch, Pa.1943, 7 Fed. Rules Serv. 59b.2, Case 4; Oglebay, Some Developments in Bankruptcy Law, 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, Hurwitz v. Hurwitz, App.D.C.1943, 136 F.2d 796, 78 U.S.App.D.C. 66, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 26-27; United States v. Forness, C.C.A.2, 1942, 125 F.2d 928, certiorari denied 1942, 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. United States v. Forness, supra; United States v. Crescent Amusement Co., 1944, 1945, 65 S.Ct. 254, 323 U.S. 173, 89 L.Ed. 160. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. Matton Oil Transfer Corp. v. The Dynamic, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. United States v. Forness, supra; United States v. Crescent Amusement Co., supra. See also Petterson Lighterage & Towing Corp. v. New York Central R. Co., C.C.A.2, 1942, 126 F.2d 992; Brown Paper Mill Co., Inc. v. Irwin, C.C.A.8, 1943, 134 F.2d 337; Allen Bradley Co. v. Local Union No. 3, I.B.E.W., C.C.A.2, 1944, 145 F.2d 215, reversed on other grounds 65 S.Ct. 1533, 325 U.S. 797; Young v. Murphy, Ohio 1946, 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see Thomas v. Peyser, App.D.C.1941, 118 F.2d 369; Schad v. Twentieth Century-Fox Corp., C.C.A.3, 1943, 136 F.2d 991; Prudential Ins. Co. of America v. Goldstein, N.Y.1942, 43 F.Supp. 767; Somers Coal Co. v. United States, N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co., E.D.Ky.1942, 2 F.R.D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed. Rules Serv. 936.

1963 Amendment

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

1983 Amendment

Rule 52(a) has been amended to revise its penultimate sentence to provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally. Nothing in the prior text of the rule forbids

this practice, which is widely utilized by district judges. See Christensen, A Modest Proposal for Immeasurable Improvement, 64 A.B.A.J. 693 (1978). The objective is to lighten the burden on the trial court in preparing findings in nonjury cases. In addition, the amendment should reduce the number of published district court opinions that embrace written findings.

1985 Amendment

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va.L.Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir.1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); Lydle v. United States, 635 F.2d 763, 765 n. 1 (6th Cir.1981); Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir.1980); Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir.1979), cert. denied, 445 U.S. 946 (1980); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir.1979); John R. Thompson Co. v. United States, 477 F.2d 164, 167 (7th Cir.1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, e.g., Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U.S. 976 (1982); United States v. Texas Education Agency, 647 F.2d 504, 506-07 (5th Cir.1981), cert. denied, 454 U.S. 1143 (1982); Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir.1980); In re Sierra Trading Corp., 482 F.2d 333, 337 (10th Cir.1973); Case v. Morrisette, 475 F.2d 1300, 1306-07 (D.C.Cir.1973).

The commentators also disagree as to the proper interpretation of the Rule. Compare Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn.L.Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), and 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2587, at 740 (1971) (language of the Rule is clear), with 5A J. Moore, Federal Practice p 52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 1958 (1984); Pullman Standard v. Swint, 456 U.S. 273, 293 (1982); United States v. General Motors Corp., 384 U.S. 127, 141 n. 16 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 394-96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

1991 Amendment

Subdivision (c) is added.

It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.

As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law as provided in Rule 56(a) and are not shielded by the "clear error" standard of review.

1995 Amendments

The only change, other than stylistic, intended by this revision is to require

that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ”no later than“ is used -- rather than ”within“ -- to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

NOTES TO RULE 53

HISTORY: (Amended July 1, 1966; Aug. 1, 1983; Aug. 1, 1987.) (Amended Dec. 1, 1991; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

Note to Subdivision (b).

This is substantially the first sentence of former Equity Rule 59 (Reference to Master--Exceptional, Not Usual) extended to actions formerly legal. See Ex parte Peterson, 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Note to Subdivision (c).

This is former Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Note to Subdivision (d).

(1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master--Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.). (2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner). (3) This is substantially former Equity

Rule 63 (Form of Accounts Before Master).

Note to Subdivision (e).

This contains the substance of former Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 12 (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See Camden v Stuart, 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); Ex parte Peterson, 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Notes of Advisory Committee on 1966 Amendments to Rules.

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

Notes of Advisory Committee on 1983 Amendments to Rules.

Subdivision (a).

The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. § 636(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., Chicago Housing Authority v. Austin, 511 F.2d 82 (7th Cir. 1975); Avco Corp. v. American Tel. & Tel. Co., 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b).

The provisions of 28 U.S.C. § 636(b)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

Subdivision (c).

The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f).

The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under 28 U.S.C. § 636(b)(1)(A) and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

NOTES TO RULE 54

1937 Adoption

Note to Subdivision (a).

The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Note to Subdivision (b).

This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54; Compare N.Y.C.P.A. (1937) § 476.

Note to Subdivision (c).

For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d).

For the present rule in common law actions, see Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, Costs in Common Law Actions in the Federal Courts (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in forma pauperis contained in U.S.C., Title 28, former §§ 832-836 [now 1915] are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: [former] §§ 815 (Costs; plaintiff not entitled to, when), 821 [now 1928] (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 [now

1927] (Costs; attorney liable for, when), and 830 [now 1920] (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission
U.S.C., Title 16, § 825p (Federal Power Commission)
U.S.C., Title 26, [former] §§ 3679(d) and 3745(d) (Internal revenue actions)
U.S.C., Title 26, [former] § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)
U.S.C., Title 28, [former] § 817 (Internal revenue actions)
U.S.C., Title 28, § 836 [now 1915] (United States--actions informa pauperis)
U.S.C., Title 28, § 842 [now 2006] (Actions against revenue officers)
U.S.C., Title 28, § 870 [now 2408] (United States--in certain cases)
U.S.C., Title 28, [former] § 906 (United States--foreclosure actions)
U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)
U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
U.S.C., Title 8, [former] § 45 (Action against district attorneys in certain cases)
U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)
U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)
U.S.C., Title 15, § 78r (Similar to 78i(e))
U.S.C., Title 15, § 96 (Infringement of trade-mark--damages)
U.S.C., Title 15, § 99 (Infringement of trade-mark--injunctions)
U.S.C., Title 15, § 124 (Infringement of trade-mark--damages)
U.S.C., Title 19, § 274 (Certain actions under customs law)
U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)
U.S.C., Title 31, §§ 232 [now 3730] and 234 [former] (Action for making false claims upon United States)
U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)
U.S.C., Title 35, § 67 [now 281, 284] (Infringement of patent--damages)
U.S.C., Title 35, § 69 [now 282] (Infringement of patent--pleading and proof)
U.S.C., Title 35, § 71 [now 288] (Infringement of patent--when specification too broad)
U.S.C., Title 45, § 153p (Actions for non-compliance with an order of

National R.R. Adjustment Board for payment of money)
U.S.C., Title 46, [former] § 38 (Action for penalty for failure to register vessel)
U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)
U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)
U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)
U.S.C., Title 49, § 16(2) [now 11705] (Action based on non-compliance with an order of I.C.C. for payment of money) 1946 Amendment

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. Hohorst v. Hamburg--American Packet Co., 1893, 13 S.Ct. 590, 148 U.S. 262, 37 L.Ed. 443; Rexford v. Brunswick-Balke-Collender Co., 1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864; Collins v. Miller, 1920, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created ”civil action“ in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in Catlin v. United States, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911. See also United States v. Florian, 1941, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105; Reeves v. Beardall, 1942, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: Atwater v. North American Coal Corp., C.C.A.2, 1940, 111 F.2d 125; Rosenblum v. Dingfelder, C.C.A.2, 1940, 111 F.2d 406; Audi-Vision, Inc. v. RCA Mfg. Co., Inc., C.C.A.2, 1943, 136 F.2d 621; Zalkind v. Scheinman, C.C.A.2, 1943, 139 F.2d 895; Oppenheimer v. F. J. Young & Co., Inc., C.C.A.2, 1944, 144 F.2d 387; Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., C.C.A.2, 1946, 154 F.2d 814, certiorari denied 1946, 66 S.Ct. 1353, 328 U.S. 859, 90 L.Ed. 1630; Zarati Steamship Co. v. Park Bridge Corp., C.C.A.2, 1946, 154 F.2d

377; Baltimore and Ohio R. Co. v. United Fuel Gas Co., C.C.A.4, 1946, 154 F.2d 545; Jefferson Electric Co. v. Sola Electric Co., C.C.A.7, 1941, 122 F.2d 124; Leonard v. Socony-Vacuum Oil Co., C.C.A.7, 1942, 130 F.2d 535; Markham v. Kasper, C.C.A.7, 1945, 152 F.2d 270; Hanney v. Franklin Fire Ins. Co. of Philadelphia, C.C.A.9, 1944, 142 F.2d 864; Toomey v. Toomey, App.D.C.1945, 149 F.2d 19, 80 U.S.App.D.C. 77.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank‘s dissenting opinion in Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

1961 Amendment

This rule permitting appeal, upon the trial court’s determination of ”no just reason for delay,“ from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. Reeves v. Beardall, 316 U.S. 283 (1942); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See Mull v. Ackerman, 279 F.2d 25 (2d Cir. 1960); Richards v. Smith, 276 F.2d 652 (5th Cir. 1960); Hardy v. Bankers Life & Cas. Co., 222 F.2d 827 (7th Cir. 1955); Steiner v. 20th Century-Fox Film Corp., 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many ”claims“ as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf.

United Artists Corp. v. Masterpiece Productions, Inc., 221 F.2d 213, 215 (2d Cir. 1955); Bowling Machines, Inc. v. First Nat. Bank, 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see Pabellon v. Grace Line, Inc., 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See Reagan v. Traders & General Ins. Co., 255 F.2d 845 (5th Cir. 1958); Meadows v. Greyhound Corp., 235 F.2d 233 (5th Cir. 1956); Steiner v. 20th Century-Fox Film Corp., supra; 6 Moore's Federal Practice p54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice & Procedure § 1193.2 (Wright ed. 1958); Developments in the Law--Multiparty Litigation, 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See Luckenbach Steamship Co., Inc., v. H. Muehlstein & Co., Inc., 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

1987 Amendment

The amendment is technical. No substantive change is intended.

NOTES TO RULE 55

HISTORY: (Amended Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

This represents the joining of the equity decree pro confesso (former Equity Rules 12 (Issue of Subpoena--Time for Answer), 16 (Defendant to Answer--Default--Decree Pro Confesso), 17 (Decree Pro Confesso to be Followed by Final Decree--Setting Aside Default), 29 (Defenses--How Presented), 31 (Reply--When Required--When Cause at Issue)) and the judgment by default now governed by USC, Title 28, former § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41(b).

Note to Subdivision (a).

The provision for the entry of default comes from the Massachusetts practice, 2 Mass Gen Laws (Ter Ed, 1932) ch 231, § 57. For affidavit of default, see 2

Minn Stat (Mason, 1927) § 9256.

Note to Subdivision (b).

The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the NYCPA (1937) § 485, in Calif Code Civ Proc (Deering, 1937) § 585(1), and in Conn Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif Code, supra, § 585(2); NYCPA (1937) § 490; 2 Minn Stat (Mason, 1927) § 9256(3); 2 Wash Rev Stat Ann (Remington, 1932) § 411(2). USC, Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e).

This restates substantially the last clause of USC, Title 28, former § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, USC, Title 28, former § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified in so far as they contain anything inconsistent therewith.

Supplementary Note of Advisory Committee Regarding this Rule.

The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC Appendix, §§ 501 et seq. Section 200 of the Act [50 USC Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e. g., Ledwith v Storkan, D Neb 1942, 6 Fed Rules Serv 60b.24, Case 2, 2 FRD 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed Rules Serv 725; 3 Moore's Federal Practice, 1938, Cum Supplement § 55.02.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 56

HISTORY: (Amended March 19, 1948; July 1, 1963; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively

used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Smith-Hurd Ill. Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d).

See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f).

These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

Notes of Advisory Committee on 1946 Amendments to Rules.

Subdivision (a).

The amendment allows a claimant to move for a summary judgment 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. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in People's Bank v Federal Reserve Bank of San Francisco, ND Cal 1944, 58 F Supp 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every

case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See United States v Adler‘s Creamery, Inc. CCA 2d, 1939, 107 F2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c).

The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in Sartor v Arkansas Natural Gas Corp. 1944, 321 US 620, 88 L Ed 967, 64 S Ct 724. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed Rules Serv 974; Madeirense Do Brasil SA v Stulman-Emrick Lumber Co. CCA 2d, 1945, 147 F2d 399, cert den 1945, 325 US 861, 89 L Ed 1982, 65 S Ct 1201. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d).

Rule 54(a) defines ”judgment“ as including a decree and ”any order from which an appeal lies.“ Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary ”judgment“ is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See Leonard v Socony-Vacuum Oil Co. CCA 7th, 1942, 130 F2d 535; Biggins v Oltmer Iron Works, CCA 7th, 1946, 154 F2d 214; 3 Moore’s Federal Practice, 1938, 3190--3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op cit supra, 3155--3156, this interpretation is in line with that policy, Leonard v Socony-Vacuum Oil Co., supra. See also Audi Vision, Inc. v RCA Mfg. Co. CCA 2d, 1943, 136 F2d 621; Toomey v Toomey, App DC 1945, 80 US App DC 77, 149 F2d 19; Biggins v Oltmer Iron Works, supra; Catlin v United States, 1945, 324 US 229, 89 L Ed 911, 65 S Ct 631.

Notes of Advisory Committee on 1963 Amendments to Rules.

Subdivision (c).

By the amendment ”answers to interrogatories“ are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice and Procedure 159--60 (Wright ed 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot, 74 ALR2d 984 (1960).

Subdivision (e).

The words ”answers to interrogatories“ are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are ”well-pleaded,“ and not supposititious, conclusory, or ultimate. See Frederick Hart & Co., Inc. v Recordgraph Corp. 169 F2d 580 (3d Cir 1948); United States ex rel. Kolton v Halpern, 260 F2d 590 (3d Cir 1958); United States ex rel. Nobles v Ivey Bros. Constr. Co., Inc. 191 F Supp 383 (D Del 1961); Jamison v Pennsylvania Salt Mfg. Co. 22 FRD 238 (WD Pa 1958); Bunny Bear, Inc. v Dennis Mitchell Industries, 139 F Supp 542 (ED Pa 1956); Levy v Equitable Life Assur. Society, 18 FRD 164 (ED Pa 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore‘s Federal Practice 2069 (2d ed 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example:

Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Preliminary draft of proposed amendments. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 56, dated August 15, 1991.

"(a) Of Claims, Defenses, and Issues. The court without a trial may enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, may summarily determine a defense, or may summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of material facts not genuinely in dispute. In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based.

"(b) Facts Not Genuinely In Dispute. A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the relevant admissible evidence shown to be available for presentation at a trail, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

"(c) Motion and Proceedings Thereon. A party may move for summary adjudication at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response thereto.

"(1) Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers depositions, documents affidavits, or other materials supporting those

assertions.

”(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying with respect thereto the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing such facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be deemed to have admitted such fact.

“(3) If a motion for summary adjudication or response thereto is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

”(4) Arguments supporting a party’s contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary adjudication or response thereto or at such other times as the court may permit or direct.

“(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 may make an order specifying the controlling law or the facts that are not genuinely in dispute, including the extent to which liability or the amount of damages or other relief is not a dispute for trial, and directing such further proceedings in the action as are just. Unless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified and by treating the facts so specified as established. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).

”(e) Matters to be Considered. In deciding whether an asserted fact is not genuinely in dispute, the court shall consider stipulations, admissions, and, to the extent filed, the following: (1) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (2) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified,

only to the extent of allegations therein that are admitted by other parties. Notwithstanding the foregoing, the court is not required to consider evidentiary materials unless called to its attention pursuant to subdivision (c)(1) or (c)(2).

"(f) When Evidence Unavailable. Should it appear from the affidavits of a party opposing a motion for summary adjudication that the party cannot for good cause shown present materials needed to support that opposition, the court may deny the motion, may permit an offer of proof, 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.

"(g) Conduct of Proceedings. The court (1) may preclude, or specify the period for filing, motions for summary adjudication with respect to particular claims, defenses, or issues; (2) may enlarge or shorten the time for responding to motions for summary adjudication, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (3) may on its own initiative direct the parties to show cause within a reasonable period why specified facts should not be treated as not genuinely in dispute and why summary adjudication bases thereon should not be entered; and (4) may conduct a hearing to consider further arguments, rule on the admissibility of evidence, or receive oral testimony to clarify whether an asserted fact is genuinely in dispute.

Committee notes.

Purpose of Revision.

This revision in intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and admitted at trial, can have but one outcome--while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The current caption, "Summary Judgment" is retained. However, the revised rule, like the former rule, also covers decisions that, by resolving only defenses or issues not dispositive of a claim, are more properly viewed as "summary determinations." The text of the revised rule adds language to clarify that it provides procedures for both types of "summary adjudications."

In various parts the revision (1) eliminates ambiguities and inconsistencies within the rule, (2) sets a single and consistent standard for determing when summary adjudication is appropriate, (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

Subdivision (a).

This subdivision combines the provisions previously contained in subdivisions (a) and (b). It adds third-party claims to the list of claims subject to disposition by summary judgment, but deletes (as surplusage) the specific reference to declaratory judgments. The former provisions allowed motions for "summary judgment" as to "any part" of a claim; the revision permits summary determination of an "issue substantially affecting but not wholly dispositive" of a claim or defense--the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some significant impact on discovery, trial, or settlement.

The revised language makes clear at the outset of the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is appropriate only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, no just those who may have filed the motion or responses; when the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions from other parties whose rights depend on those facts. As with the prior rule, elimination of trial through summary adjudication is not mandatory even when the standards of the rule are satisfied.

The court is directed to indicate the factual and legal basis if it grants summary judgment or summarily determines a defense or issue. A lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute, on the basis of which summary adjudication is appropriate. The determination that a fact is not in genuine dispute is, when reviewed on appeal, treated as a question of law.

Subdivision (b).

The standards stated in this subdivision for determing whether a fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson V. Liberty Lobby, Inc., 477 U.S. 242 (1986). The rule clarifies that the obligation to consider only matters potentially admissible at trail applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

Subdivision (c).

Revised subdivision (c) provides a structure for presentation and consideration of motions for summary adjudication, and should displace in large part the numerous local rules spawned by deficiencies in the former rule. Adoption of

this structure is not intended to create procedural pitfalls to deprive parties of trial with respect to facts in genuine dispute, but rather to provide a framework enabling the courts to discharge more effectively their responsibility in deciding whether such controversies exist.

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing of a motion for summary adjudication may be desirable in many cases. However, if a party will need to obtain evidence from other persons in order to show that a fact is in genuine dispute, it should have a reasonable opportunity for discovery respecting those matters before being confronted with a motion for summary judgment or summary determination. It should also have a sufficient time--ordinarily more than the 10 days specified in the prior rule--to marshal and present its evidentiary materials to the court. The times specified in the revised rule for filing motions for summary adjudication and responses to such motions incorporate these principles.

Paragraphs (1) and (2) prescribe a format for motions for summary adjudication and responses thereto. They are to be non-argumentative, for arguments are to be presented in separate memorandums under paragraph (4). They must be specific, particularly with respect to the facts asserted to be not in genuine dispute. They must provide a cross-reference to the specific portions of any evidentiary materials relied upon to support a contention that a fact is or is not in genuine dispute; failure to do so will, under revised subdivision (e), relieve the court of the obligation to consider such materials.

Pertinent portions of evidentiary materials not previously filed must be attached to the motion or response. As under the prior rule, a movant must obtain leave of court to supplement its supporting materials because such late filing may prejudice other parties or merit an extension of time for responses. The obligation to obtain leave of court applies only to evidentiary materials, and not to memorandums and arguments filed under paragraph (4).

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not previously filed is not, of course applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to cite and demonstrate in their responses the existence of such evidence.

A response to a motion for summary adjudication--formally recognized for the first time in this revision--can be filed by any party and can take several forms. In multiple-party cases a party similarly situated to the movant may merely wish to adopt the position of the movant in its response. The parties to be adversely affected by the judgment or determination sought in the motion may agree that the asserted facts, or some of them, are true but claim that,

because of a different view regarding the controlling law, summary judgment or summary determination in their favor is warranted. Frequently, of course, the parties to be adversely affected by the judgment or determination sought in the motion will oppose the grant of any summary adjudication, either because of a different view of the law or because some of the asserted facts are believed to be false or at least in genuine dispute or because there are additional facts rendering the asserted facts not dispositive of the claim, defense, or issue. Subdivision (c)(2) is written to accommodate any of these possibilities. Of course, a party may also file a separate cross motion for summary adjudication if there are other facts asserted to be not in genuine dispute on the basis of which it is entitled to a favorable judgment or determination as a matter of law.

A party is not required to file a response to a summary adjudication motion. The failure to make a timely response, however, may be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine dispute, the party must file a timely response that indicates the extent of disagreement with the movant‘s statement of the fact and provides reference to the evidentiary materials supporting its position. Failure to do so may result in the fact being deemed admitted for purposes of the pending action. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

The substance of the last sentence of former subdivision (c), relating to partial summary judgments on issues of liability, has been incorporated into the revision of subdivision (d).

Subdivision (d).

The revision provides that, when a court denies summary adjudication in the form sought by a movant, if may--but is no longer required to--enter an order specifying which facts are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that “partial summary judgments” may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication is an interlocutory order not subject to the law-of-the-case doctrine; and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate for example because of developments in the case or changes of law.

Confusion was caused by the reference in the former provisions to a “hearing on the motion.” While oral argument on a motion for summary adjudication is often desirable--and is explicitly authorized in subdivision (g)(4)--the court is not precluded from considering such motions solely on the basis of written

submissions.

Subdivision (e).

Implementing the principle stated in subdivision (b) that the court should consider (in addition to facts stipulated or admitted) only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary adjudiction. Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as during a conference under Rule 16.

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person, with the proviso that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

Independent authentication of documentary evidence is not required--submission of the materials under the rule should be treated as sufficient authentication. Similarly, independent evidence that the materials submitted are accurate copies of the originals is not required. However, if other evidence would be required at trial to establish admissibility--such as the foundation for business records--the party presenting such records should provide the supporting evidence through deposition, interrogatory answers, or affidavits. Voluminous data should, as permitted under Federal Rules of Evidence 1006, be submitted by means of an affidavit summarizing the data and offering, if not previously provided, access to the underlying data.

The last sentence in revised subdivision (e) provides that the court is required to consider only the materials called to its attention by the parties. Subdivision (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal.

Subdivision (f).

Extensions of time to oppose summary adjudication should be less frequent than under former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party is unable to procure supporting materials that would satisfy the requirements of subdivision (e).

Subdivision (g).

The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of summary adjudications, or indeed even to direct that such motions not be filed with respect to particular claims, defenses, or issues.

At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

Subdivision (g)(2) recognizes the court's power to change the time within which parties may respond to motions for summary judgment or summary determinations.

Depending on the circumstances, particularly the extent to which discovery has or has not been afforded or available, the extent to which the facts have been stipulated or admitted, and the imminence of trial, the 30-day period prescribed in subdivision (c) may be lengthened or shortened.

Subdivision (g)(3) permits the court to initiate an inquiry into the appropriateness of summary adjudication.

Such an inquiry may be initiated in an order setting a conference under Rule 16 or might arise as a result of discussions during such a conference. In any event, the parties should be afforded a reasonable opportunity to marshal and submit evidentiary materials if they assert facts are in genuine dispute and to present legal arguments bearing on the appropriateness of summary adjudication.

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications.

One such purpose would be to hear oral arguments supplementing the written submissions. (Other portions of the revision to Rule 56 have eliminated the language that seemed to require such a hearing.) Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person‘s deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiray hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person‘s testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

The former provisions of subdivision (g), providing sanctions when "affidavits. . .are presented in bad faith or solely for the purpose of delay," have been eliminated as unnecessary in view of the amendments to Rule 11. The provisions of revised Rule 11 apply not only to affidavits submitted under Rule 56 but also to motions, responses, briefs, and other supporting materials. Motions for summary adjudication should not be filed merely to "educate" the court or as a discovery device intended to flush out the evidence of an opposing party.

NOTES TO RULE 57

HISTORY: (Amended Oct. 20, 1949.)

Notes of Advisory Committee on Rules.

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ Proc (Deering, 1937) § 1062a), Michigan (3 Comp Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ Pract § 639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." Ashwander v Tennessee Valley Authority, 297 US 288, 325, 56 S Ct 466, 473, 80 L Ed 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may sua sponte, if it serves a useful purpose, grant instead a declaration of rights. Hasselbring v Koepke, 263 Mich 466, 248 NW 869, 93 ALR 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served

on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare Aetna Life Insurance Co. v Haworth, 300 US 227, 57 S Ct 461, 81 L Ed 617, 108 ALR 1000 (1937); Nashville, Chattanooga & St. Louis Ry. v Wallace, 288 US 249, 53 S Ct 345, 77 L Ed 730, 87 ALR 1191 (1933); Gully, Tax Collector v Interstate Natural Gas Co. 82 F2d 145 (CCA 5th, 1936); Ohio Casualty Ins. Co. v Plummer, 13 F Supp 169 (SD Tex, 1935); Borchard, Declaratory Judgments (1934), passim.

Notes of Advisory Committee on 1949 Amendments to Rules.

1948--The amendment effective October 1949 substituted the reference to "Title 28, USC, § 2201" in the first sentence for the reference to "Section 274(d) of the Judicial Code, as amended, USC, Title 28, § 400."

NOTES TO RULE 58

HISTORY: (Amended Mar. 19, 1948; July 1, 1963; Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

See Wis Stat (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann (1932) § 7-1101, and 4 Mont Rev Codes Ann (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev Stat Ann (Remington, 1932) § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (ibid), provides that all judgments shall be entered by the clerk, subject to the court's direction.

Notes of Advisory Committee on 1946 Amendments to Rules.

The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", make it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain

district court rules, for example, Civil Rule 22 of the Southern District of New York--until its annulment Oct. 1, 1945, for conflict with this rule--and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. Fowler v Hamill, 1891, 139 US 549, 35 L Ed 266, 11 S Ct 663; Craig v The Hartford, CC Cal 1856, Fed Cas No 3,333; Tuttle v Claflin, CCA 2d, 1895, 66 Fed 7; Prescott & A. C. Ry. Co. v Atchison, T. & S. F. R. Co. CCA 2d, 1897, 84 Fed 213; Stallo v Wagner, CCA 2d, 1917, 245 Fed 636, 639--40; Brown v Parker, CCA 8th, 1899, 97 Fed 446; Allis-Chalmers v United States, CCA 7th, 1908, 162 Fed 679. And this applies even though state law is to the contrary. United States v Nordbye, CCA 8th, 1935, 75 F2d 744, 746, cert den 1935, 296 US 572, 80 L Ed 404, 56 S Ct 103. Inasmuch as it has been held that failure of the clerk thus to enter judgment is a "misprison" "not to be excused", The Washington, CCA 2d, 1926, 16 F2d 206, such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See Commissioner of Internal Revenue v Bedford's Estate, 1945, 325 US 283, 89 L Ed 1611, 65 S Ct 1157.

Notes of Advisory Committee on 1963 Amendments to Rules.

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 USC § 956; cf. Gilbertson v United States, 168 Fed 672 (7th Cir 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered. Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See Matteson v United States, 240 F2d 517, 518--19 (2d Cir 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see United States v F. & M. Schaefer Brewing Co. 356 US 227, 229, 78 S Ct 674, 2 L Ed 2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See id.; and compare Blanchard v Commonwealth Oil Co., 294 F2d 834 (5th Cir 1961); United States v Higginson, 238 F2d 439 (1st Cir 1956); Danzig v Virgi Isle Hotel, Inc., 278 F2d 580 (3d Cir 1960); Sears v Austin, 282 F2d 340 (9th Cir 1960), with Matteson v United States, supra; Erstling v Southern Bell Tel. & Tel. Co., 255 F2d 93 (5th Cir 1958); Barta v Oglala Sioux Tribe, 259 F2d 553 (8th Cir 1958), cert denied 358 US 932, 79 S Ct 320, 3 L Ed 2d 304 (1959); Beacon Fed. S. & L. Assn. v Federal Home L. Bank Bd., 266 F2d 246 (7th Cir 1959), cert denied 361 US 823, 80 S Ct 70, 4 L Ed 2d 67 (1959); Ram v Paramount Film D. Corp., 278 F2d 191 (4th Cir 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U. S. District Courts for the Eastern and Southern Districts of New York; Ram v Paramount Film D. Corp., supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b) and (2) covering the subject of judgments by default.

Notes of Advisory Committee on 1993 amendments to Rules.

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

NOTES TO RULE 59

HISTORY: (Amended Mar. 19, 1948; July 1, 1966; Dec. 1, 1995.)

Notes of Advisory Committee on Rules.

This rule represents an amalgamation of the petition for rehearing of former Equity Rule 69 (Petition for Rehearing) and the motion for new trial of USC, Title 28, formerly § 391 (now § 2111) (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif Code Civ Proc (Deering, 1937) §§ 656--663a, USC, Title 28, formerly § 391 (now § 2111) (New trials; harmless error) is thus substantially continued in this rule. USC, Title 28, former § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with Subdivision (b). For the effect of the motion for new trial upon the time for taking an appeal, see Morse v United States, 270 US 151, 46 S Ct 241, 70 L Ed 518 (1926); Aspen Mining and Smelting Co. v Billings, 150 US 31, 14 S Ct 4, 37 L Ed 986 (1893).

For partial new trials which are permissible under Subdivision (a), see Gasoline Products Co. Inc. v Champlin Refining Co. 283 US 494, 51 S Ct 513, 75 L Ed 1188 (1931); Schuerholz v Roach, 58 F2d 32 (CCA 4th, 1932); Simmons v Fish, 210 Mass 563, 97 NE 102, Ann Cas 1912D, 588 (1912) (sustaining and recommending the practice and citing Federal cases and cases in accord from about sixteen States and contra from three States). The procedure in several States provides specifically for partial new trials. Ariz Rev Code Ann (Struckmeyer, 1928) § 3852; Calif Code Civ Proc (Deering, 1937) §§ 657, 662; Ill Rev Stat (1937) ch 110, § 216 (par (f)); Md Ann Code (Bagby, 1924) Art 5, §§ 25, 26; Mich Court Rules Ann (Searl, 1933) Rule 47, § 2; Miss Sup Ct Rule 12, 161 Miss 903, 905 (1931); NJ Sup Ct Rules 131, 132, 147, 2 NJ Misc 1197, 1246--1251, 1255 (1924); 2 ND Comp Laws Ann (1913), § 7844, as amended by ND Laws 1927, ch 214.

Notes of Advisory Committee on 1948 Amendments to Rules.

Subdivision (b).

With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not

later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Subdivision (e).

This subdivision has been added to care for a situation such as that arising in Boaz v Mutual Life Ins. Co. of New York, CCA 8th, 1944, 146 F2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

Notes of Advisory Committee on 1966 Amendments to Rules.

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. Freid v McGrath, 133 F2d 350 (DC Cir 1942); National Farmers Union Auto. & Cas. Co. v Wood, 207 F2d 659 (10th Cir 1953); Bailey v Slentz, 189 F2d 406 (10th Cir 1951); Marshall's U.S. Auto Supply, Inc. v Cashman, 111 F2d 140 (10th Cir 1940), cert den 311 US 667, 85 L Ed 428, 61 S Ct 26 (1940); but see Steinberg v Indemnity Ins. Co. 36 FRD 253 (ED La 1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 Moore's Federal Practice, par 59.09 [2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See Lebeck v William A. Jarvis Co., 250 F2d 285 (3d Cir 1957); Tsai v Rosenthal, 297 F2d 614 (8th Cir 1961); General Motors Corp. v Perry, 303 F2d 544 (7th Cir 1962); cf. Grimm v California Spray-Chemical Corp., 264 F2d 145 (9th Cir 1959); Cooper v Midwest Feed Products Co., 271 F2d 177 (8th Cir

1959).

Notes of Advisory Committee on 1995 Amendments to Rules

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. The phrase "no later than" is used -- rather than "within" -- to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing period less than 8 days.

NOTES TO RULE 60

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

See former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich Court Rules Ann (Searl, 1933) Rule 48, § 3; 2 Wash Rev Stat Ann (Remington, 1932) § 464(3); Wyo Rev Stat Ann (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va Code Ann (Michie, 1936) §§ 6329, 6333. Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif Code Civ Proc (Deering, 1937) § 473. See also NYCPA (1937) § 108; 2 Minn Stat (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, Federal Procedure, pages 760--765, compare 639; and Simkins, Federal Practice, ch CXXI (pp 820--830) and ch CXXII (pp 831--834), compare § 214.

Notes of Advisory Committee on 1946 Amendments to Rules.

Subdivision (a).

The amendment incorporates the view expressed in Perlman v 322 West Seventy-Second Street Co., Inc. CCA 2d, 1942, 127 F2d 716; 3 Moore's Federal Practice, 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See Schram v Safety Investment Co. ED Mich 1942, 45 F Supp 636; also Miller v United States, CCA 7th, 1940, 114 F2d 267.

Subdivision (b).

When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L J 623. See also 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed Rules Serv 942, 945; Wallace v United States, CCA 2d, 1944, 142 F2d 240, cert den 1944, 323 US 712, 89 L Ed 573, 65 S Ct 37.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those

of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L J 623, 659--682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referr

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review. Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See Wallace v United States, CCA 2d, 1944, 142 F2d 240, cert den, 1944, 323 US 712, 89 L Ed 573, 65 S Ct 37; Fraser v Doing, App DC 1942, 130 F2d 617; Jones v Watts, CCA 5th, 1944, 142 F2d 575; Preveden v Hahn, SD NY 1941, 36 F Supp 952; Cavallo v Agwilines, Inc. SD NY 1942, 6 Fed Rules Serv 60b.31, Case 2, 2 FRD 526; McGinn v United States, D Mass, 1942, 6 Fed Rules Serv 60b.51, Case 3, 2 FRD 562; City of Shattuck, Oklahoma ex rel. Versluis v Oliver, WD Okla 1945, 8 Fed Rules Serv 60b.31, Case 3; Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L J 623, 631--653; 3 Moore‘s Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief from Judgment, op cit supra. Cf. Norris v Camp, CCA 10th, 1944, 144 F2d 1; Reed v South Atlantic Steamship Co. of

Delaware, D Del 1942, 2 FRD 475, 6 Fed Rules Serv 60b.31, Case 1; Laughlin v Berens, D DC 1945, 8 Fed Rules Serv 60b.51, Case 1, 73 WLR 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. Fiske v Buder, CCA 8th, 1942, 125 F2d 841; see also inferentially Bucy v Nevada Construction Co. CCA 9th, 1942, 125 F2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60(b) on Other Methods of Relief From Judgment, 1941, 4 Fed Rules Serv 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L J 623, 653--659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see Hazel-Atlas Glass Co. v Hartford Empire Co. 1944, 322 US 238, 88 L Ed 1250, 64 S Ct 997.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC

Appendix, §§ 501 et seq. [§ 520(4)], a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the reference to "Title 28, USC, § 1655" in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, USC, Title 28, § 118."

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 61

Notes of Advisory Committee on Rules.

A combination of USC, Title 28, former § 391 (now § 2111) (New trials; harmless error) and former § 777 (Defects of form; amendments) with modifications. See McCandless v United States, 298 US 342, 56 S Ct 764, 80 L Ed 1205 (1936). Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally).

NOTES TO RULE 62

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; July 19, 1961; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

The first sentence states the substance of the last sentence of USC, Title 28, former § 874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of USC, Title 28, former § 227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of former § 227a (now §§ 1292, 2107) (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

Note to Subdivision (b).

This modifies USC, Title 28, former § 840 (Executions; stay on conditions).

Note to Subdivision (c).

Compare former Equity Rule 74 (Injunction Pending Appeal); and Cumberland Telephone and Telegraph Co. v Louisiana Public Service Commission, 260 US 212, 67 L Ed 217, 43 S Ct 75 (1922). See Simkins, Federal Practice (1934) § 916 in regard to the effect of appeal on injunctions and the giving of bonds. See USC, Title 6 (Official and Penal Bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

USC, Title 7: § 217 (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)--by reference § 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)--by reference

USC, Title 15: § 28 (Antitrust laws; suits against monopolies expedited)

USC, Title 28, former: § 47 (Injunctions as to orders of Interstate Commerce Commission, etc.) § 380 (Injunctions; alleged unconstitutionality of State statutes) § 380a (Same; constitutionality of federal statute)

USC, Title 49: § 44 (Suits in equity under interstate commerce laws; expedition of suits)

Note to Subdivision (d).

This modifies USC, Title 28, former § 874 (Supersedeas). See Rule 36(2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73(d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

Note to Subdivision (e).

This states the substance of USC, Title 28, formerly § 870 (now § 2408) (Bond; not required of the United States).

Note to Subdivision (f).

This states the substance of USC, Title 28, former § 841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6(c) as to terms of court.

Notes of Advisory Committee on 1946 Amendments to Rules.

Note to Subdivision (a).

[This subdivision not amended.] Sections 203 and 204 of the Soldiers‘ and Sailors’ Civil Relief Act of 1940, 50 USC Appendix, §§ 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of

a stay of execution of any judgment or order entered against a person in military service. See Bowsman v Peterson, D Neb 1942, 45 F Supp 741. Section 201 of the Act [50 USC App § 521] permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also Note to Rule 64 herein.

Subdivision (b).

This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

Subdivision (h).

In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 deleted at the end of subdivision (g) the following language which originally appeared after the word "entered": "and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, USC, Title 28, former § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

Notes of Advisory Committee on 1961 Amendments to Rules.

The amendment adopted Apr. 17, 1961, eliminated words "on some but not all of the claims presented in the action" which followed "final judgment."

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 63

HISTORY: (Amended Aug. 1, 1987; Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

This rule adapts and extends the provisions of USC, Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule.

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. United States v. Lane, 708 F. 2d 1394, 1395-1397 (9th cir. 1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. E.g., Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir. 1982, en banc) cert. denied, 459 U.S. 910 (1982) (jury trial); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711 (6th Cir. 1977) (non-jury trial). See generally Comment, The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co., 67 MINN. L. REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F. R. Ev. 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial

on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. Anderson v. City of Bessemer City NC, 470 U.S. 564, 575 (1985); Marshall v. Jerrico Inc, 446 U.S. 238, 242 (1980). See also United States v. Radatz, 447 U.S. 667 (1980).

NOTES TO RULE 64

Notes of Advisory Committee on Rules.

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the remedy is sought. Under USC, Title 28, former § 726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Lis pendens. No rule concerning lis pendens is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal actions, the commencement of a Federal action is notice to all persons affected. King v Davis, 137 Fed 198 (WD Va, 1903). It has been held, however, that when a State statute does so provide expressly, its provisions are binding. United States v Calcasieu Timber Co. 236 Fed 196 (CCA 5th, 1916).

For statutes of the United States on attachment, see e.g.:

USC, Title 28, former:
§ 737 (Attachment in postal suits)
§ 738 (Attachment; application for warrant)
§ 739 (Attachment; issue of warrant)
§ 740 (Attachment; trial of ownership of property)
§ 741 (Attachment; investment of proceeds of attached property)
§ 742 (Attachment; publication of attachment)
§ 743 (Attachment; personal notice of attachment)
§ 744 (Attachment; discharge; bond)
§ 745 (Attachment; accrued rights not affected)
§ 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see e.g.:

USC, Title 28, former:
§ 748 (Garnishees in suits by United States against a corporation)
§ 749 (Same; issue tendered on denial of indebtedness)
§ 750 (Same; garnishee failing to appear)

For statutes of the United States on arrest, see e.g.:

USC, Title 28, former:
§ 376 (Writs of ne exeat)
§ 755 (Special bail in suits for duties and penalties)
§ 756 (Defendant giving bail in one district and committed in another)
§ 757 (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
§ 758 (Bail and affidavits; taking by commissioners)
§ 759 (Calling of bail in Kentucky)
§ 760 (Clerks may take bail de bene esse)

For statutes of the United States on replevin, see e.g.:

USC, Title 28, former:
§ 747 (Replevy of property taken under revenue laws)
§ 843 (Imprisonment for debt)
§ 844 (Imprisonment for debt; discharge according to State laws)
§ 845 (Imprisonment for debt; jail limits)

Supplementary Note of Advisory Committee Regarding this Rule.

Sections 203 and 204 of the Soldiers‘ and Sailors’ Civil Relief Act of 1940, 50 USC Appendix, §§ 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person‘s property, money, or debts in the hands of another. See also Note to Rule 62 herein.

NOTES TO RULE 65

HISTORY: (Amended March 19, 1948; Oct. 20, 1949; July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivisions (a) and (b).

These are taken from USC, Title 28, former § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c).

Except for the last sentence, this is substantially USC, Title 28, former § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements: USC, Title 15, §§ 77t(b), 78u(e), and 79r(f) (Securities and Exchange Commission). It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory

judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See USC, Title 6 (Official and Penal Bonds) for bonds by surety companies.

Note to Subdivision (d).

This is substantially USC, Title 28, former § 383 (Injunctions; requisites of order; binding effect).

Note to Subdivision (e).

The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare former Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

USC, Title 28, former:
§ 46 (Suits to enjoin orders of Interstate Commerce Commission to be against United States)
§ 47 (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)
§ 378 (Injunctions; when granted)
§ 379 (Injunctions; stay in State courts)
§ 380 (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)
§ 380a (Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court)

USC, Title 7:
§ 216 (Court proceedings to enforce orders; injunction)
§ 217 (Proceedings for suspension of orders)

USC, Title 15:
§ 4 (Jurisdiction of courts; duty of district attorney; procedure)
§ 25 (Restrainig violations; procedure)
§ 26 (Injunctive relief for private parties; exceptions)
§ 77t(b) (Injunctions and prosecutions of offenses)

Notes of Advisory Committee on 1946 Amendments to Rules.

It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. Russell v Farley, 1881, 105 US 433, 466, 26 L Ed 1060. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f)

for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub n of the Bankruptcy Act, 11 USC § 78, sub n, under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 Collier on Bankruptcy, 14th ed by Moore and Oglebay, 1853--1854.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949, changed subdivision (e) in the following respects: in the first clause the amendment substituted the words "any statute of the United States" for the words "the Act of October 15, 1914, ch 323, §§ 1 and 20 (38 Stat 730), USC, Title 29, §§ 52 and 53, or the Act of March 23, 1932, ch 90 (47 Stat 70), USC, Title 29, ch 6"; in the second clause of subdivision (e) the amendment substituted the reference to "Title 28, USC, § 2361" for the reference to "Section 24(26) of the Judicial Code as amended, USC, Title 28, § 41(26)"; and the third clause was amended to read "Title 28, USC, § 2284," etc., as at present, instead of "the Act of August 24, 1937, ch 754, § 3, relating to actions to enjoin the enforcement of acts of Congress."

Notes of Advisory Committee on 1961 Amendments to Rules.

These changes conform to the amendment of Rule 54(b).

Notes of Advisory Committee on 1966 Amendments to Rules.

Subdivision (a)(2).

This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the other hand, repetition is not altogether prohibited. That would be impractical and

unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties. Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b).

In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal notice to be given. See the emphatic criticisms in Pennsylvania Rd. Co. v Transport Workers Union, 278 F2d 693, 694 (3d Cir 1960); Arvida Corp. v Sugarman, 259 F2d 428, 429 (2d Cir 1958); Lummus Co. v Commonwealth Oil Ref. Co., Inc. 297 F2d 80, 83 (2d Cir 1961), cert den 368 US 986, 7 L Ed 2d 524, 82 S Ct 601 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining

order may be issued without any notice when the circumstances warrant.

Subdivision (c).

Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 66

HISTORY: (Amended Mar. 19, 1948; Oct. 20, 1949.)

Notes of Advisory Committee on 1948 Amendments to Rules.

The title of Rule 66 has been expanded to make clear the subject of the rule, i. e., federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31(e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious and less expensive judicial administration. 2 Moore‘s Federal Practice, 1938, 2088--2091. For the rule necessitating ancillary appointment, see Sterrett v Second Nat. Bank, 1918, 248 US 73, 63 L Ed 135, 39 S Ct 27; Kelley v Queeney, WD NY 1941, 41 F Supp 1015; see also McCandless v Furlaud, 1934, 293 US 67, 79 L Ed 202, 55 S Ct 42. This rule has been extensively criticized. First, Extraterritorial Powers of Receivers, 1932, 27 Ill L Rev 271; Rose, Extraterritorial Actions by Receivers, 1933, 17 Minn L Rev 704; Laughlin, The Extraterritorial Powers of Receivers, 1932, 45 Harv L Rev 429; Clark and Moore, A New Federal Civil Procedure--II, Pleadings and Parties, 1935, 44 Yale L J 1291, 1312--1315; Note, 1932, 30 Mich L Rev 1322. See also comment in Bicknell v Lloyd-Smith, CCA 2d, 1940, 109 F2d 527, cert den, 1940, 311 US 650, 85 L Ed 416, 61 S Ct 15. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since Barton v Barbour, 1881, 104 US 126, 26 L Ed 672. See also 1 Clark on Receivers, 2d ed, § 549. Under 28 USC § 125 leave of court is unnecessary when a receiver

is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in federal court is governed by Rule 17(b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been striken as superfluous. Under Rule 81(a)(1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 [following section 53 of Title 11, USC] only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See 1 Collier on Bankruptcy, 14th ed by Moore and Oglebay, paras. 2.23--2.36.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 deleted a sentence which formerly appeared immediately following the first sentence and which read as follows: "A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

NOTES TO RULE 67

HISTORY: (Amended Oct. 20, 1949; Aug. 1, 1983.)

Notes of Advisory Committee on Rules.

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as USC, Title 28, formerly § 41(26) (now §§ 1335, 1397, 2361) (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally Howard v United States, 184 US 676, 22 S Ct 543, 46 L Ed 754 (1902); United States Supreme Court Admiralty Rules (1920), Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry). With the first sentence, compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 22, r. 1(1).

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the reference to "Title 28, USCA §§ 2041, and 2042" for the reference to "Sections 995 and 996, Revised Statutes, as amended, USCA, Title 28, §§ 851, 852." The amendment also added the words "as amended" following the citation of the Act of June 26, 1934, ch 756, § 23, and in the parenthetical citation immediately following, added the reference to "58 Stat 845."

Notes of Advisory Committee on 1983 Amendments to Rules.

Rule 67 has been amended in three ways. The first change is the addition of the clause in the first sentence. Some courts have construed the present rule to permit deposit only when the party making it claims no interest in the fund or thing deposited. E.g., Blasin-Stern v. Beech-Nut Life Savers Corp., 429 F.Supp. 533 (D. Puerto Rico 1975); Dinkins v. General Aniline & Film Corp., 214 F.Supp. 281 (S.D.N.Y. 1963). However, there are situations in which a litigant may wish to be relieved of responsibility for a sum or thing, but continue to claim an interest in all or part of it. In these cases the deposit-in-court procedure should be available; in addition to the advantages to the party making the deposit, the procedure gives other litigants assurance that any judgment will be collectable. The amendment is intended to accomplish that.

The second change is the addition of a requirement that the order of deposit be served on the clerk of the court in which the sum or thing is to be deposited. This is simply to assure that the clerk knows what is being deposited and what his responsibilities are with respect to the deposit. The latter point is particularly important since the rule as amended contemplates that deposits will be placed in interest-bearing accounts; the clerk must know what treatment has been ordered for the particular deposit.

The third change is to require that any money be deposited in an interest-bearing account or instrument approved by the court.

NOTES TO RULE 68

HISTORY: (Amended March 19, 1948; July 1, 1966; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

See 2 Minn Stat (Mason, 1927) § 9323; 4 Mont Rev Codes Ann (1935) § 9770; NYCPA (1937) § 177.

For the recovery of costs against the United States, see Rule 54(d).

Notes of Advisory Committee on 1948 Amendments to Rules.

The third sentence of Rule 68 has been altered to make clear that evidence of an

unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits--as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues--whether there be a first, second or third trial--and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase "before the trial begins," in the first sentence of the rule, has been construed in Cover v Chicago Eye Shield Co., CCA 7th, 1943, 136 F2d 374, cert den 1943, 320 US 749, 88 L Ed 445, 64 S Ct 53.

Notes of Advisory Committee on 1966 Amendments to Rules.

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 69

HISTORY: (Amended Oct. 20, 1949; July 1, 1970; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This follows in substance USC, Title 28, former § 727 (Executions as provided by State laws) and former § 729 (Proceedings in vindication of civil rights), except that, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable State law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

USC, Title 12:
§ 91 (Tranfers by bank and other acts in contemplation in insolvency)
§ 632 (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party)

USC, Title 19: § 199 (Judgments for customs duties, how payable)

USC, Title 26: § 1610(a) (Surrender of property subject to distraint)

USC, Title 28, former:
§ 122 (Creation of new district or transfer of territory; lien)
§ 350 (Time for making application for appeal or certiorari; stay pending application for certiorari)
§ 489 (District Attorneys; reports to Department of Justice)
§ 574 (Marshals, fees enumerated)
§ 786 (Judgments for duties; collected in coin)
§ 811 (Interest on judgments)
§ 838 (Executions; run in all districts of State)
§ 839 (Executions; run in every State and Territory)
§ 840 (Executions; stay on conditions), as modified by Rule 62(b)
§ 841 (Executions; stay of one term), as modified by Rule 62(f)
§ 842 (Executions; against officers of revenue in cases of probable cause), as incorporated in Subdivision (b) of this rule
§ 843 (Imprisonment for debt)
§ 844 (Imprisonment for debt; discharge according to State laws)
§ 845 (Imprisonment for debt; jail limits)
§ 846 (Fieri Facias; appraisal of goods; appraisers)
§ 847 (Sales; real property under order or decree)
§ 848 (Sales; personal property under order or decree)
§ 849 (Sales; necessity of notice)
§ 850 (Sales; death of marshal after levy or after sale)
§ 869 (Bond in former error and on appeal), as incorporated in Rule 73(c)
§ 874 (Supersedeas), as modified by Rules 62(d) and 73(d)

USC, Title 31: § 195 (Purchase on execution)

USC, Title 33: § 918 (Collection of defaulted payments)

USC, Title 49: § 74(g) (Causes of action arising out of Federal control of railroad; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

USC, Title 2: § 118 (Actions against officers of Congress for official acts)

USC, Title 5: § 729 (Federal employees retirement annuities not subject to assignment, execution, levy, or other legal process)

USC, Title 10: § 610 (Exemption of enlisted men from arrest on civil

process)

USC, Title 22, former: § 21(h) (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

USC, Title 33: § 916 (Assignment and exemption from claims of creditors) Longshoremen's and Harborworkers' Compensation Act

USC, Title 38: § 54 (Attachment, levy or seizure of moneys due pensioners prohibited)
§ 393 (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, § 365(c) (Medal of Honor Roll; special pension to persons enrolled)
§ 618 (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)

USC, Title 43: § 175 (Exemption for execution of homestead land)

USC, Title 48: § 1371o (Panama Canal and railroad retirement annuities, exemption from execution and so forth)

Supplementary Note of Advisory Committee Regarding this Rule.

With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC Appendix, § 501 et seq., see Notes to Rules 62 and 64 herein.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the citation of "Title 28, USCA, § 2006" in subdivision (b) in place of the citation to "Section 989, Revised Statutes, USCA, Title 28, § 842."

Notes of Advisory Committee on 1970 Amendments to Rules.

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court has held that Rule 34 discovery is unavailable to the judgment creditor. M. Lowenstein & Sons, Inc. v American Underwear Mfg. Co., 11 FRD 172 (ED Pa 1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. United States v McWhirter, 376 F2d 102 (5th Cir 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26--33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 Moore's Federal Practice para. 69.05 [1] (2d ed 1966), but another believes that a rules amendment is needed. 3 Barron & Holtzoff, Federal Practice and Procedure 1484 (Wright ed 1958). Both commentators and the court in

McWhirter are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 70

Notes of Advisory Committee on Rules.

Compare former Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn Ann Code (Williams, 1934), § 10594; 2 Conn Gen Stat (1930), § 5455; NM Stat Ann (Courtright, 1929), § 117-117; 2 Ohio Gen Code Ann (Page, 1926), § 11590; and England, Supreme Court of Judicature Act (1925), § 47.

NOTES TO RULE 71

HISTORY: (Amended Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Compare former Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also Terrell v Allison, 21 Wall 289, 22 L Ed 634 (US, 1875); Farmers‘ Loan and Trust Co. v Chicago and A. Ry. Co., 44 Fed 653 (CC Ind, 1890); Robert Findlay Mfg. Co. v Hygrade Lighting Fixture Corp., 288 Fed 80 (ED NY, 1923); Thompson v Smith, Fed Cas No 13,977 (CC Minn, 1870).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

NOTES TO RULE 71A

HISTORY: (Added Aug. 1, 1951; July 1, 1963; Aug. 1, 1985) (Amended effective Aug. 1, 1987; Aug. 1, 1988; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7050, 102 Stat. 4401; Dec. 1, 1993.)

AMENDMENTS: 1988. Act Nov. 18, 1988, in subsec. (e), purported to substitute “taking of the defendant’s property” for “taking of the defendants property”, but this amendment was not executed because “taking of the defendants property” did not appear in the existing text.

Notes of Advisory Committee on Rules (Original report).

General Statement.

1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state‘s power reach the United States District Courts. The Committee’s reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act (40 USC sec 258), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act wher

Some six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign‘s power to condemn and the property owner’s right to compensation could be promoted by a simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Preliminary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944.

To avoid unduly delaying the proposed amendments to existing rules the

Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions, specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under 40 USC § 258. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, § 46, pp 55--56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, Proposed Amendments to Federal Rules for Civil Procedure 1944, 4 FRD 124, 134; id., Report of the Advisory Committee on Federal Rules of Civil

Procedure Recommending Amendments, 1946, 5 FRD 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

USC, Title 16:
§ 404c-11 (Mammouth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior)
§ 426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army)

§ 450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior)
§ 517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture)

USC, Title 42:
§§ 1805(b)(5), 1813(b) (Atomic Energy Act)

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform with that of similar actions in state courts:

USC, Title 16:
§ 423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior)
§ 714 (Exercise by water power licensee of power of eminent domain)

USC, Title 24:
§ 78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers)

USC, Title 33: § 591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army)

USC, Title 40: § 257 (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized) § 258 (Same procedure).

USC, Title 50:
§ 171 (Acquisition of land by the Secretary of the Army for national defense)
§ 172 (Acquisition of property by the Secretary of the Army, etc., for production of lumber)
§ 632 App (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy and others)

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

USC, Title 16: § 831x (Condemnation by Tennessee Valley Authority).

USC, Title 40: §§ 361-386 (now DC Code, 1951 Ed, Title 16-619 to 16-644) (Acquisition of lands in District of Columbia for use of United States; condemnation)

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to

state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the initial award of the commissioners. This procedure has worked to the satisfation of the property owners and the TVA. A full statement of the TVA position and experience is set forth in Preliminary Draft to Proposed Rule to Govern Condmnation Cases (June, 1947) 15-19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners‘ awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. Stratton v. St. Louis, Southwestern Ry. Co., 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; Ayrshire Collieries Corp. v. United States, 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases, It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with

the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a landowner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and landowner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), infra.

Note to Subdivision (a).

As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, supra. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act [Act of June 19, 1934, c 651, §§ 1, 2 (48 Stat 1064), 28 USC former §§ 723b, 723c, now § 2072] gives the Supreme Court "the power to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In Kohl v United States, 1875, 91 US 367, 23 L Ed 449, a proceeding instituted by the United States to appropriate land for a post-office site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is . . . a suit at common law, when initiated in a court." See also Madisonville Traction Co. v Saint Bernard Mining Co. 1905, 25 S Ct 251, 196 US 239, 23 L Ed 449, infra, under subdivision (k). And the Conformity Act, 40 USC § 258, which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." United States v 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y., DC NY 1942, 43 F Supp 561, affirmed 129 F2d 678, certiorari denied, 63 S Ct 441, 317 US 698, 87 L Ed 558. Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or

required by statute. See 38 USC § 438j (World War Veterans' Relief Act); 42 USC §§ 1805, 1811, 1813 (Atomic Energy Act); 50 USC § 79 (Nitrates Act); 50 USC §§ 161--166 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see 42 USC § 1813, supra, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property. Rule 71A is not intended to and does not supersede the Act of February 26, 1931, ch 307, §§ 1--5 (46 Stat 1421), 40 USC §§ 258a--258e, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See United States v 76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga., DC Ga 1942, 44 F Supp 653; United States v 17,280 Acres of Land, More or Less, Situated in Saunders County, Nebr., DC Neb 1942, 47 F Supp 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

USC, Title 33: § 594 (When immediate possession of land may be taken; for a work of river and harbor improvements)

USC, Title 42: § 1813(b) (When immediate possession may be taken under Atomic Energy Act)

USC, Title 50:
§ 171 (Acquisition of land by the Secretary of the Army for national defense)
§ 632 App (Second War Powers Act, 1942; Acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others)

Note to Subdivision (b).

This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

Note to Subdivision (c).

Since a condemnation proceeding is in rem and since a great many property owners are often involved, paragraph (1) requires the property to be named and only one of the owners. In other respects the caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, ch 307 §§ 1--5 (46 Stat 1421), 40 USC §§ 258a--258e, supra; and 33 USC § 594, 42 USC § 1813(b), 50 USC §§ 171, 632, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This in no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved" both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 § 2; Ill Ann Stat (Smith-Hurd) c 47, § 2; 1 Iowa Code, 1946, § 472.3; Kan Stat Ann, 1935, § 26-101; 2 Mass Laws Ann, 1932, ch 80A, § 4; 7 Mich Stat Ann, 1936, § 8.2; 2 Minn Stat, Mason, 1927, § 6541; 20 NJ Stat Ann, 1939, § 1-2; 3 Wash Revised Stat, Remington, 1932, Title 6, § 891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of "unknown owner", see Hawaii Revised Laws, 1945, c 8, § 310 ("such [unknown] defendant may be joined in the petition under a fictitious name."); Ill Ann Stat, Smith-Hurd, c 47, § 2

("Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; . . ."); Maryland Code Ann, 1939, Art 33A, § 1 ("In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner."); 2 Mass Laws Ann, 1932, c 80A, § 4 ("Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, . . ."); New Mex Stat Ann, 1941, § 25-901 ("the owners . . . shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown."); Utah Code Ann, 1943, § 104-61-7 ("The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants").

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

Note to Subdivision (d).

In lieu of a summons, which is the initial process in other civil actions under Rule 4(a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice. Rule 4(a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the

territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A(d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by 28 USC § 118.

Note to Subdivision (e).

Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

Note to Subdivision (f).

Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

Note to Subdivision (g).

A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cutoff and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

Note to Subdivision (h).

This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The

method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, supra. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, USC, Title 16, § 831x requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question de novo; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation "without regard to the awards of findings theretofore made by the commissioners or the district judges." The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in USC, Title 40, §§ 361--386. Under § 371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn "from the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. Bauman v Ross, 1897, 17 S Ct 966, 167 US 548, 42 L Ed 270. See, also, Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 1925, 11 Va L Rev 505; Blair, Federal Condemnation Proceedings and the Seventh Amendment 1927, 41 Harv L Rev 29; 3 Moore's Federal Practice 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, 40 USC, § 258, in states which provided for jury trial. See generally, 2 Lewis, Eminent Domain 3d ed 1909, §§ 509, 510; 3 Moore, op cit supra. Since the general conformity statute is superseded by Rule 71A, see supra under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

Note to Subdivision (i).

Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, viz., any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

Note to Subdivision (j).

Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see USC, Title 40, § 258a; USC, Title 33, § 594--acquisition of title and possession statutes referred to in note to subdivision (a), supra. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed 1917, §§ 209--216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see United States v Miller, 1943, 63 S Ct 276, 317 US 369, 87 L Ed 336, 147 ALR 55, rehearing denied, 63 S Ct 557, 318 US 798, 87 L Ed 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

Note to Subdivision (k).

While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See Boom Co. v Patterson, 1878, 98 US 403, 25 L Ed 206; Searl v School District No. 2, 1888, 8 S Ct 460, 124 US 197, 31 L Ed 415; Madisonville Traction Co. v Saint Bernard Mining Co., 1905, 25 S Ct 251, 196 US 239, 49 L Ed 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the

federal court. See also Franzen v Chicago, M & St. P. Ry. Co., CCA 7th, 1921, 278 F 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j).) Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

Note to Subdivision (l).

Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: "Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a matter in which the United States has no legal interest. Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as amici curiae." Lands Division Manual 861. For other discussion and citation, see Grand River Dam Authority v Jarvis, CCA 10th, 1942, 124 F2d 914. Costs may not be taxed against the United States except to the extent permitted by law. United States v 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa, DC Pa 1944, 54 F Supp 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

Notes of Advisory Committee on Rules (Supplementary report).

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (. . .), the particular question being whether the tribunal to award compensation should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress

was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia (USC, Title 40, §§ 361--386 (now DC Code, 1951 Ed, Title 16-619 to 16-644)) where a rather unique system exists under which the court is required in all cases to order the selection of a "jury" of five from among not less than twenty names drawn from "the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (USC, Title 16, § 831x) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred.

Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation case. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three-judge district court. The Advisory Committee has not considered abolition of the three-judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (. . .): (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. Trial of all issues shall otherwise be by the court.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed

the Committee that the Court was particularly interested in the views expressed by Judge John Paul, judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is as follows: (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. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. 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 paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul‘s objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court’s discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations--either the Administrative Office or some other interested department of the government--should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items

for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommended the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee has given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous “Manual on Federal Eminent Domain,” the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes--statutes which sometimes conflict with one another--but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to

provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful "double" system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as "United States District Courts" instead of "District Courts of the United States," and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, . . . which provided that the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity "in light of the type and value of the property involved," the phrase in quotation marks was changed to read "in the light of the character and value of the property involved and the interests to be acquired."

The Department of Justice made a counter proposal . . . that there be substituted the words "reasonably diligent search of the records, considering the type." When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objection to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word "character" instead of the word "type."

The Department of Justice also suggested that in subdivision (d)(2)(3) relating to service by publication, the search for a defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows: (k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the

substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a "condition" attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows: (k) Condemnation Under a State's Power of Eminent Domain. The practice 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.

THE OTHER IS AS FOLLOWS: (k) Condemnation Under a State's Power of Eminent Domain. The practice 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 gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in Erie R. Co. v Tompkins and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in Erie R. Co. v Tompkins and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision . . . of the 1948 draft . . . prescribing the effective date of the rule was drafted before the recent amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

Such rules shall not take effect until they have been reported to Congress by the

Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of 90 days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

Effective Date. This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

5. We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or Title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft . . . . The existence of this right is taken into account in the rule. In paragraph (c)(2), . . . it is stated: "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." That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaining the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i) subdivisions (1), (2) and (3), . . .); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property, probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law,

and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice of the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has vigorously objected to the substitution of juries for commissions in TVA cases.

We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the "double" trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

Notes of Advisory Committee on 1963 Amendments to Rules.

This amendment conforms to the amendment of Rule 4(f).

Notes of Advisory Committee on 1985 Amendments to Rules.

Rule71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the

situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be available, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission‘s deliberations.

Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court then may authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective commissioners and by recognizing the right of each party to object to the appointment of any person for cause.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

NOTES TO RULE 72

HISTORY: (Added Aug. 1, 1983.) (Amended Dec. 1, 1991; Dec. 1, 1993.)

EXPLANATORY NOTES: A prior Rule 72 was abrogated effective July 1, 1968. It provided for appeals from a District Court to the Supreme Court.

Notes of Advisory Committee on Rules.

Subdivision (a).

This subdivision addresses court-ordered referrals of nondispositive matters under 28 U.S.C. § 636(b)(1)(A). The rule calls for a written order of the magistrate's disposition to preserve the record and facilitate review. An oral order read into the record by the magistrate will satisfy this requirement.

No specific procedures or timetables for raising objections to the magistrate's rulings on nondispositive matters are set forth in the Magistrates Act. The rule fixes a 10-day period in order to avoid uncertainty and provide uniformity that will eliminate the confusion that might arise if different periods were prescribed by local rule in different districts. It also is contemplated that a party who is successful before the magistrate will be afforded an opportunity to respond to objections raised to the magistrate's ruling.

The last sentence of subdivision (a) specifies that reconsideration of a magistrate's order, as provided for in the Magistrates Act, shall be by the district judge to whom the case is assigned. This rule does not restrict experimentation by the district courts under 28 U.S.C. § 636(b)(3) involving references of matters other than pretrial matters, such as appointment of counsel, taking of default judgments, and acceptance of jury verdicts when the judge is unavailable.

Subdivision (b).

This subdivision governs court-ordered referrals of dispositive pretrial matters and prisoner petitions challenging conditions of confinement, pursuant to statutory authorization in 28 U.S.C. § 636(b)(1)(B). This rule does not extend to habeas corpus petitions, which are covered by the specific rules relating to proceedings under Sections 2254 and 2255 of Title 28.

This rule implements the statutory procedures for making objections to the magistrate's proposed findings and recommendations. The 10-day period, as specified in the statute, is subject to Rule 6(e) which provides for an additional 3-day period when service is made by mail. Although no specific provision appears in the Magistrates Act, the rule specifies a 10-day period for a party to respond to objections to the magistrate's recommendation.

Implementing the statutory requirements, the rule requires the district judge to

whom the case is assigned to make a de novo determination of those portions of the report, findings, or recommendations to which timely objection is made. The term "de novo" signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required. See United States v. Raddatz, 417 U.S. 667 (1980). See also Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1367 (1975). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. See Campbell v. United States Dist. Court, 501 F.2d 196, 206 (9th Cir. 1974), cert. denied, 419 U.S. 879, quoted in House Report No. 94-1609, 94th Cong. 2d Sess. (1976) at 3. Compare Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980). Failure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Notes of Advisory Committee on December 1991 amendment of Rule.

This amendment is intended to eliminate a discrepancy in measuring the 10 days for serving and filing objections to a magistrate's action under subdivisions (a) and (b) of this Rule. The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed within 10 days of entry of the order, but required objections to dispositive motions to be made within 10 days of being served with a copy of the recommended disposition. Subdivision (a) is here amended to conform to subdivision (b) to avoid any confusion or technical defaults, particularly in connection with magistrate orders that rule on both dispositive and nondispositive matters.

The amendment is also intended to assure that objections to magistrate's orders that are not timely made shall not be considered. Compare Rule 51.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

NOTES TO RULE 73

HISTORY: (Added Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

EXPLANATORY NOTES: A prior Rule 73 was abrogated effective July 1, 1968. It provided for an appeal to a Court of Appeals.

Notes of Advisory Committee on Rules.

Subdivision (a).

This subdivision implements the broad authority of the 1979 amendments to the Magistrates Act, 28 U.S.C. § 636(c), which permit a magistrate to sit in lieu of a district judge and exercise civil jurisdiction over a case, when the parties consent. See McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. Legis. 343, 364-79 (1979). In order to exercise this jurisdiction, a magistrate must be specially designated under 28 U.S.C. § 636(c)(1) by the district court or courts he serves. The only exception to a magistrate's exercise of civil jurisdiction, which includes the power to conduct jury and nonjury trials and decide dispositive motions, is the contempt power. A hearing on contempt is to be conducted by the district judge upon certification of the facts and an order to show cause by the magistrate. See 28 U.S.C. § 639(e). In view of 28 U.S.C. § 636(c)(1) and this rule, it is unnecessary to amend Rule 58 to provide that the decision of a magistrate is a "decision by the court" for the purposes of that rule and a "final decision of the district court" for purposes of 28 U.S.C. § 1291 governing appeals.

Subdivision (b).

This subdivision implements the blind consent provision of 28 U.S.C. § 636(c)(2) and is designed to ensure that neither the judge nor the magistrate attempts to induce a party to consent to reference of a civil matter under this rule to a magistrate. See House Rep. No. 96-444, 96th Cong. 1st Sess. 8 (1979).

The rule opts for a uniform approach in implementing the consent provision by directing the clerk to notify the parties of their opportunity to elect to proceed before a magistrate and by requiring the execution and filing of a consent form or forms setting forth the election. However, flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made.

The last paragraph of subdivision (b) reiterates the provision in 28 U.S.C. § 636(c)(6) for vacating a reference to the magistrate.

Subdivision (c).

Under 28 U.S.C. § 636(c)(3), the normal route of appeal from the judgment of a magistrate--the only route that will be available unless the parties otherwise agree in advance--is an appeal by the aggrieved party "directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." The quoted statutory language indicates Congress' intent that the same procedures and standards of appealability that govern appeals from district court judgments govern appeals from magistrates' judgments.

Subdivision (d).

28 U.S.C. § 636(c)(4) offers parties who consent to the exercise of civil

jurisdiction by a magistrate an alternative appeal route to that provided in subdivision (c) of this rule. This optional appellate route was provided by Congress in recognition of the fact that not all civil cases warrant the same appellate treatment. In cases where the amount in controversy is not great and there are no difficult questions of law to be resolved, the parties may desire to avoid the expense and delay of appeal to the court of appeals by electing an appeal to the district judge. See McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. Legis. 343, 388 (1979). This subdivision provides that the parties may elect the optional appeal route at the time of reference to a magistrate. To this end, the notice by the clerk under subdivision (b) of this rule shall explain the appeal option and the corollary restriction on review by the court of appeals. This approach will avoid later claims of lack of consent to the avenue of appeal. The choice of the alternative appeal route to the judge of the district court should be made by the parties in their forms of consent. Special appellate rules to govern appeals from a magistrate to a district judge appear in new Rules 74 through 76.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990. The Act requires that, when being reminded of the availability of a magistrate judge, the parties be advised that withholding of consent will have no "adverse substantive consequences." They may, however, be advised if the withholding of consent will have the adverse procedural consequence of a potential delay in trial.

NOTES TO RULE 74

HISTORY: (Added Aug. 1, 1983; Dec. 1, 1993.)

EXPLANATORY NOTES: A prior Rule 74 was abrogated effective July 1, 1980. It provided for joint appeals to the Supreme Court or to a Court of Appeals.

Notes of Advisory Committee on Rules.

Subdivision (a).

This rule governs appeals from decisions of magistrates exercising consensual civil jurisdiction under Rule 73 when the parties elect to appeal to a judge of the district court under subdivision (d) of that rule. Congress specified that such an appeal would be "on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals." See 28 U.S.C. § 636(c)(4). Presumably, Congress intended that

the district court follow the same general procedures, including the "clearly erroneous" factual review standard of Civil Rule 52(a), that a court of appeals follows in reviewing a judgment of the district court. However, Congress also provided that "whenever possible" the local rules of the district court shall endeavor to make appeals expeditious and inexpensive. See 28 U.S.C. § 636(c)(4). Since the Federal Rules of Appellate Procedure are designed to cover appeals from a single judge to a three-member appeal tribunal, some modifications have proved desirable in assuring an expeditious appeal from a magistrate to a single district judge. Rules 74 through 76 provide this set of rules governing appeals from magistrates' exercise of consensual jurisdiction.

The time limits in subdivision (a) generally conform to those in Appellate Rule 4(a), except that the period in which a party may move for leave to file a late notice of appeal on grounds of excusable neglect is 20 days, rather than the 30-day period provided for in the Appellate Rules.

The term "appealable decision" as used in this rule embraces the "final decision" concept of 28 U.S.C. § 1291 and permits an appeal from a magistrate to a district judge in those situations in which an appeal from a district judge to the court of appeals would lie. That term, along with the specific provision in the rule permitting appeals of certain interlocutory orders, incorporates by reference the provisions of 28 U.S.C. § 1292 and adopts, by analogy to Section 1292(b), a certification procedure for otherwise unappealable orders "where the order is based on a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although no specific certification procedure is set forth, the rule contemplates that a magistrate may certify such an order for appeal, and the district judge, in his discretion, may allow the appeal. In the interest of expediting the trial, interlocutory appeals of any kind will not stay the proceedings unless the magistrate or district judge finds that the nature of the appeal or its relation to the remaining proceedings requires a stay.

Subdivision (b).

The provisions governing the content and service of the notice of appeal conform substantially to Rules 3(c) and 3(d) of the Federal Rules of Appellate Procedure.

Subdivision (c).

This subdivision represents a simplified version of Rule 8 of the Federal Rules of Appellate Procedure. Under this subdivision, the district judge is in the position of an appellate judge under Rule 8 of the Appellate Rules when the judge below has refused a stay under Rule 62.

In proceedings under 28 U.S.C. § 636(c), an application for a stay of the judgment under Rule 62 initially will be made to the magistrate. The district judge under this rule may hear an application for a stay of the judgment upon

a showing that the magistrate has refused to stay the judgment pending appeal to the district judge.

Subdivision (d).

The provisions governing dismissal are similar to Rule 3(a) (failure to prosecute) and Rule 42(a) (voluntary dismissal) of the Federal Rules of Appellate Procedure.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

NOTES TO RULE 75

HISTORY: (Added Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

EXPLANATORY NOTES: A prior Rule 75 was abrogated effective July 1, 1968. It provided for a record on appeal to a Court of Appeals.

Notes of Advisory Committee on Rules.

Subdivision (a).

28 U.S.C. § 636(c)(4) provides that whenever possible the local rules of the district court shall endeavor to make appeals from the magistrate to the district judge expeditious and inexpensive. The provisions of this rule are directed to that end in simplifying the record on appeal and permitting typewritten briefs. The availability of oral argument and the length and form of briefs are matters appropriately left to local rule.

Subdivision (b).

The provisions governing the composition of the record and the transcript are adapted from Rule 10 of the Federal Rules of Appellate Procedure. The language requiring the appellant to "make arrangements for the production of a transcript" is broad enough to require the party to order a transcript from the court reporter or to make arrangements to transcribe a taped record of the proceedings. The magistrate is to settle any differences regarding the extent of the transcript and to require the appellant to provide for transcription of any additional portions designated by the appellee that are material to the issues on appeal. Naturally, the rule is subject to the operation of 28 U.S.C. § 1915 in the case of a party who is unable to pay such costs.

Although it is not anticipated that an appeal will often be taken from a hearing or trial of which no record was made, the parties do have the option to forego a record in routine matters under 28 U.S.C. § 636(c)(7). In such cases a

statement of the evidence will be prepared by the parties (or by the magistrate if the parties cannot agree) from the best available means, including the recollections and notes of the parties and the magistrate.

Subdivision (c).

Although the parties, with agreement of the court, can dispense with the filing of briefs, a schedule for the serving and filing of briefs will often be necessary. In lieu of the elaborate provisions of Rules 28 through 32 of the Federal Rules of Appellate Procedure, this rule adopts a simplified approach for the filing and serving of briefs in order to achieve an inexpensive and expeditious appeal from a magistrate's judgment to a district judge. The timing of the appellant's initial brief is tied to the filing of the transcript or statement, instead of the filing of the record (Appellate Rule 31(a)) or the docketing of the appeal, because the rest of the record is already in the hands of the district court clerk and need not be transmitted. This rule does not require payment of a filing fee. Thus the filing of the transcript or statement is all that remains of the traditional concepts of filing the record and docketing the appeal.

The introductory clause of the rule recognizes the desirability of allowing local and individual variations in the filing of briefs, and the numbered clauses prescribe shorter periods than the corresponding intervals allowed by Appellate Rule 31(a). The provision allowing a reply brief for an appellee who has filed a cross-appeal is taken from Appellate Rule 28(c).

Subdivision (d).

The use of typewritten briefs is urged as a means of minimizing costs and of expediting appeals from the magistrate to the district judge. The form and length of briefs should be addressed as a matter of local rule in order to avoid resort to the more elaborate provisions of the Federal Rules of Appellate Procedure.

Subdivision (e).

The availability of oral argument has been left as a matter for local rule.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

NOTES TO RULE 76

HISTORY: (Added Aug. 1, 1983.) (Amended Dec. 1, 1993.)

EXPLANATORY NOTES: A prior Rule 76 was abrogated effective July 1, 1968. It provided for a record on appeal to a Court of Appeals and an agreed statement.

Notes of Advisory Committee on Rules.

Subdivision (a).

This subdivision, adapted from Rule 36 of the Federal Rules of Appellate Procedure, directs the clerk to enter judgment in accordance with the order or decision of the district judge affirming, reversing, or modifying the judgment of the magistrate and to mail copies of the order or decision to all parties.

Subdivision (b).

This subdivision, adapted from Rule 41 of the Federal Rules of Appellate Procedure, stays the effect of the district judge's decision on an appeal from a judgment of the magistrate. The availability of a rehearing by the district judge is contemplated (see Appellate Rule 40), but no particular form of petition is specified by the rule. The initial 10-day stay and the stay pending disposition of a timely petition for rehearing operate automatically upon the magistrate and all parties. Any other stay is at the discretion of the district judge.

Subdivision (c).

This provision for costs on appeal is adapted from Rule 39 of the Federal Rules of Appellate Procedure to achieve the inexpensive appellate process envisioned for district judge review of magistrate action. No filing fee is required since a single clerk‘s office handles the file throughout, and no bond for costs is required. Ordinarily the only costs will be the costs of the transcript and the premium for any supersedeas bond.

Notes of Advisory Committee on 1993 amendments to Rules.

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

NOTES TO RULE 77

HISTORY: (Amended March 19, 1948; July 1, 1963; July 1, 1968; July 1, 1971; Aug. 1, 1987; Dec. 1, 1991.)

Notes of Advisory Committee on Rules.

This rule states the substance of USC, Title 28, formerly § 13 (now § 452) (Courts open as courts of admiralty and equity). Compare former Equity Rules 1 (District

Court Always Open For Certain Purposes--Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

Notes of Advisory Committee on 1946 Amendments to Rules.

Rule 77(d) has been amended to avoid such situations as the one arising in Hill v Hawes, 1944, 320 US 520, 88 L Ed 283, 149 ALR 736. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then reentered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in Hill v Hawes is to give the district court power, in its discretion and without time limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note. Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

Notes of Advisory Committee on 1963 Amendments to Rules.

Subdivision (c).

The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated. ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d).

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

Notes of Advisory Committee on 1968 Amendments to Rules.

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

Notes of Advisory Committee on 1971 Amendments to Rules.

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 6(a).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 77.

Notes of Advisory Committee on December 1991 amendment of Rule.

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1986); Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates, 780 F.2d 1043 (D.C. Cir. 1986); In re OPM Leasing Services, Inc., 769 F.2d 911 (2d Cir. 1985); Spika v. Village of Lombard, Ill., 763 F.2d 282 (7th Cir. 1985); Hall v. Community Mental Health Center of Beaver County, 772 F.2d 42 (3d Cir. 1985); Wilson v. Atwood, 725 F.2d 255 (5th Cir. en banc), cert dismissed, 105 S.Ct. 17 (1984); Case v. BASF Wyandotte, 737 F.2d 1034 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 386 (1984); Hensley v. Chesapeake & Ohio R.R.Co., 651 F.2d 226 (4th Cir. 1981); Buckeye Cellulose Corp. v. Electric Construction Co., 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the

caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

NOTES TO RULE 78

HISTORY: (Amended Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Compare former Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See Rule 43(e) of these rules dealing with evidence on motions. Compare Civil Practice Rules of the Municipal Court of Chicago (1935), Rules 269, 270, 271.

Notes of Advisory Committee on proposed 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

NOTES TO RULE 79

HISTORY: (Amended Mar. 19, 1948; Oct. 20, 1949; July 1, 1963.)

Notes of Advisory Committee on Rules.

Compare Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

USC, Title 5:
§ 301 (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees)
§ 318 (Accounts of district attorneys)

USC, Title 28, former:
§ 556 (Clerks of district courts; books open to inspection)
§ 567 (Same; accounts)

§ 568 (Same; reports and accounts of money received; dockets)
§ 813 (Indices of judgment debtors to be kept by clerks)

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

Notes of Advisory Committee on 1946 Amendments to Rules.

Subdivision (a).

The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, ch 501, §§ 1--7, 53 Stat 1223, 28 USC formerly §§ 444--450 (now §§ 601--610).

Subdivision (b).

The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography. See Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts, prepared by the Bureau of the Budget, 1941, 38--42. See also Rule 55, Federal Rules of Criminal Procedure [following section 687 of Title 18 USC].

Subdivision (c).

The words "Separate and" have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

Subdivision (d).

Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), supra.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the name, "Judicial Conference of the United States," for "Judicial Conference of Senior Circuit Judges," in the first sentence of subdivision (a), and in subdivisions (b) and (d).

Notes of Advisory Committee on 1963 Amendments to Rules.

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

NOTES TO RULE 80

HISTORY: (Amended Mar. 19, 1948.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

This follows substantially former Equity Rule 50 (Stenographer--Appointment--Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (b).

See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 ABAJ 818, 819; (1937), 24 ABAJ 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (c).

Compare Iowa Code (1935) § 11353.

Notes of Advisory Committee on 1948 Amendments to Rules.

Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong, ch 3, 2d Sess, approved Jan. 20, 1944, 28 USC formerly § 9a (now §§ 550, 604, 753, 1915, 1920), providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

NOTES TO RULE 81

HISTORY: (Amended April 3, 1941; March 19, 1948; Oct. 20, 1949; Aug. 1, 1951; July 1, 1963; July 1, 1966; July 1, 1968; July 1, 1971; Aug. 1, 1987.)

Notes of Advisory Committee on Rules.

Note to Subdivision (a).

Paragraph (1): Compare the enabling act, act of June 19, 1934, USC, Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). For the application of these rules in bankruptcy and copyright proceedings, see Orders xxxvi and xxxvii in Bankruptcy and Rule 1 of Rules of Practice and Procedure under § 25 of the copyright act, act of March 4, 1909, USC, Title 17, § 25 (now § 101) (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: USC, Title 8, ch 9 (Naturalization); Title 28, former ch 14 (Habeas corpus); Title 28, former §§ 377a--377c (Quo warranto); and such forfeiture statutes as USC, Title 7, former § 116 (Misbranded seeds, confiscation), and Title 21, formerly § 14 (now § 334(b)) (Pure Food and Drug Act--condemnation of adulterated or misbranded food; procedure). See also 443 Cans of Frozen Eggs Product v U. S. 226 US 172, 33 S Ct 50, 57 L Ed 174 (1912).

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see USC, Title 40, § 258 (Condemnation of realty for sites for public building, etc., procedure); USC, Title 16, § 831x (Condemnation by Tennessee Valley Authority); USC, Title 40, § 120 (Acquisition of lands for public use in District of Columbia); Title 40, ch 7 (Acquisition of lands in District of Columbia for use of United States; condemnation).

Note to Subdivision (b).

Some statutes which will be affected by this subdivision are:

USC, Title 7: § 222 (Federal Trade Commission powers adopted for enforcement of stockyards Act) (By reference to Title 15, § 49)

USC, Title 15:
§ 49 (Enforcement of Federal Trade Commission orders and antitrust laws)
§ 77t(c) (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)
§ 78u(f) (Same; Securities Exchange Act of 1934)
§ 79r(g) (Same; Public Utility Holding Company Act of 1935)

USC, Title 16:
§ 820 (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)

§ 825m(b) (Mandamus to compel compliance with Federal Water Power Act, etc.)

USC, Title 19: § 1333(c) (Mandamus to compel compliance with orders of Tariff Commission, etc.)

USC, Title 28, former:
§ 377 (Power to issue writs)
§ 572 (Fees, attorneys, solicitors and proctors)
§ 778 (Death of parties; substitution of executor or administrator). Compare Rule 25(a) (Substitution of parties; death), and the note thereto.

USC, Title 33: § 495 (Removal of bridges over navigable waters)

USC, Title 45:
§ 88 (Mandamus against Union Pacific Railroad Company)
§ 153(p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)
§ 185 (Same; National Air Transport Adjustment Board) (By reference to § 153)

USC, Title 47:
§ 11 (Powers of Federal Communications Commission)
§ 401(a) (Enforcement of Federal Communications Act and orders of Commission)
§ 406 (Same; compelling furnishing of facilities; mandamus)

USC, Title 49:
§ 19a(1) (Mandamus to compel compliance with Interstate Commerce Act)
§ 20(9) (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

For comparable provisions in state practice see Ill Rev Stat (1937), ch 110, § 179; Calif Code Civ Proc (Deering, 1937) § 802.

Note to Subdivision (c).

Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

USC, Title 28, former:
§ 71 (Removal of suits from state courts)
§ 72 (Same; procedure)
§ 73 (Same; suits under grants of land from different states)
§ 74 (Same; causes against persons denied civil rights)
§ 75 (Same; petitioner in actual custody of state court)
§ 76 (Same; suits and prosecutions against revenue officers)
§ 77 (Same; suits by aliens)
§ 78 (Same; copies of records refused by clerk of state court)
§ 79 (Same; previous attachment bonds or orders)

§ 80 (Same; dismissal or remand)
§ 81 (Same; proceedings in suits removed)
§ 82 (Same; record; filing and return)
§ 83 (Service of process after removal)

USC, Title 28, formerly § 72 (now §§ 1446, 1447), supra, however, is modified by shortening the time for pleading in removed actions.

Note to Subdivision (e).

The last sentence of this subdivision modifies USC, Title 28, formerly § 725 (now § 1652) (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

Notes of Advisory Committee on 1946 Amendments to Rules.

Note to Subdivision (a).

Despite certain dicta to the contrary, Lynn v United States, CCA 5th, 1940, 110 F2d 586; Mount Tivy Winery, Inc. v Lewis, ND Cal 1942, 42 F Supp 636, it is manifest that the rules apply to actions against the United States under the Tucker Act [28 USC, formerly §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761--765 (now §§ 791, 1346, 1401, 1402, 1491, 1493, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501, 2506, 2509, 2510)]. See United States to use of Foster Wheeler Corp. v American Surety Co. of New York, ED NY 1939, 25 F Supp 700; Boerner v United States, ED NY 1939, 26 F Supp 769; United States v Gallagher, CCA 9th, 1945, 151 F2d 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term "civil action" [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4(d)(4), 12(a), 13(d), 25(d), 37(f), 39(c), 45(c), 54(d), 55(e), 62(e), and 65(c). In United States v Sherwood, 1941, 312 US 584, 85 L Ed 1058, 61 S Ct 767, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: "The Government, of course, recognizes that the Federal Rules of Civil

Procedure apply to cases brought under the Tucker Act." (Brief for the United States, p 31). Regarding Lynn v United States, supra, the Solicitor General said: "In Lynn v United States . . . the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4(d), 12(a), 39(c),

and 55(e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat 1064, 28 USC formerly §§ 723b, 723c (now § 2072) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec 4, Act of March 3, 1887, 24 Stat 505, 28 USC, formerly § 761 (now §§ 2071, 2072))." (Brief for the United States, p 31, n 17.)

United States v Sherwood, supra, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the Sherwood case, the New York Supreme Court, acting under § 795 of the New York Civil Practice Act, made an order authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

Subdivision (a)(2).

The added sentence makes it clear that the rules have not superseded the requirements of USC Title 28, formerly § 466 (now § 2253). Schenk v Plummer, CCA 9th 1940, 113 F2d 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under USC Title 22, § 405 (seizure of war materials intended for unlawful export) or USC Title 21, § 334(b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, USC § 14, Pure Food and Drug Act), see Reynal v United States, CCA 5th, 1945, 153 F2d 929; United States v 108 Boxes of Cheddar Cheese, SD Iowa 1943, 3 FRD 40.

Subdivision (a)(3).

The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas. See Perkins v Endicott Johnson Corp. CCA 2d 1942, 128 F2d 208, affd on other grounds, 1943, 317 US 501, 87 L Ed 424, 63 S Ct 339; Walling v News Printing, Inc. CCA 3d,

1945, 148 F2d 57; McCrone v United States, 1939, 307 US 61, 83 L Ed 1108, 59 S Ct 685. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired, Goodyear Tire & Rubber Co. v National Labor Relations Board, CCA 6th, 1941, 122 F2d 450; Cudahy Packing Co. v National Labor Relations Board, CCA 10th, 1941, 117 F2d 692, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, e. g., Peoples Natural Gas Co. v Federal Power Commission, App DC 1942, 127 F2d 153, cert den 1942, 316 US 700, 86 L Ed 1769, 62 S Ct 1298; Martin v Chandis Securities Co. CCA 9th, 1942, 128 F2d 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 Collier on Bankruptcy, 14th ed by Moore and Oglebay, 326--327; 2 Collier, op cit supra, 1401--1402; 3 Collier, op cit supra, 228--231; 4 Collier, op cit supra, 1199--1202.

Subdivision (a)(6).

Section 405 of USC, Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and former § 738 (now § 1451), USC, Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a)(6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen‘s and Harbor Workers’ Compensation Act [33 USC §§ 901 et seq.] was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

Subdivision (c).

The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81(c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

Subdivision (f).

The use of the phrase “the United States or an officer or agency thereof” in the rules (as e. g., in Rule 12(a) and amended Rule 73(a)) could raise the question

of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. Sage v United States, 1919, 250 US 33, 63 L Ed 828, 39 S Ct 415; Smietanka v Indiana Steel Co. 1921, 257 US 1, 66 L Ed 99, 42 S Ct 1; United States v Nunnally Investment Co. 1942, 316 US 258, 86 L Ed 1455, 62 S Ct 1064, 140 ALR 792. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the words "United States District Court" for the words "District Court of the United States" in the last sentence of subdivision (a)(1) and in the first and third sentences of subdivision (e). The amendment substituted the words "United States district courts" for "district courts of the United States" in subdivision (a)(4) and (5) and in the first sentence of subdivision (c).

The amendment effective October 20, 1949, also made the following changes:

In subdivision (a)(1), the reference to "Title 17, USC" was substituted for the reference to "the Act of March 4, 1909, ch 320, § 25 (35 Stat 1081), as amended, USC, Title 17, § 25."

In subdivision (a)(2), the reference to "Title 28, USC, § 2253" was substituted for "USC, Title 28, § 466."

In subdivision (a)(3), the reference in the first sentence to "Title 9, USC," was substituted for "the Act of February 12, 1925, ch 213 (43 Stat 883), USC, Title 9".

In subdivision (a)(5), the words "as amended" were inserted after the parenthetical citation of "(49 Stat 453)," and after the citations of "Title 29, §§ 159 and 160," former references to subdivisions "(e), (g), and (i)" were deleted.

In subdivision (a)(6), after the words "These rules" at the beginning of the first sentence, the following words were deleted: "do not apply to proceedings under the Act of September 13, 1888, ch 1015, § 13 (25 Stat 479), as amended, USC, Title 8, § 282, relating to deportation of Chinese; they". Also in the first sentence, after the parenthetical citation of "44 Stat 1434, 1436)," the words "as amended" were added. In the last sentence, the words "October 14, 1940, ch 876, § 338 (54 Stat 1158)" were inserted in lieu of the words "June 29, 1906, ch 3592, § 15 (34 Stat 601), as amended."

In subdivision (c), the word "all" originally appearing in the first sentence between the words "govern" and "procedure" was deleted. In the third sentence, the portion beginning with the words "20 days after the receipt" and including all the remainder of that sentence was substituted for the following language: "the time allowed for answer by the law of the state or within 5 days after the filing of

the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript". In the fourth or last sentence, after the words at the beginning of the sentence, "If at the time of removal all necessary pleadings have been," the word "served" was inserted in lieu of the word "filed," and the concluding words of the sentence, "petition for removal is filed if he is the petitioner," together with the final clause immediately following, were substituted for the words "record of the action is filed in the district court of the United States."

Notes of Advisory Committee on 1963 Amendments to Rules.

Subdivision (a)(4).

This change reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II, § 4(e), 53 Stat 1433.

Subdivision (a)(6).

The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c).

Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. Zakoscielny v Waterman Steamship Corp., 16 FRD 314 (D Md 1954); Talley v American Bakeries Co., 15 FRD 391 (ED Tenn 1954); Rehrer v Service Trucking Co. 15 FRD 113 (D Del 1953); 5 Moore's Federal Practice para. 38.39 [3] (2d ed 1951); 1 Barron & Holtzoff, Federal Practice & Procedure § 132 (Wright ed 1960). But there is some authority to the contrary. Petsel v Chicago, B. & Q. R. Co. 101 F Supp 1006 (SD Iowa 1951); Nelson v American Nat. Bank & Trust Co. 9 FRD 680 (ED Tenn 1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f).

The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150-26(2), 18 Fed Reg 3499 (1953).

Notes of Advisory Committee on 1966 Amendments to Rules.

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, formerly governed by the admiralty rules, will be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, the Federal Rules of Civil Procedure are made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words "mental health" are substituted for "lunacy" to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause "unless a shorter time is provided by law." The 10 day period fixed for an appeal under 45 USC § 159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it is eliminated because its retention would preserve the 15 day period heretofore allowed by 28 USC § 2107 for appeals from interlocutory decrees in admiralty, it being one of the purposes of the amendment to make the time for appeals in civil and admiralty cases uniform under the unified rules. See Advisory Committee's Note to subdivision (a) of Rule 73.

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 Moore's Federal Practice para. 25.09 at 531 (2d ed 1950).

Notes of Advisory Committee on 1968 Amendments to Rules.

The amendments eliminate inappropriate references to appellate procedure.

Notes of Advisory Committee on 1971 Amendments to Rules.

Title 28, USC, § 2243 now requires that the custodian of a person detained must respond to an application for a writ of habeas corpus "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The amendment increases to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The substantial increases in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause.

While the time allowed in such a case for the return of the writ may not exceed forty days, this does not mean that the state must necessarily be limited to that

period of time to provide for the federal court the transcript of the proceedings of a state trial or plenary hearing if the transcript must be prepared after the habeas corpus proceeding has begun in the federal court.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 prospective amendment of Rule.

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1986); Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates, 780 F.2d 1043 (D.C. Cir. 1986); In re OPM Leasing Services, Inc., 769 F.2d 911 (2d Cir. 1985); Spika v. Village of Lombard, Ill., 763 F.2d 282 (7th Cir. 1985); Hall v. Community Mental Health Center of Beaver County, 772 F.2d 42 (3d Cir. 1985); Wilson v. Atwood v. Stark, 725 F.2d 255 (5th Cir. en banc), cert dismissed, 105 S.Ct. 17 (1984); Case v. BASF Wyandotte, 727 F.2d 1034 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 386 (1984); Hensley v. Chesapeake & Ohio R.R.Co., 651 F.2d 226 (4th Cir. 1981); Buckeye Cellulose Corp. v. Electric Construction Co., 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks‘ offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk’s offices, for the duty of that office to give notice of entry of judgment must be maintained.

NOTES TO RULE 82

HISTORY: (Amended Oct. 20, 1949; July 1, 1966.)

Notes of Advisory Committee on Rules.

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The

rule is declaratory of existing practice under the former Federal Equity Rules with regard to such provisions as former Equity Rule 26 on Joinder of Causes of Action and former Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L J 393 (1936).

Notes of Advisory Committee on 1949 Amendments to Rules.

The amendment effective October 1949 substituted the words "United States district courts" for "district courts of the United States."

Notes of Advisory Committee on 1966 Amendments to Rules.

Title 28, USC, § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what were formerly suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action": i.e., a suit in admiralty is not a "civil action" within the statute. By virtue of the amendment to Rule 1, the provisions of Rule 2 convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law with respect to venue.

NOTES TO RULE 83

HISTORY: (Amended Aug. 1, 1985; Dec. 1, 1995.)

Notes of Advisory Committee on Rules.

This rule substantially continues USC, Title 28, formerly § 731 (now § 2071) (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts To Make Rules of Practice) (originally promulgated in 1842).

Notes of Advisory Committee on 1985 Amendments to Rules.

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, permits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

The widespread adoption of local rules and the modest procedural prerequisites for their promulgation have led many commentators to question the soundness of the process as well as the validity of some rules. See 12 C. Wright & A. Miller,

Federal Practice and Procedure: Civil § 3152, at 217 (1973); Caballero, Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts? 24 Fed. Bar News 325 (1977). Although the desirability of local rules for promoting uniform practice within a district is widely accepted, several commentators also have suggested reforms to increase the quality, simplicity, and uniformity of the local rules. See Note, Rule 83 and the Local Federal Rules, 67 Colum. L. Rev. 1251 (1967), and Comment, The Local Rules of Civil Procedure in the Federal District Courts--A Survey, 1966 Duke L.J. 1011.

The amended Rule attempts, without impairing the procedural validity of existing local rules, to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. Although some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other. See 12 C. Wright & A. Miller, supra, § 3152, at 217; Blair, The New Local Rules for Federal Practice in Iowa, 23 Drake L. Rev. 517 (1974). The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated. See Weinstein, Reform of Court Rule-Making Procedures 84-87, 127-37, 151 (1977).

The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations. See generally, Weinstein, supra, at 117-37, 151. The new Rule does not foreclose any other form of consultation. For example, it can be accomplished through the mechanism of an "Advisory Committee" similar to that employed by the Supreme Court in connection with the Federal Rules themselves.

The amended Rule provides that a local rule will take effect upon the date specified by the district court and will remain in effect unless amended by the district court or abrogated by the judicial council. The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. § 332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules.

The amended Rule requires copies of local rules to be sent upon their promulgation to the judicial council and the Administrative Office of the United

States Courts rather than to the Supreme Court. The Supreme Court was the appropriate filing place in 1938, when Rule 83 originally was promulgated, but the establishment of the Administrative Office makes it a more logical place to develop a centralized file of local rules. This procedure is consistent with both the Criminal and the Appellate Rules. See Fed. R. Crim. P. 57(a); Fed. R. App. P. 47. The Administrative Office also will be able to provide improved utilization of the file because of its recent development of a Local Rules Index.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

Preliminary draft of proposed amendments. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 83, dated August 15, 1991. "

Rule 83. Rules by District Courts; Orders

"(a) Local Rules. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice consistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court 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.

"(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with these rules if it is consistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less.

"(c) Orders. In all cases not provided for by rule, the district judges and magistrates judges may regulate their practice in any manner consistent with these rules and with those of the district in which they act.

"(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a manner that protects all parties against forfeiture of substantial rights as a result of negligent failures to comply with a requirement of form imposed by such a local rule or order.

Committee notes.

Purpose of Revision.

A major goal of the Rules Enabling Act was to achieve national uniformity in

the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and these rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purpose of Rule 1 in the light of local conditions. The omission of a similar authorization in other rules should not be viewed as by precluding by implication the adoption of a local rule subject to the contraints of this Rule 83.

Subdivision (a).

The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071.

Subdivision (b).

This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with these rules should be permitted only with approval of the Judicial Conference of the United States, and then only for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c).

The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a ”standing order“) provided the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d).

This provision is new. Its aim is to protect parties against loss of substantive rights in the enforcement of local rules and standing orders against litigants who may be unfamiliar with their provisions.

The bulk of local rules and standing orders is now quite substantial. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by the elaboration of local rules enforced so rigorously that attorneys might be reluctant to hazard an appearance or clients reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local rules poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the substantive rights of the parties.

Notes of Advisory Committee on 1995 Amendments to Rules

Subdivision (a).

This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat Acts of Congress or local rules.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting -- a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to nonwillful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one invloving merely a matter of form. Nor does it affect the court‘s power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring parties to

identify evidentiary matters relied upon to support or oppose motions for summary judgments.

Subdivision (b).

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with the district local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the loca rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished actual notice of the requirement in a particular case.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

NOTES TO RULE 84

HISTORY: (Amended Mar. 19, 1948.)

Notes of Advisory Committee on Rules.

In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading. Compare 2 Mass Gen Laws (Ter Ed, 1932) ch 231, § 147, Forms 1--47; English Annual Practice (1937) Appendix A to M, inclusive; Conn Practice Book (1934) Rules, 47--68, pp 123--427.

Notes of Advisory Committee on 1948 Amendments to Rules.

The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are

drawn, and that the practitioner using them may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. Sierocinski v E. I. DuPont De Nemours & Co. CCA 3d, 1939, 103 F2d 843; Swift & Co. v Young, CCA 4th, 1939, 107 F2d 170; Sparks v England, CCA 8th, 1940, 113 F2d 579; Ramsouer v Midland Valley R. Co. CCA 8th, 1943, 135 F2d 101. And the forms as a whole have met with widespread approval in the courts. See cases cited in 1 Moore's Federal Practice, 1938, Cum Supplement § 8.07, under "Page 554"; see also Commentary. The Official Forms, 1941, 4 Fed Rules Serv 954. In Cook, "Facts" and "Statements of Fact," 1937, 4 U Chi L Rev 233, 245--246, it is said with reference to what is now Rule 84: ". . . pleaders in the federal courts are not to be left to guess as to the meaning of [the] language" in Rule 8(a) regarding the form of the complaint. "All of which is as it should be. In no other way can useless litigation be avoided." Ibid. The amended rule will operate to discourage isolated results such as those found in Washburn v Moorman Mfg. Co. SD Cal 1938, 25 F Supp 546; Employers Mutual Liability Ins. Co. of Wisconsin v Blue Line Transfer Co. WD Mo 1941, 2 FRD 121, 5 Fed Rules Serv 12e.235, Case 2.

Preliminary draft of proposed amendments. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 84, dated August 15, 1991. "

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 Judicial Conference of the United States may authorize additional forms and may revise or delet forms.".

Committee notes. The revision is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

NOTES TO RULE 85

See Rule 86 Notes.

NOTES TO RULE 86

HISTORY: (Amended Mar. 19, 1948; Oct. 20, 1949; July 19, 1961; July 1, 1963.)

Notes of Advisory Committee on Rules.

See former Equity Rule 81 (These Rules Effective February 1, 1913--Old Rules Abrogated).

Notes of Advisory Committee on 1949 Amendments to Rules.

By making the general amendments effective on the day following the adjournment of the first regular session of Congress to which they are transmitted, subdivision (c), supra, departs slightly from the prior practice of making amendments effective on the day which is 3 months subsequent to the adjournment of Congress or on September 1 of that year, whichever day is later. The reason for this departure is that no added period of time is needed for the Bench and Bar to acquaint themselves with the general amendments, which effect a change in nomenclature to conform to revised Title 28, substitute present statutory references to this Title and cure the omission or defect occasioned by the statutory revision in relation to the substitution of public officers, to a cost bond on appeal, and to procedure after removal (see Rules 25(d), 73(c), 81(c)).

Effective Date of Original Rules. Effective date of original Rules [Rule 86(a)] was September 16, 1938. McCrone v United States (1939) 307 US 61, 83 L Ed 1108, 59 S Ct 685.

Effective Date of 1939 Amendment to Rule 81. Amendment to Rule 81(a)(6) was adopted by order of December 28, 1939 (308 US 643, 84 L Ed 1427, 60 S Ct clix) and became effective February 3, 1941.

Effective Date of 1946 Amendments. Effective date of amendments adopted December 27, 1946 [Rule 86(b)] was March 19, 1948 (3 months after 1st Sess of 80th Cong adjourned on December 19, 1947. See Memorandum on Effective Date of Amendments of Federal Rules of Civil Procedure, United States Senate (80th Cong, 1st Sess 1947) 2; and Ashley v Keith Oil Corp. (1947, DC Mass) 7 FRD 589).

Effective Date of 1948 Amendments. Effective date of amendments adopted December 29, 1948 [Rule 86(c)] was October 20, 1949 (day following adjournment of 1st Reg Sess of 81st Cong on October 19, 1949).

Effective Date of 1951 Amendment. Rule 71A was adopted and Rule 81(a)(7) abrogated by order of April 30, 1951, which became effective August 1, 1951. 341 US 962, 95 L Ed 1404, 71 S Ct cxvii.

Effective Date of 1966 Amendments. Several new rules were added, and amendments to other rules made, by order of February 28, 1966, effective July 1, 1966. 384 US 1031, 15 L Ed 2d lxxv, 86 S Ct 145.

Effective Date of 1967 Amendments. Rule 72--76 were abrogated, Federal Rules of Appellate Procedure prescribed, and several rules amended by order of December 4, 1967, effective July 1, 1968. 389 US 1065, 19 L Ed 2d lxix, 88 S Ct 2333.

Effective Date of 1970 Amendments. Amendments to rules were prescribed by order of March 30, 1970, effective July 1, 1970. 398 US 979, 25 L Ed 2d xlviii, 90 S Ct 2357.

Effective Date of 1971 Amendments. Amendments to rules were further prescribed by order of March 1, 1971, effective July 1, 1971. 401 US 1017, 28 L

Ed 2d xxxix, 91 S Ct 2311.

Effective Dates of 1972 Amendments. Amendments to Rules 30, 32, 43 and 44.1, relating to the Federal Rules of Evidence, were prescribed by orders of November 20, 1972, and December 18, 1972, effective on the one hundred and eightieth day beginning after the date of enactment of P.L. 93-595, 88 Stat. 1296 [Jan. 2, 1975].

Effective Dates of 1980 Amendments. Amendments to Rules 4, 5, 26, 28, 30, 32, 33, 34, 37, and 45, were prescribed by order of April 29, 1980, effective on August 1, 1980. 446 US 995, 64 L Ed 2d, xli.

Effective Dates of 1985 Amendments. Amendments to Rules 6(a), 45(d)(2), 52(a), 71A(h), and 83, were prescribed by order of April 29, 1985, effective on August 1, 1985. --US--, 85 L Ed 2d i, --S Ct--.

Effective Dates of 1993 Amendments. Amendments to Rules 1, 4, 4.1, 5(e), 11, 12(a), 15(c), 16, 26, 28(b), 29, 30, 31(a), 32, 33, 34(b), 36(a), 37, 38, 50(a), 53, 58, 71A(d), 72, 73, 74, 75(b), 76, were prescribed by order of April 22, 1993, effective on December 1, 1993.

[A] proposed amendment, to take effect Dec. 1, 1996, will change Rule 5(e) as follows (new language highlighted):

The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the 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. ~~A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States.~~ 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 ~~by~~ any local rules or practices.

[A] proposed amendment, to take effect Dec. 1, 1996, will change Rule 43(a) as follows (new language highlighted):

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. ~~In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.~~