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WASHINGTON, D.C. 20544

December 6, 1999

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 4, 5, 12, 14, 26, 30, and 37 of the Federal Rules of Civil Procedure and to Rules B, C, and E of the Supplemental Admiralty Rules. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Leonidas Ralph Mecham

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Summons

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

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

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties

on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g).

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

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

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

* * * * *

Rule 5. Serving and Filing Pleadings and Other Papers

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

* * * * *

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

(a) When Presented.

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(3) **(A)** The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity,

shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

* * * * *

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may

be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant

arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data

compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

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

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

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

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine

what disclosures — if any — are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

* * * * *

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly

file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

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

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

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to

offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant

to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative,

or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

* * * * *

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

* * * * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule

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

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

(2) the subjects on which discovery may be needed, when discovery should be completed, and

whether discovery should be conducted in phases or be limited to or focused upon particular issues;

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

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

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with

its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

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Rule 30. Depositions Upon Oral Examination

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

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

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

if the deponent or another person, or other circumstance, impedes or delays the examination.

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

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or

may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

(f) Certification and Delivery by Officer; Exhibits; Copies.

(1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing

and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be

marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

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

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

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including

attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

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SUPPLMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review

the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) **(i)** If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process

must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof — which may be by affidavit — that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

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Rule C. In Rem Actions: Special Provisions

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(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be within the district while the action is pending;

(d) in a forfeiture proceeding for violation of a federal statute, state:

(i) the place of seizure and whether it was on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) all allegations required by the statute under which the action is brought.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(ii) **(A)** In other actions, the court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to

show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an

action brought by the United States, any officer or employee of the United States.

(c) Deposit in Court. If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue — in addition to the warrant — a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental Process. The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule

E(5). If the property is not released within 10 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must file an answer within 20 days after filing the statement of interest or right.

(c) Interrogatories. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the

interrogatories must be served with the answer to the complaint.

Rule E. Actions In Rem and Quasi In Rem: General Provisions

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(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) In forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.

(c) **Issuance and Delivery.** Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

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(7) Security on Counterclaim.

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to

respond in damages if a private party but is relieved by law from giving security.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

* * * * *

(b) Interlocutory Sales; Delivery.

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold — with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court — if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in Rule E(9)(b)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

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(10) Preservation of Property. When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.

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

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EVIDENCE RULES

MEMORANDUM

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure

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

Date: May 11, 1999

Re: Report of the Advisory Committee on Civil Rules

I. INTRODUCTION

At its meeting on April 19 and 20, 1999, in Gleneden Beach, Oregon, the Civil Rules Advisory Committee approved recommendations for the adoption of the three rules packages that were published for comment in August 1998. The first package, involving Rules 4 and 12, would regulate service on the United States and the time to answer when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of public duties. The second package, involving Admiralty Rules B, C, and E, along with conforming changes to Civil Rule 14, would adjust these rules to reflect the growing use of admiralty procedure in civil forfeiture proceedings and also to reflect 1993 changes in Civil Rule 4. The third package would amend discovery Rules 5, 26, 30, 34*, and 37 to reduce cost and increase the efficiency of discovery, while yet preserving the policy of full disclosure and judicial discretion in case management.

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Service Rules Package.

The first package, involving service on the United States, was initiated at the suggestion of the Department of Justice to provide service on the United States and 60 days to answer a complaint

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* At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision. The proposed cost-bearing addition to Rule 26(b)(2) and the conforming cross-reference in Rule 34(b) have been deleted.

against an individual sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. This change would make the practice essentially the same as when a United States officer is sued in an official capacity. The Committee's recommendation was adopted without any substantial opposition.

Admiralty Rules Package.

The proposals to amend the Admiralty Rules grew from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been employed for civil forfeiture proceedings. With the dramatic growth in land-based civil forfeiture proceedings, the need to adopt changes making some distinctions between maritime and forfeiture procedures became apparent. The process of considering these changes also led to a number of other proposed changes, including some designed to reflect the 1993 reorganization of Rule 4.

These proposals were developed over a long period, beginning with groundwork done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Committee's Admiralty Rules Subcommittee. When the Committee finally discussed the proposals in October 1997, the chair of the Maritime Law Association Rules Committee and a representative of the Department of Justice attended and participated.

The Committee is pleased that lawyers using the Admiralty Rules seem satisfied with the proposed changes. Several comments received in response to publication indicated minor changes that the Committee has made. Through comment, the Federal Magistrate Judges Associations endorsed particularly the style changes as "a significant improvement" that "provide clarity."

Discovery Rules Package.

The discovery package has received the most attention from the public. The Committee received over 300 comments and heard testimony from over 70 witnesses during 3 hearings in December 1998 and January 1999. While the comments did not reveal much that was new to the Committee, the Committee did learn of minor deficiencies which have prompted some further changes that are described in more detail below. In substance, the package remains as published in August 1998.

Discovery Rules Process.

Before undertaking to present the specific proposals, I believe that it would be useful both to the Standing Committee and to those who may consider this package later to be given a brief background of the process because the Committee believes that the process pursued in connection with the discovery rules package created an unusually well-informed Committee that acted most selectively to adopt a modest, balanced package to address identified problems in a manner

comfortable to the practicing bar and to the courts. While the Committee has received the usual criticisms about various of its decisions — often competing criticisms — it has also received an unusual amount of support. From past experience, the Committee usually hears mostly from those offering criticism and not those offering support.

The discovery project formally began in the fall of 1996. For many years before then, the Committee had received complaints from the bar and the public that discovery costs too much. During the same period, the American College of Trial Lawyers advanced a proposal that had been advanced earlier by the American Bar Association Section of Litigation and by other bar groups to limit the scope of discovery to meet these concerns. In addition, the Civil Justice Reform Act directed the Judicial Conference to examine discovery and initial disclosure issues as part of its response to Congress, and in its final report to Congress on the Civil Justice Reform Act, the Conference called on the Committee to examine whether local variations of disclosure should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be put into national rules. With all of these stirrings, the Committee determined to focus on the architecture of discovery rules and determine whether modest changes could be effected to reduce the costs of discovery, to increase its efficiency, to restore uniformity of practice, and to encourage the judiciary to participate more actively in case management. The Committee determined expressly not to review the question of discovery abuse, a matter that had been the subject of repeated rules activity over the years.

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

The Boston College conference, to which the Committee invited a most distinguished group from the academic community, the bench, the bar, and representatives from various bar associations, was particularly successful. The Committee received formal responses not only from some academics, but also from the American Bar Association Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At the Committee's request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery and prepared a comprehensive report of its findings. The Committee also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice. The RAND Institute also prepared a report. Much of this material was printed in a symposium issue of the Boston College Law Review, and copies of this issue were provided to the members of the Standing Committee last year.

In all, the Committee received a wide range of information, including that which is summarized in connection with our formal request for comment when publishing the proposed rules package in August 1998. Important to the package, the Committee learned that in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs. In short, the discovery rules are relevant to only a limited portion of cases in which discovery is actively employed by the parties. In these cases, however, discovery was often thought to be too expensive, and concerns about undue expense were expressed by both plaintiffs' and defendants' attorneys. The Committee learned that the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed. The attorneys responding to the FJC survey indicated overwhelmingly — 83% — that they wanted changes made to the discovery rules.

At the Boston conference in particular, the Committee heard a nearly universal demand from the bar for national uniformity in discovery rules and a profound wish that the judiciary could be encouraged to engage in discovery issues earlier in each case and more completely. Both anecdotal and survey data seem to demonstrate that early judicial supervision of discovery reduces the cost of discovery and increases the parties' satisfaction with it.

Finally, from the FJC study, the Committee learned that some form of mandatory disclosure is used in a majority of districts. Even in "opt-out districts," the courts or individual judges have often imposed some form of mandatory disclosure. The FJC survey revealed that attorneys who have practiced disclosure are highly satisfied with it. Moreover, the Committee learned that an earlier expressed fear of satellite litigation with respect to disclosure was unfounded.

The discovery subcommittee, drawing on the matters presented at the conferences, on the data generated by the Federal Judicial Center and the RAND Institute, and on published legal literature, developed over 40 possible revisions to discovery rules for consideration by the Committee. The Committee narrowed this list and instructed the subcommittee to draft proposed amendments to implement specific proposals. In considering the various proposals offered by the subcommittee, the Committee engaged in debate at the highest level. Proposals that were thought to risk damage to procedural foundations were discarded, and proposals that unnecessarily favored particular interests were discarded. A balanced approach was sought in which more focused discovery could be employed, preserving the underlying purpose of discovery to provide the parties with full disclosure of opposing parties' positions in the litigation. When the vote in Committee on a proposal was close, the Committee chose not to proceed with the proposed change but elected rather to discuss the proposal further until a substantial majority in one direction or the other could be achieved. In the end, every proposal adopted for presentation to the Standing Committee in June 1998 was passed by a substantial majority. Through this process, the Committee satisfied itself that its recommendations represented changes that were modest, balanced, and likely designed to improve the efficiency and fairness of the rules.

As important to the immediate concerns that faced the Committee, the Committee also kept its focus on long-range discovery issues that will confront it in the emerging information age. The

Committee recognized that it will be faced with the task of devising mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation. While the tasks of designing discovery rules for an information age are formidable and still face the Committee, the mechanisms adopted in the current proposals begin the establishment of a framework in which to work.

Committee Response to Comments.

Following publication, public hearings, and the receipt of numerous comments, the discovery subcommittee proposed modest changes to the Committee to various of the rules to reflect deficiencies that had been discovered. At its April 1999 meeting in Oregon, the Committee again discussed each proposal and either approved or rejected it by unanimous vote or by a large majority.

In addition to a review of the changes proposed by the discovery subcommittee, the Committee independently debated motions made by members to review earlier substantive decisions of the Committee. While the debates on these motions uncovered again all of the policy considerations for and against, the Committee voted to remain with the proposals that it had submitted to the Standing Committee in June 1998. Nevertheless, in order to present fairly the views of the members making these motions, I am presenting the opposition views to give the Standing Committee a more complete background.

Professor Rowe's Motion.

Professor Rowe moved to abandon the proposed change to Rule 26(b)(1) relating to the scope of discovery. Rule 26(b)(1) now defines the scope of discovery to include any matter "relevant to the subject matter involved in the pending action." The Committee's proposal would limit the presumptive scope to include any "matter relevant to the claim or defense of any party." At the same time, the court would be given the power, for good cause shown, to authorize discovery to the present "subject matter" limit. The proposal would change the balance between attorney-controlled discovery and court-controlled discovery, but the overall scope of discovery authorized by Rule 26(b)(1) would not be altered.

Professor Rowe's motion to abandon this proposed change was presented to the Committee in written form, a copy of which is attached to the minutes prepared by the reporter. Professor Rowe noted that twenty years ago the Committee rejected a proposal to narrow the scope of discovery by amending Rule 26(b)(1) to authorize discovery of matters relevant to "the claim or defense." He noted that the Committee then felt that the change would substitute one general term for another and therefore would invite litigation. He urged that the Committee recognize this wisdom.

While he acknowledged that the proposed change was somewhat different, he concluded that it "makes no improvement in clarity." He argued that the change will lead to satellite litigation, "stonewall resistance," and overpleading. He observed that support for the change is spotty and that

other means to curb discovery abuse are preferable, particularly by emphasizing the "burdensomeness limits" of Rule 26(b)(2) and the availability of protective orders under Rule 26(c).

Following debate on Professor Rowe's motion, four members voted in favor and nine against. Thus, the Committee, by a substantial majority, elected to continue with the original proposal presented to the Standing Committee in June 1998. The views of the various members, both for and against, are ably described in the minutes of the meeting prepared by the reporter.

After the vote was taken, Professor Rowe commended the Committee for the thoughtfulness and thoroughness of the debate.

Mr. Lynk's Motion.

In addition to Professor Rowe's motion, Mr. Lynk made a motion to delete the proposal that affirms the court's authority to require a party to pay for excessive discovery. In the Committee's proposal, which originally was contained in Rule 34(b) and now has been moved to Rule 26(b), the Committee makes explicit the court's implicit authority to condition discovery which exceeds the limitations of Rule 26(b)(2)(i), (ii), and (iii), on the payment of reasonable costs of the discovery. The limitations of Rule 26(b)(2)(i), (ii), and (iii) are against excessive discovery. The Committee acted on the assumption that even now the courts have the authority to refuse excessive discovery or implicitly to condition it on the payment of costs.

Mr. Lynk moved to delete the proposed change, arguing that there was no need to add an explicit provision to the rules because judges already have the authority. By making the authority explicit, he maintained, the change would encourage courts to permit excessive discovery on the condition that costs be paid, thus undermining the limitations of (i), (ii), and (iii). He also maintained that moving the cost-bearing provision from Rule 34(b) to Rule 26(b)(2) only heightened this encouragement by applying it more clearly to all discovery. In the end, he argued, the result would be differential justice: the party who cannot afford to pay will not get this discovery, while the one who can pay — who may be eager to pay — will get the discovery.

Again, the Committee debated the motion at length, reviewing the policy considerations for and against, and following debate, five members voted in favor and eight voted against the motion. Accordingly, the Committee again elected to remain with its original proposal to the Standing Committee, subject to the change of moving the provision from Rule 34(b) to Rule 26(b).*

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* At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision, which has been deleted.

Committee Vote on Package.

After all of the recommendations of the subcommittee were debated and voted on and after the two additional motions were debated and voted on, the Advisory Committee voted unanimously to recommend the attached discovery package for adoption.

Personal Observations.

On a personal note, as chair of the Committee, I am particularly pleased with the thorough process that the Committee followed in making its recommendations, and I am proud of the sensitive judgment that it exercised. I do not recall Committee action ever having been taken with as much information as this Committee considered and with the depth of debate over the policy considerations. I would find it difficult to believe that this Committee — or another — could devise a significantly improved overall package. As I have already complimented the Committee, this was democratic action at its best.

I now proceed to summarize in detail the items requested for action by the Standing Committee. As already noted, Part II describes the rules proposed for Judicial Conference approval and Part III describes the rules proposed for possible publication.

II Action Items: Rules Transmitted for Judicial Conference Approval

A. Individual-Capacity Actions Against Federal Employees: Rules 4, 12

The proposed amendments to Rule 4 and Rule 12 were published in August 1998. The amendments are designed to do three things. Rule 4(i)(2) is amended to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Rule 4(i)(3) also is amended to ensure that an action is not dismissed for failure to serve all the persons required to be served under Rule 4(i)(2). Rule 12(a)(3) is amended to provide 60 days to answer in these individual-capacity actions, just as when a United States officer is sued in an official capacity.

The public comments and testimony suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap Report. Some of the comments also suggested that the dual-service requirement, and the extended time to answer, should be made available in individual-capacity actions against state employees. The Advisory Committee had considered this issue in drafting the published proposal. On reconsideration, the Advisory Committee concluded again that the time has not come to expand these provisions beyond the United States and its officers and employees.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

1 * * * * *

2 **(i) Serving~~ce Upon~~ the United States, ~~and~~ Its Agencies,**

3 **Corporations, ~~or~~ Officers, or Employees.**

4 * * * * *

5 (2) (A) Service ~~upon~~ on an ~~officer,~~ agency~~,~~ or
6 corporation of the United States, or an officer or
7 employee of the United States sued only in an
8 official capacity, ~~shall be~~ is effected by serving the
9 United States in the manner prescribed by
10 ~~paragraph (1) of this subdivision~~ Rule 4(i)(1) and
11 by also sending a copy of the summons and ~~of the~~
12 complaint by registered or certified mail to the
13 officer, employee, agency, or corporation.
14 (B) Service on an officer or employee of
15 the United States sued in an individual capacity
16 for acts or omissions occurring in connection with

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

17 the performance of duties on behalf of the United
18 States — whether or not the officer or employee
19 is sued also in an official capacity — is effected
20 by serving the United States in the manner
21 prescribed by Rule 4(i)(1) and by serving the
22 officer or employee in the manner prescribed by
23 Rule 4 (e), (f), or (g).

24 **(3)** The court shall allow a reasonable time ~~for~~ to
25 serve~~ice of~~ process under ~~this subdivision~~ Rule 4(i) for
26 the purpose of curing the failure to serve:

27 **(A)** all persons required to be served in an action
28 governed by Rule 4(i)(2)(A), ~~multiple officers,~~
29 ~~agencies, or corporations of the United States~~ if the
30 plaintiff has ~~effected service on~~ served either the
31 United States attorney or the Attorney General of the
32 United States, or

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

37 * * * * *

Committee Note

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

Paragraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be determined as a practical matter, considering whether the individual

defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

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

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

GAP Report

The most important changes were made to ensure that no one would read the seemingly independent provisions of paragraphs 2(A) and 2(B) to mean that service must be made twice both on the United States and on the United States employee when the employee is sued in both official and individual capacities. The word "only" was added in subparagraph (A) and the new phrase "whether or not the officer or employee is sued also in an individual capacity" was inserted in subparagraph (B).

Minor changes were made to include "Employees" in the catch-line for subdivision (i), and to add "or employee" in paragraph 2(A). Although it may seem awkward to think of suit against an employee in an official capacity, there is no clear definition that separates "officers" from "employees" for this purpose. The published proposal to amend Rule 12(a)(3) referred to actions against an employee sued in an official capacity, and it seemed better to make the rules parallel by adding "employee" to Rule 4(i)(2)(A) than by deleting it from Rule 12(a)(3)(A).

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

1 **(a) When Presented.**

2 * * * * *

3 (3) (A) The United States, an agency of the
4 United States, or an officer or ~~agency thereof~~
5 employee of the United States sued in an official
6 capacity, shall serve an answer to the complaint or
7 ~~to a~~ cross-claim~~;~~ — or a reply to a counterclaim~~;~~
8 — within 60 days after ~~the service upon~~ the
9 United States attorney is served with ~~of~~ the
10 pleading ~~in which~~ asserting the claim ~~is asserted~~.
11 (B) An officer or employee of the United
12 States sued in an individual capacity for acts or

13 omissions occurring in connection with the
14 performance of duties on behalf of the United
15 States shall serve an answer to the complaint or
16 cross-claim — or a reply to a counterclaim —
17 within 60 days after service on the officer or
18 employee, or service on the United States
19 attorney, whichever is later.
20 * * * * *

Committee Note

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

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report

No changes are recommended for Rule 12 as published.

B. Admiralty Rules B, C, E; Civil Rule 14

The Admiralty Rules proposals published in August 1998 were prompted by two primary goals. The first was to reflect the growing use of Admiralty procedure in civil forfeiture proceedings; the most important change in this area appears in Rule C(6), which for the first time establishes separate provisions for civil forfeiture proceedings. The second goal was to adjust for the 1993 amendments of Civil Rule 4. Civil Rule 14 is changed only to reflect the change of nomenclature in Admiralty Rule C(6).

There was little comment or testimony on these proposals. Minor drafting changes, made to reflect useful suggestions, are described in the GAP Report. One of these changes, in Rule C(3), acts on a comment that was addressed only to Rule B(1)(d). The change modifies the requirement that the court's clerk deliver the warrant of arrest to the marshal, so that the requirement is only that the warrant must be delivered to the marshal. The Advisory Committee recommends that there is no need to republish Rule C(3) to reflect this change, which establishes a parallel with Rule B in a way that conforms to changes earlier made in Civil Rule 4.

Rule B. <u>In Personam Actions:</u> Attachment and Garnishment~~: Special Provisions~~

1 ~~**(1) When Available; Complaint, Affidavit, Judicial**~~

2 ~~**Authorization, and Process.** With respect to any admiralty~~

3 ~~or maritime claim in personam a verified complaint may~~

4 ~~contain a prayer for process to attach the defendant's goods~~
5 ~~and chattels, or credits and effects in the hands of garnishees~~
6 ~~to be named in the process to the amount sued for, if the~~
7 ~~defendant shall not be found within the district. Such a~~
8 ~~complaint shall be accompanied by an affidavit signed by the~~
9 ~~plaintiff or the plaintiff's attorney that, to the affiant's~~
10 ~~knowledge, or to the best of the affiant's information and~~
11 ~~belief, the defendant cannot be found within the district. The~~
12 ~~verified complaint and affidavit shall be reviewed by the court~~
13 ~~and, if the conditions set forth in this rule appear to exist, an~~
14 ~~order so stating and authorizing process of attachment and~~
15 ~~garnishment shall issue. Supplemental process enforcing the~~
16 ~~court's order may be issued by the clerk upon application~~
17 ~~without further order of the court. If the plaintiff or the~~
18 ~~plaintiff's attorney certifies that exigent circumstances make~~
19 ~~review by the court impracticable, the clerk shall issue a~~
20 ~~summons and process of attachment and garnishment and the~~

21 ~~plaintiff shall have the burden on a post-attachment hearing~~
22 ~~under Rule E(4)(f) to show that exigent circumstances~~
23 ~~existed. In addition, or in the alternative, the plaintiff may,~~
24 ~~pursuant to Rule 4(e), invoke the remedies provided by state~~
25 ~~law for attachment and garnishment or similar seizure of the~~
26 ~~defendant's property. Except for Rule E(8) these~~
27 ~~Supplemental Rules do not apply to state remedies so~~
28 ~~invoked.~~
29 ~~**(2) Notice to Defendant.** No judgment by default shall~~
30 ~~be entered except upon proof, which may be by affidavit, (a)~~
31 ~~that the plaintiff or the garnishee has given notice of the~~
32 ~~action to the defendant by mailing to the defendant a copy of~~
33 ~~the complaint, summons, and process of attachment or~~
34 ~~garnishment, using any form of mail requiring a return~~
35 ~~receipt, or (b) that the complaint, summons, and process of~~
36 ~~attachment or garnishment have been served on the defendant~~
37 ~~in a manner authorized by Rule 4(d) or (i), or (c) that the~~

38 ~~plaintiff or the garnishee has made diligent efforts to give~~
39 ~~notice of the action to the defendant and has been unable to~~
40 ~~do so.~~

41 **(1) When Available; Complaint, Affidavit, Judicial**
42 **Authorization, and Process.** In an in personam action:

43 **(a)** If a defendant is not found within the district, a
44 verified complaint may contain a prayer for process to
45 attach the defendant's tangible or intangible personal
46 property — up to the amount sued for — in the hands of
47 garnishees named in the process.

48 **(b)** The plaintiff or the plaintiff's attorney must sign
49 and file with the complaint an affidavit stating that, to the
50 affiant's knowledge, or on information and belief, the
51 defendant cannot be found within the district. The court
52 must review the complaint and affidavit and, if the
53 conditions of this Rule B appear to exist, enter an order so
54 stating and authorizing process of attachment and

55 garnishment. The clerk may issue supplemental process
56 enforcing the court's order upon application without
57 further court order.

58 **(c)** If the plaintiff or the plaintiff's attorney certifies
59 that exigent circumstances make court review
60 impracticable, the clerk must issue the summons and
61 process of attachment and garnishment. The plaintiff has
62 the burden in any post-attachment hearing under Rule
63 E(4)(f) to show that exigent circumstances existed.

64 **(d)** **(i)** If the property is a vessel or tangible
65 property on board a vessel, the summons, process,
66 and any supplemental process must be delivered
67 to the marshal for service.

68 **(ii)** If the property is other tangible or
69 intangible property, the summons, process, and
70 any supplemental process must be delivered to a
71 person or organization authorized to serve it, who

72 may be (A) a marshal; (B) someone under contract
73 with the United States; (C) someone specially
74 appointed by the court for that purpose; or, (D) in
75 an action brought by the United States, any officer
76 or employee of the United States.
77 **(e)** The plaintiff may invoke state-law remedies under
78 Rule 64 for seizure of person or property for the purpose
79 of securing satisfaction of the judgment.
80 **(2) Notice to Defendant.** No default judgment may be
81 entered except upon proof — which may be by affidavit —
82 that:
83 **(a)** the complaint, summons, and process of
84 attachment or garnishment have been served on the
85 defendant in a manner authorized by Rule 4;
86 **(b)** the plaintiff or the garnishee has mailed to the
87 defendant the complaint, summons, and process of

88 attachment or garnishment, using any form of mail

89 requiring a return receipt; or

90 (c) the plaintiff or the garnishee has tried diligently to

91 give notice of the action to the defendant but could not do

92 so.

93 * * * * *

Committee Note

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction if the defendant was not an inhabitant of, or found within, the state. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some

circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

Rule C. ~~Actions~~ In Rem Actions: Special Provisions

1 * * * * *

2 ~~**(2) Complaint.** In actions in rem the complaint shall be~~

3 ~~verified on oath or solemn affirmation. It shall describe with~~

4 ~~reasonable particularity the property that is the subject of the~~

5 ~~action and state that it is within the district or will be during~~

6 ~~the pendency of the action. In actions for the enforcement of~~

7 ~~forfeitures for violation of any statute of the United States the~~

8 ~~complaint shall state the place of seizure and whether it was~~

9 ~~on land or on navigable waters, and shall contain such~~
10 ~~allegations as may be required by the statute pursuant to~~
11 ~~which the action is brought.~~
12 ~~**(3) Judicial Authorization and Process.** Except in~~
13 ~~actions by the United States for forfeitures or federal statutory~~
14 ~~violations, the verified complaint and any supporting papers~~
15 ~~shall be reviewed by the court and, if the conditions for an~~
16 ~~action in rem appear to exist, an order so stating and~~
17 ~~authorizing a warrant for the arrest of a vessel or other~~
18 ~~property that is the subject of the action shall issue and be~~
19 ~~delivered to the clerk who shall prepare the warrant. If the~~
20 ~~property is a vessel or a vessel and tangible property on board~~
21 ~~the vessel, the warrant shall be delivered to the marshal for~~
22 ~~service. If other property, tangible or intangible is the subject~~
23 ~~of the action, the warrant shall be delivered by the clerk to a~~
24 ~~person or organization authorized to enforce it, who may be~~
25 ~~a marshal, a person or organization contracted with by the~~

26 ~~United States, a person specially appointed by the court for~~
27 ~~that purpose, or, if the action is brought by the United States,~~
28 ~~any officer or employee of the United States. If the property~~
29 ~~that is the subject of the action consists in whole or in part of~~
30 ~~freight, or the proceeds of the property sold, or other~~
31 ~~intangible property, the clerk shall issue a summons directing~~
32 ~~any person having control of the funds to show cause why~~
33 ~~they should not be paid into court to abide the judgment.~~
34 ~~Supplemental process enforcing the court's order may be~~
35 ~~issued by the clerk upon application without further order of~~
36 ~~the court. If the plaintiff or the plaintiff's attorney certifies~~
37 ~~that exigent circumstances make review by the court~~
38 ~~impracticable, the clerk shall issue a summons and warrant~~
39 ~~for the arrest and the plaintiff shall have the burden on a post-~~
40 ~~arrest hearing under Rule E(4)(f) to show that exigent~~
41 ~~circumstances existed. In actions by the United States for~~
42 ~~forfeitures for federal statutory violations, the clerk, upon~~

43 ~~filing of the complaint, shall forthwith issue a summons and~~
44 ~~warrant for the arrest of the vessel or other property without~~
45 ~~requiring a certification of exigent circumstances.~~
46 ~~**(4) Notice.** No notice other than the execution of the~~
47 ~~process is required when the property that is the subject of the~~
48 ~~action has been released in accordance with Rule E(5). If the~~
49 ~~property is not released within 10 days after execution of~~
50 ~~process, the plaintiff shall promptly or within such time as~~
51 ~~may be allowed by the court cause public notice of the action~~
52 ~~and arrest to be given in a newspaper of general circulation in~~
53 ~~the district, designated by order of the court. Such notice shall~~
54 ~~specify the time within which the answer is required to be~~
55 ~~filed as provided by subdivision (6) of this rule. This rule~~
56 ~~does not affect the requirements of notice in actions to~~
57 ~~foreclose a preferred ship mortgage pursuant to the Act of~~
58 ~~June 5, 1920, ch. 250, §30, as amended.~~
59 * * * * *

60 ~~**(6) Claim and Answer; Interrogatories.** The claimant of~~
61 ~~property that is the subject of an action in rem shall file a~~
62 ~~claim within 10 days after process has been executed, or~~
63 ~~within such additional time as may be allowed by the court,~~
64 ~~and shall serve an answer within 20 days after the filing of the~~
65 ~~claim. The claim shall be verified on oath or solemn~~
66 ~~affirmation, and shall state the interest in the property by~~
67 ~~virtue of which the claimant demands its restitution and the~~
68 ~~right to defend the action. If the claim is made on behalf of~~
69 ~~the person entitled to possession by an agent, bailee, or~~
70 ~~attorney, it shall state that the agent, bailee, or attorney is duly~~
71 ~~authorized to make the claim. At the time of answering the~~
72 ~~claimant shall also serve answers to any interrogatories served~~
73 ~~with the complaint. In actions in rem interrogatories may be~~
74 ~~so served without leave of court.~~
75 **(2) Complaint.** In an action in rem the complaint must:
76 **(a)** be verified;

77 **(b)** describe with reasonable particularity the property
78 that is the subject of the action;
79 **(c)** in an admiralty and maritime proceeding, state that
80 the property is within the district or will be within the
81 district while the action is pending;
82 **(d)** in a forfeiture proceeding for violation of a federal
83 statute, state:
84 **(i)** the place of seizure and whether it was on
85 land or on navigable waters;
86 **(ii)** whether the property is within the district,
87 and if the property is not within the district the
88 statutory basis for the court's exercise of
89 jurisdiction over the property; and
90 **(iii)** all allegations required by the statute
91 under which the action is brought.

92 **(3) Judicial Authorization and Process.**

93 **(a) Arrest Warrant.**

94 (i) When the United States files a complaint
95 demanding a forfeiture for violation of a federal
96 statute, the clerk must promptly issue a summons
97 and a warrant for the arrest of the vessel or other
98 property without requiring a certification of
99 exigent circumstances.

100 (ii) (A) In other actions, the court must review
101 the complaint and any supporting papers. If
102 the conditions for an in rem action appear to
103 exist, the court must issue an order directing
104 the clerk to issue a warrant for the arrest of the
105 vessel or other property that is the subject of
106 the action.

107 (B) If the plaintiff or the plaintiff's
108 attorney certifies that exigent circumstances

109 make court review impracticable, the clerk
110 must promptly issue a summons and a warrant
111 for the arrest of the vessel or other property
112 that is the subject of the action. The plaintiff
113 has the burden in any post-arrest hearing
114 under Rule E(4)(f) to show that exigent
115 circumstances existed.
116 **(b) Service.**
117 **(i)** If the property that is the subject of the
118 action is a vessel or tangible property on board a
119 vessel, the warrant and any supplemental process
120 must be delivered to the marshal for service.
121 **(ii)** If the property that is the subject of the
122 action is other property, tangible or intangible, the
123 warrant and any supplemental process must be
124 delivered to a person or organization authorized to
125 enforce it, who may be: (A) a marshal; (B)

126 someone under contract with the United States;

127 (C) someone specially appointed by the court for

128 that purpose; or, (D) in an action brought by the

129 United States, any officer or employee of the

130 United States.

131 **(c) Deposit in Court.** If the property that is the

132 subject of the action consists in whole or in part of freight,

133 the proceeds of property sold, or other intangible property,

134 the clerk must issue — in addition to the warrant — a

135 summons directing any person controlling the property to

136 show cause why it should not be deposited in court to

137 abide the judgment.

138 **(d) Supplemental Process.** The clerk may upon

139 application issue supplemental process to enforce the

140 court's order without further court order.

141 **(4) Notice.** No notice other than execution of process is

142 required when the property that is the subject of the action has

143 been released under Rule E(5). If the property is not released
144 within 10 days after execution, the plaintiff must promptly —
145 or within the time that the court allows — give public notice
146 of the action and arrest in a newspaper designated by court
147 order and having general circulation in the district, but
148 publication may be terminated if the property is released
149 before publication is completed. The notice must specify the
150 time under Rule C(6) to file a statement of interest in or right
151 against the seized property and to answer. This rule does not
152 affect the notice requirements in an action to foreclose a
153 preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as
154 amended.

155 * * * * *

156 **(6) Responsive Pleading; Interrogatories.**

157 **(a) Civil Forfeiture.** In an in rem forfeiture action for
158 violation of a federal statute:

159 **(i)** a person who asserts an interest in or right
160 against the property that is the subject of the
161 action must file a verified statement identifying
162 the interest or right:
163 **(A)** within 20 days after the earlier of (1)
164 receiving actual notice of execution of
165 process, or (2) completed publication of notice
166 under Rule C(4), or
167 **(B)** within the time that the court allows;
168 **(ii)** an agent, bailee, or attorney must state the
169 authority to file a statement of interest in or right
170 against the property on behalf of another; and
171 **(iii)** a person who files a statement of interest
172 in or right against the property must serve an
173 answer within 20 days after filing the statement.
174 **(b) Maritime Arrests and Other Proceedings.** In an
175 in rem action not governed by Rule C(6)(a):

176 (i) A person who asserts a right of possession
177 or any ownership interest in the property that is
178 the subject of the action must file a verified
179 statement of right or interest:
180 (A) within 10 days after the earlier of (1)
181 the execution of process, or (2) completed
182 publication of notice under Rule C(4), or
183 (B) within the time that the court allows;
184 (ii) the statement of right or interest must
185 describe the interest in the property that supports
186 the person's demand for its restitution or right to
187 defend the action;
188 (iii) an agent, bailee, or attorney must state
189 the authority to file a statement of right or interest
190 on behalf of another; and
191 (iv) a person who asserts a right of possession
192 or any ownership interest must file an answer

193 within 20 days after filing the statement of interest

194 or right.

195 **(c) Interrogatories.** Interrogatories may be served

196 with the complaint in an in rem action without leave of

197 court. Answers to the interrogatories must be served with

198 the answer to the complaint.

Committee Note

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in

any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before

publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of

possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions In Rem and Quasi In Rem: General Provisions

* * * * *

1 **(3) Process.**

2 ~~(a) Territorial Limits of Effective Service. Process in~~

3 ~~rem and of maritime attachment and garnishment shall be~~

4 ~~served only within the district.~~

5 **(a)** In admiralty and maritime proceedings process in

6 rem or of maritime attachment and garnishment may be

7 served only within the district.

8 **(b)** In forfeiture cases process in rem may be served
9 within the district or outside the district when authorized
10 by statute.

11 (~~b~~c) **Issuance and Delivery.** Issuance and delivery of
12 process in rem, or of maritime attachment and
13 garnishment, shall be held in abeyance if the plaintiff so
14 requests.

15 * * * * *

16 ~~(7) **Security on Counterclaim.** Whenever there is~~
17 ~~asserted a counterclaim arising out of the same transaction or~~
18 ~~occurrence with respect to which the action was originally~~
19 ~~filed, and the defendant or claimant in the original action has~~
20 ~~given security to respond in damages, any plaintiff for whose~~
21 ~~benefit such security has been given shall give security in the~~
22 ~~usual amount and form to respond in damages to the claims~~
23 ~~set forth in such counterclaim, unless the court, for cause~~
24 ~~shown, shall otherwise direct; and proceedings on the original~~

25 ~~claim shall be stayed until such security is given, unless the~~
26 ~~court otherwise directs. When the United States or a corporate~~
27 ~~instrumentality thereof as defendant is relieved by law of the~~
28 ~~requirement of giving security to respond in damages it shall~~
29 ~~nevertheless be treated for the purposes of this subdivision~~
30 ~~E(7) as if it had given such security if a private person so~~
31 ~~situated would have been required to give it.~~
32 **(7) Security on Counterclaim.**
33 **(a)** When a person who has given security for
34 damages in the original action asserts a counterclaim that
35 arises from the transaction or occurrence that is the
36 subject of the original action, a plaintiff for whose benefit
37 the security has been given must give security for
38 damages demanded in the counterclaim unless the court,
39 for cause shown, directs otherwise. Proceedings on the
40 original claim must be stayed until this security is given,
41 unless the court directs otherwise.

42 **(b)** The plaintiff is required to give security under
43 Rule E(7)(a) when the United States or its corporate
44 instrumentality counterclaims and would have been
45 required to give security to respond in damages if a
46 private party but is relieved by law from giving security.
47 ~~**(8) Restricted Appearance.** An appearance to defend~~
48 ~~against an admiralty and maritime claim with respect to which~~
49 ~~there has issued process in rem, or process of attachment and~~
50 ~~garnishment whether pursuant to these Supplemental Rules or~~
51 ~~to Rule 4(e), may be expressly restricted to the defense of~~
52 ~~such claim, and in that event shall not constitute an~~
53 ~~appearance for the purposes of any other claim with respect~~
54 ~~to which such process is not available or has not been served.~~
55 **(8) Restricted Appearance.** An appearance to defend
56 against an admiralty and maritime claim with respect to which
57 there has issued process in rem, or process of attachment and
58 garnishment, may be expressly restricted to the defense of

59 such claim, and in that event is not an appearance for the
60 purposes of any other claim with respect to which such
61 process is not available or has not been served.

62 **(9) Disposition of Property; Sales.**

63 * * * * *

64 ~~(b) Interlocutory Sales. If property that has been~~
65 ~~attached or arrested is perishable, or liable to~~
66 ~~deterioration, decay, or injury by being detained in~~
67 ~~custody pending the action, or if the expense of keeping~~
68 ~~the property is excessive or disproportionate, or if there is~~
69 ~~unreasonable delay in securing the release of property, the~~
70 ~~court, on application of any party or of the marshal, or~~
71 ~~other person or organization having the warrant, may~~
72 ~~order the property or any portion thereof to be sold, and~~
73 ~~the proceeds, or so much thereof as shall be adequate to~~
74 ~~satisfy any judgment, may be ordered brought into court~~
75 ~~to abide the event of the action; or the court may, upon~~

76 ~~motion of the defendant or claimant, order delivery of the~~
77 ~~property to the defendant or claimant, upon the giving of~~
78 ~~security in accordance with these rules.~~
79 **(b) Interlocutory Sales; Delivery.**
80 (i) On application of a party, the marshal, or
81 other person having custody of the property, the
82 court may order all or part of the property sold —
83 with the sales proceeds, or as much of them as
84 will satisfy the judgment, paid into court to await
85 further orders of the court — if:
86 **(A)** the attached or arrested property is
87 perishable, or liable to deterioration, decay, or
88 injury by being detained in custody pending
89 the action;
90 **(B)** the expense of keeping the property is
91 excessive or disproportionate; or

92 **(C)** there is an unreasonable delay in
93 securing release of the property.
94 **(ii)** In the circumstances described in Rule
95 E(9)(b)(i), the court, on motion by a defendant or
96 a person filing a statement of interest or right
97 under Rule C(6), may order that the property,
98 rather than being sold, be delivered to the movant
99 upon giving security under these rules.
100 * * * * *
101 **(10) Preservation of Property.** When the owner or
102 another person remains in possession of property attached or
103 arrested under the provisions of Rule E(4)(b) that permit
104 execution of process without taking actual possession, the
105 court, on a party's motion or on its own, may enter any order
106 necessary to preserve the property and to prevent its removal.

Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction. But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 "in the manner provided by" state law.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached

or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

Rule 14. Third-Party Practice

1 **(a) When Defendant May Bring in Third Party.** At
2 any time after commencement of the action a defending party,
3 as a third-party plaintiff, may cause a summons and complaint
4 to be served upon a person not a party to the action who is or
5 may be liable to the third-party plaintiff for all or part of the
6 plaintiff's claim against the third-party plaintiff. The third-
7 party plaintiff need not obtain leave to make the service if the
8 third-party plaintiff files the third-party complaint not later
9 than 10 days after serving the original answer. Otherwise the
10 third-party plaintiff must obtain leave on motion upon notice
11 to all parties to the action. The person served with the
12 summons and third-party complaint, hereinafter called the
13 third-party defendant, shall make any defenses to the third-
14 party plaintiff's claim as provided in Rule 12 and any

15 counterclaims against the third-party plaintiff and cross-
16 claims against other third-party defendants as provided in
17 Rule 13. The third-party defendant may assert against the
18 plaintiff any defenses which the third-party plaintiff has to the
19 plaintiff's claim. The third-party defendant may also assert
20 any claim against the plaintiff arising out of the transaction or
21 occurrence that is the subject matter of the plaintiff's claim
22 against the third-party plaintiff. The plaintiff may assert any
23 claim against the third-party defendant arising out of the
24 transaction or occurrence that is the subject matter of the
25 plaintiff's claim against the third-party plaintiff, and the third-
26 party defendant thereupon shall assert any defenses as
27 provided in Rule 12 and any counterclaims and cross-claims
28 as provided in Rule 13. Any party may move to strike the
29 third-party claim, or for its severance or separate trial. A
30 third-party defendant may proceed under this rule against any
31 person not a party to the action who is or may be liable to the

32 third-party defendant for all or part of the claim made in the
33 action against the third-party defendant. The third-party
34 complaint, if within the admiralty and maritime jurisdiction,
35 may be in rem against a vessel, cargo, or other property
36 subject to admiralty or maritime process in rem, in which case
37 references in this rule to the summons include the warrant of
38 arrest, and references to the third-party plaintiff or defendant
39 include, where appropriate, ~~the claimant of~~ a person who
40 asserts a right under Supplemental Rule C(6)(b)(i) in the
41 property arrested.

42 * * * * *

43 **(c) Admiralty and Maritime Claims.** When a plaintiff
44 asserts an admiralty or maritime claim within the meaning of
45 Rule 9(h), the defendant or ~~claimant~~ person who asserts a
46 right under Supplemental Rule C(6)(b)(i), as a third-party
47 plaintiff, may bring in a third-party defendant who may be
48 wholly or partly liable, either to the plaintiff or to the third-

49 party plaintiff, by way of remedy over, contribution, or
50 otherwise on account of the same transaction, occurrence, or
51 series of transactions or occurrences. In such a case the third-
52 party plaintiff may also demand judgment against the third-
53 party defendant in favor of the plaintiff, in which event the
54 third-party defendant shall make any defenses to the claim of
55 the plaintiff as well as to that of the third-party plaintiff in the
56 manner provided in Rule 12 and the action shall proceed as if
57 the plaintiff had commenced it against the third-party
58 defendant as well as the third-party plaintiff.

Committee Note

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

GAP Report

Rule B(1)(a) was modified by moving "in an in personam action" out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process

be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons "to the plaintiff for service on the defendant." A parallel change is made in Rule C(3)(b).

C. Discovery Rules 5, 26, 30, 34, and 37

As detailed in last year's report and the Introduction, the package of proposed amendments to the discovery rules was developed on the basis of an unusually extensive information-gathering effort by the Advisory Committee. In October 1996, it appointed a Discovery Subcommittee, chaired by Hon. David F. Levi, and a Special Reporter, Prof. Richard L. Marcus, to explore possible improvements to the discovery rules. Over the following year, the Discovery Subcommittee hosted a conference of lawyers and judges from around the country to discuss possible discovery amendments, representatives of the Subcommittee attended an ABA Section of Litigation convention at which a session was devoted to discovery problems, and the whole Advisory Committee hosted a two-day conference at Boston College Law School to explore a wide range of discovery problems and solutions. In addition, the Federal Judicial Center did a survey of 1,000 recently closed cases to obtain information on current discovery practice and possible rule amendments to improve that practice.

Having received this information, the Advisory Committee reviewed over 40 possible rule amendments and selected those that seemed most promising, directing the Discovery Subcommittee to prepare specific proposed amendments to address those areas. The Discovery Subcommittee then met for two days to develop specific proposals, and the Advisory Committee adopted the proposed

amendments it brought to the Standing Committee last year from among those proposals.

At its June 1998 meeting, the Standing Committee authorized publication of proposed amendments to various rules relating to discovery — Civil Rules 5, 26, 30, 34, and 37.

The Advisory Committee held three public hearings on these proposed rule amendments — in Baltimore on Dec. 7, 1998, in San Francisco on Jan. 22, 1999, and in Chicago on Jan. 29, 1999. Altogether over 70 witnesses appeared and testified in the public hearings. In addition, the Advisory Committee received over 300 written comments.* Almost all of these comments and all of the testimony related to the proposed amendments to the discovery rules.

Perhaps in part due to the extent of the prepublication investigation of discovery issues — which had been on the Advisory Committee agenda almost continuously for over 20 years — the high volume of commentary made few new points.

The Advisory Committee's Discovery Subcommittee met in Chicago on Jan. 28, 1999, to discuss issues raised by commentary and testimony received by that time. In addition, after the formal comment period closed, the Subcommittee held a telephone

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* Approximately 30 of these comments were received after the agenda materials were prepared for the Advisory Committee's April 19-20 meeting, and were not included in the Summaries of Public Comments circulated in connection with that meeting. All of these comments were received more than six weeks after Feb. 1, 1999, the last date on which comments were to be received.

conference to discuss possible proposals to the full Committee responsive to the public comments and testimony.

The Discovery Subcommittee recommended that the Advisory Committee adhere to the package that was published, subject to consideration of several adjustments based on the public comments and testimony. Most of the adjustments focused on the Committee Notes, but a few went to the language of the Rules themselves. Specific recommendations were made as to most of these matters. The Advisory Committee acted to adopt several proposed refinements of rule language and Committee Notes. With these changes, the Advisory Committee voted unanimously to recommend adoption of the complete discovery package.

Because the discovery package is lengthy, it is best introduced by a short summary. Detailed development follows. The package was the focus of the great majority of the public comments and testimony on the August 1998 Civil Rules proposals. Because the entire Summary of Public Comments is of necessity so long that it would interfere with ready review of this Report, the summary is attached at Tab 6A-v. The summary is organized to coincide with the topics in the order of presentation, which corresponds to the numerical order of the Rules. Brief summaries of the most salient points are included in this Report.

1. Rule 5(d). Service and Filing Pleadings and Other Papers

The amendment forbids filing discovery materials until they are used in the proceeding. The Advisory Committee has proposed no changes to this rule or the Committee Note as published.

2. Rule 26. General Provisions Regarding Discovery; Duty of Disclosure

The published amendment proposals included a number of changes to Rule 26. For purposes of comprehension, it seems desirable to separate these changes into categories, and they will be so treated in this memorandum.

(a) Rule 26(a). Required Disclosures; Methods to Discover Additional Matter

The proposed amendments make a number of changes in the disclosure provision adopted in the 1993 amendments. They narrow the initial disclosure obligation and remove the previous authority to "opt out" of this requirement by local rule. At the same time, they exclude eight specified categories of proceedings from the initial disclosure requirements. They also permit any party to object that disclosure is not appropriate for the action and thereby submit to the court the question whether disclosure should occur. The amendments also provide for disclosure by added parties — who are not addressed in the current rule — and make a slight change in the timing of initial disclosures.

The Advisory Committee has decided to recommend different wording for the initial disclosure obligation. The published proposal called on each party to disclose information "supporting its claims or defenses." The new recommendation calls for disclosure of information that the disclosing party "may use to support its claims or defenses." This alternative wording was included in the published proposed amendments, and commentary was invited on the choice between that wording and the wording initially proposed. Except for this change, the Advisory Committee recommends no change to the rule as published. It has proposed some clarifications to the

Committee Note to address issues raised during the public commentary period.

(b) Rule 26(b)(1). Discovery Scope and Limits. In General.

The published proposed amendment limited attorney-controlled discovery to matter "relevant to the claim or defense of any party," and authorized the court to order discovery "relevant to the subject matter involved in the action" on a showing of good cause. It also modified the last sentence of the current rule and included a reference to the limitations of Rule 26(b)(2) in this subdivision.

The Advisory Committee proposes changing one word in the amended rule as published to avoid the risk of an untoward interpretation. The published proposal provided that the court might, for good cause, order discovery of any "information" relevant to the subject matter involved in the action. The recommendation is to substitute "matter" for "information"; this change will avoid any confusion that might arise from the first sentence of current subdivision (b)(1), which defines the scope of discovery as "any matter" relevant to the claim or defense of any party. In addition, the Advisory Committee proposes adding explanatory material to the Committee Note to address concerns raised during the public commentary period.

(c) Rule 26(b)(2). Discovery Scope and Limits: Limitations.

The published proposed amendment removed prior authority to deviate from the national limitations on the number of depositions or interrogatories by local rule, or to establish durational limitations on depositions by local rule. The published materials also noted that the

Advisory Committee was considering relocating to Rule 26(b)(2) the explicit authority to impose cost-bearing conditions on discovery that exceeded the limitations of Rule 26(b)(2) that was published for comment in a proposed amendment to Rule 34(b). The materials invited public comment on the question of proper location.

The Advisory Committee now proposes including cost-bearing in Rule 26(b)(2) rather than in Rule 34(b). The form of this change is exactly the one included in the memorandum that accompanied the published proposals. It also proposes additional explanatory material in the Committee Note regarding cost-bearing, as well as minor changes in the Note to accommodate concerns that arose during the public commentary period.*

(d) Rule 26(d) Timing and Sequence of Discovery. Rule 26(f) Conference of Parties; Planning for Discovery

The published proposed amendments to Rule 26(d) remove the present authority to exempt cases by local rule from the moratorium on discovery before the Rule 26(f) conference, but exempt from that moratorium the categories of proceedings exempted from initial disclosure.

The Advisory Committee is not proposing any change in the published proposed amendments to Rule 26(d) or to the Committee Note.

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* At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision. The proposed cost-bearing addition to Rule 26(b)(2) and the cross-reference in Rule 34(b) have been deleted.

The published proposed amendments to Rule 26(f) remove the present authority to exempt cases by local rule from the discovery conference requirement, but exempt from the conference requirement the categories of proceedings exempted from initial disclosure. The amendment also removes the requirement that this conference be a face-to-face meeting, but confers authority on courts to require that it be conducted face-to-face. In addition, it changes the timing for the meeting in order to ensure that the resulting report is received by the court before its action under Rule 16(b).

Based on concerns raised during the public commentary period, the Advisory Committee proposes that a sentence be added to the rule to permit courts that move very rapidly with initial case management to adopt a local rule to shorten the period between the Rule 26(f) conference and the Rule 16(b) conference with the court, and to shorten the time for submission of the written report or relieve the parties of the obligation to submit a written report if they instead give the court an oral report. Additional language for the Committee Note is also proposed to address this additional rule provision. The Advisory Committee concluded that this addition need not be published for comment; it responds to an issue that was raised in the comment process and should not be controversial.

3. Rule 30. Depositions Upon Oral Examination

The published proposed amendments would impose a presumptive limitation of depositions to "one day of seven hours." In addition, they would clarify a number of matters, including that any person — not only a party — who purports to instruct a deposition witness not to answer is subject to the limitations on such instructions imposed by amendments to Rule 30(d) in 1993.

The Advisory Committee proposes amending the published proposal to remove the "deponent veto" — the requirement that the deponent consent to extension of a deposition beyond the presumptive time limitation. The Advisory Committee also proposes to add clarifying language to the Committee Note regarding the proper computation of the deposition length limitation. In addition, it proposes a technical conforming amendment to Rule 30(f)(1) to remove the current direction to the court reporter to file a deposition transcript once it is completed. This change is necessary to give effect to the published change to Rule 5(d), which the Committee is recommending be forwarded to the Judicial Conference. Because it is purely a technical and conforming amendment, the Advisory Committee believes there is no need to publish it for comment.

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

The published proposed amendments added to Rule 34(b) a provision explicitly authorizing the court to condition discovery beyond the limitations of Rule 26(b)(i), (ii), or (iii) on payment of part or all of the costs of the responding party.

As noted above, the Advisory Committee decided that this cost-bearing provision would better be included in Rule 26(b)(2) itself (in the alternative form included in the published proposed amendments). Accordingly, it recommends that this proposed amendment to Rule 34(b) not be adopted. Owing to the reported frequency of concerns in document production situations, however, the Advisory Committee also proposes addition of a sentence to Rule 34(b) calling attention to the authority now made explicit in Rule 34(b). Appropriate changes to the Committee Note are also proposed. Because this change

merely calls attention to a rule provision that has been published, the Committee does not believe that republication is needed.*

5. Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Refusal to Admit

The published proposal added failure to amend a prior response to discovery as required by Rule 26(e)(2) to the circumstances warranting the sanction of Rule 37(c)(1) — refusal to permit use of material not properly provided via supplementation — listed in the current rule.

The Advisory Committee proposes a clarifying revision of the wording of the published rule change.

Rule 5. Serving~~ice~~ and Filing ~~of~~ Pleadings and Other Papers

1 * * * * *

2 **(d) Filing; Certificate of Service.** All papers after the

3 complaint required to be served upon a party, together with a

4 certificate of service, ~~shall~~ must be filed with the court within

5 a reasonable time after service, but disclosures under Rule

6 26(a)(1) or (2) and the following discovery requests and

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* As earlier noted, the Judicial Conference of the United States did not approve the cost-bearing provision, which has been deleted.

7 responses must not be filed until they are used in the
8 proceeding or the court orders filing: (i) depositions, (ii)
9 interrogatories, (iii) requests for documents or to permit entry
10 upon land, and (iv) requests for admission ~~the court may on~~
11 ~~motion of a party or on its own initiative order that~~
12 ~~depositions upon oral examination and interrogatories,~~
13 ~~requests for documents, requests for admission, and answers~~
14 ~~and responses thereto not be filed unless on order of the court~~
15 ~~or for use in the proceeding~~.
16

* * * * *

Committee Note

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

proceeding when the parties do not agree, are unaffected by these amendments.

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

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

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

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

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends no changes to either the amendments to Rule 5(d) or the Committee Note as published.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 **(a) Required Disclosures; Methods to Discover**
2 **Additional Matter.**
3 **(1) Initial Disclosures.** Except in categories of
4 proceedings specified in Rule 26(a)(1)(E), or to the extent
5 otherwise stipulated or directed by order ~~or local rule~~, a
6 party ~~shall~~ must, without awaiting a discovery request,
7 provide to other parties:
8 (A) the name and, if known, the address and
9 telephone number of each individual likely to have
10 discoverable information that the disclosing party may
11 use to support its claims or defenses, unless solely for
12 impeachment ~~relevant to disputed facts alleged with~~
13 ~~particularity in the pleadings~~, identifying the subjects
14 of the information;

15 (B) a copy of, or a description by category and
16 location of, all documents, data compilations, and
17 tangible things that are in the possession, custody, or
18 control of the party and that the disclosing party may
19 use to support its claims or defenses, unless solely for
20 impeachment ~~that are relevant to disputed facts~~
21 ~~alleged with particularity in the pleadings~~;
22 (C) a computation of any category of damages
23 claimed by the disclosing party, making available for
24 inspection and copying as under Rule 34 the
25 documents or other evidentiary material, not
26 privileged or protected from disclosure, on which
27 such computation is based, including materials
28 bearing on the nature and extent of injuries suffered;
29 and
30 (D) for inspection and copying as under Rule 34
31 any insurance agreement under which any person

32 carrying on an insurance business may be liable to
33 satisfy part or all of a judgment which may be entered
34 in the action or to indemnify or reimburse for
35 payments made to satisfy the judgment.
36 (E) The following categories of proceedings are
37 exempt from initial disclosure under Rule 26(a)(1):
38 (i) an action for review on an administrative
39 record;
40 (ii) a petition for habeas corpus or other
41 proceeding to challenge a criminal conviction or
42 sentence;
43 (iii) an action brought without counsel by a
44 person in custody of the United States, a state, or
45 a state subdivision;
46 (iv) an action to enforce or quash an
47 administrative summons or subpoena;

48 (v) an action by the United States to recover
49 benefit payments;
50 (vi) an action by the United States to collect
51 on a student loan guaranteed by the United States;
52 (vii) a proceeding ancillary to proceedings in
53 other courts; and
54 (viii) an action to enforce an arbitration award.
55 ~~Unless otherwise stipulated or directed by the court,~~
56 T~~t~~hese disclosures must ~~shall~~ be made at or within 14 ~~10~~
57 days after the Rule 26(f) conference ~~meeting of the parties~~
58 ~~under subdivision (f).~~ unless a different time is set by
59 stipulation or court order, or unless a party objects during
60 the conference that initial disclosures are not appropriate
61 in the circumstances of the action and states the objection
62 in the Rule 26(f) discovery plan. In ruling on the
63 objection, the court must determine what disclosures —
64 if any — are to be made, and set the time for disclosure.

65 Any party first served or otherwise joined after the Rule
66 26(f) conference must make these disclosures within 30
67 days after being served or joined unless a different time is
68 set by stipulation or court order. A party must ~~shall~~ make
69 its initial disclosures based on the information then
70 reasonably available to it and is not excused from making
71 its disclosures because it has not fully completed its
72 investigation of the case or because it challenges the
73 sufficiency of another party's disclosures or because
74 another party has not made its disclosures.

75 * * * * *

76 **(3) Pretrial Disclosures.** In addition to the
77 disclosures required by Rule 26(a)(1) and (2) ~~in the~~
78 ~~preceding paragraphs~~, a party ~~shall~~ must provide to other
79 parties and promptly file with the court the following
80 information regarding the evidence that it may present at
81 trial other than solely for impeachment ~~purposes~~:

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

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

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

97 Unless otherwise directed by the court, these disclosures
98 ~~shall~~ must be made at least 30 days before trial. Within

99 14 days thereafter, unless a different time is specified by
100 the court, a party may serve and promptly file a list
101 disclosing (i) any objections to the use under Rule 32(a)
102 of a deposition designated by another party under
103 ~~subparagraph (B)~~ Rule 26(a)(3)(B), and (ii) any objection,
104 together with the grounds therefor, that may be made to
105 the admissibility of materials identified under
106 ~~subparagraph (C)~~ Rule 26(a)(3)(C). Objections not so
107 disclosed, other than objections under Rules 402 and 403
108 of the Federal Rules of Evidence, ~~shall be deemed~~ are
109 waived unless excused by the court for good cause ~~shown~~.
110 **(4) Form of Disclosures~~; Filing~~.** Unless the court
111 orders otherwise ~~directed by order or local rule~~, all
112 disclosures under ~~paragraphs~~ Rules 26(a)(1) through (3)
113 must ~~shall~~ be made in writing, signed, and served.~~, and~~
114 ~~promptly filed with the court.~~
115 * * * * *

Committee Note

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

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

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final

report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, *supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the

number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from — or limit or expand — the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if — in the language of Rule 26(a)(3) — "the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly

to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

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

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

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the

effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties — and, when needed, the courts — with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a

defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

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

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

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures — if any — should be made. Ordinarily, this determination would be included

in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others — such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D) — may continue to be appropriate.

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

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

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to

require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 * * * * *

2 **(b) Discovery Scope and Limits.** Unless otherwise

3 limited by order of the court in accordance with these rules,

4 the scope of discovery is as follows:

5 **(1) In General.** Parties may obtain discovery
6 regarding any matter, not privileged, that ~~which~~ is
7 relevant to ~~the subject matter involved in the pending~~
8 ~~action, whether it relates to~~ the claim or defense of ~~the~~
9 ~~party seeking discovery or to the claim or defense of~~ any
10 ~~other~~ party, including the existence, description, nature,
11 custody, condition, and location of any books, documents,
12 or other tangible things and the identity and location of
13 persons having knowledge of any discoverable matter.
14 For good cause, the court may order discovery of any
15 matter relevant to the subject matter involved in the
16 action. Relevant ~~The~~ information ~~sought~~ need not be
17 admissible at the trial if the discovery ~~information sought~~
18 appears reasonably calculated to lead to the discovery of

19 admissible evidence. All discovery is subject to the

20 limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

21 * * * * *

Committee Note

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

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains

authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See* Discovery and Disclosure Practice, supra, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is

relevant to the claims or defenses depends on the circumstances of the pending action.

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

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf.* Crawford-El v. Britton, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter" — not "information" — relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 * * * * *

2 **(b) Discovery and Limits.**

3 * * * * *

4 **(2) Limitations.** By order ~~or by local rule~~, the court
5 may alter the limits in these rules on the number of
6 depositions and interrogatories~~;~~ or ~~and may also limit~~ the
7 length of depositions under Rule 30. ~~and~~ By order or local
8 rule, the court may also limit the number of requests
9 under Rule 36. The frequency or extent of use of the
10 discovery methods otherwise permitted under these rules
11 and by any local rule shall be limited by the court if it
12 determines that: (i) the discovery sought is unreasonably
13 cumulative or duplicative, or is obtainable from some
14 other source that is more convenient, less burdensome, or
15 less expensive; (ii) the party seeking discovery has had
16 ample opportunity by discovery in the action to obtain the
17 information sought; or (iii) the burden or expense of the
18 proposed discovery outweighs its likely benefit, taking
19 into account the needs of the case, the amount in

20 controversy, the parties' resources, the importance of the
21 issues at stake in the litigation, and the importance of the
22 proposed discovery in resolving the issues. The court
23 may act upon its own initiative after reasonable notice or
24 pursuant to a motion under ~~subdivision~~ Rule 26(c).
25 * * * * *

Committee Note

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 * * * * * *

2 **(d) Timing and Sequence of Discovery.** Except in
3 categories of proceedings exempted from initial disclosure
4 under Rule 26(a)(1)(E), or when authorized under these rules
5 or by ~~local rule,~~ order, or agreement of the parties, a party
6 may not seek discovery from any source before the parties
7 have ~~met and~~ conferred as required by ~~subdivision~~ Rule 26(f).
8 Unless the court upon motion, for the convenience of parties
9 and witnesses and in the interests of justice, orders otherwise,
10 methods of discovery may be used in any sequence, and the
11 fact that a party is conducting discovery, whether by
12 deposition or otherwise, ~~shall~~ does not operate to delay any
13 other party's discovery.

14 * * * * *

15 **(f) Conference ~~Meeting~~ of Parties; Planning for**
16 **Discovery.** Except in categories of proceedings ~~actions~~

17 exempted from initial disclosure under Rule 26(a)(1)(E) ~~by~~
18 ~~local rule~~ or when otherwise ordered, the parties ~~shall~~ must,
19 as soon as practicable and in any event at least 21 ~~14~~ days
20 before a scheduling conference is held or a scheduling order
21 is due under Rule 16(b), confer ~~meet~~ to consider ~~discuss~~ the
22 nature and basis of their claims and defenses and the
23 possibilities for a prompt settlement or resolution of the case,
24 to make or arrange for the disclosures required by ~~subdivision~~
25 Rule 26(a)(1), and to develop a proposed discovery plan~~. The~~
26 ~~plan shall~~ that indicates the parties' views and proposals
27 concerning:
28 (1) what changes should be made in the timing, form,
29 or requirement for disclosures under ~~subdivision~~ Rule
30 26(a) ~~or local rule~~, including a statement as to when
31 disclosures under ~~subdivision~~ Rule 26(a)(1) were made or
32 will be made;

33 (2) the subjects on which discovery may be needed,
34 when discovery should be completed, and whether
35 discovery should be conducted in phases or be limited to
36 or focused upon particular issues;
37 (3) what changes should be made in the limitations on
38 discovery imposed under these rules or by local rule, and
39 what other limitations should be imposed; and
40 (4) any other orders that should be entered by the
41 court under ~~subdivision~~ Rule 26(c) or under Rule 16(b)
42 and (c).
43 The attorneys of record and all unrepresented parties that have
44 appeared in the case are jointly responsible for arranging the
45 conference ~~and being present or represented at the meeting~~,
46 for attempting in good faith to agree on the proposed
47 discovery plan, and for submitting to the court within 14~~10~~
48 days after the conference ~~meeting~~ a written report outlining
49 the plan. A court may order that the parties or attorneys

50 attend the conference in person. If necessary to comply with
51 its expedited schedule for Rule 16(b) conferences, a court
52 may by local rule (i) require that the conference between the
53 parties occur fewer than 21 days before the scheduling
54 conference is held or a scheduling order is due under Rule
55 16(b), and (ii) require that the written report outlining the
56 discovery plan be filed fewer than 14 days after the
57 conference between the parties, or excuse the parties from
58 submitting a written report and permit them to report orally
59 on their discovery plan at the Rule 16(b) conference.
60 * * * * *

Committee Note

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

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

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for

completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

Rule 30. Depositions Upon Oral Examination

1 * * * * *

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

4 (1) Any objection ~~to evidence~~ during a deposition
5 ~~shall~~ must be stated concisely and in a non-argumentative
6 and non-suggestive manner. A person ~~party~~ may instruct
7 a deponent not to answer only when necessary to preserve
8 a privilege, to enforce a limitation ~~on evidence~~ directed by
9 the court, or to present a motion under ~~paragraph~~ Rule
10 30(d)(4~~3~~).

11 (2) Unless otherwise authorized by the court or
12 stipulated by the parties, a deposition is limited to one day
13 of seven hours. ~~By order or local rule, t~~The court ~~may~~
14 ~~limit the time permitted for the conduct of a deposition,~~
15 ~~but shall~~ must allow additional time consistent with Rule
16 26(b)(2) if needed for a fair examination of the deponent

17 or if the deponent or another person ~~party~~, or other
18 circumstance, impedes or delays the examination.

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

25 (4~~3~~) At any time during a deposition, on motion of a
26 party or of the deponent and upon a showing that the
27 examination is being conducted in bad faith or in such
28 manner as unreasonably to annoy, embarrass, or oppress
29 the deponent or party, the court in which the action is
30 pending or the court in the district where the deposition is
31 being taken may order the officer conducting the
32 examination to cease forthwith from taking the
33 deposition, or may limit the scope and manner of the

34 taking of the deposition as provided in Rule 26(c). If the
35 order made terminates the examination, it ~~shall~~ may be
36 resumed thereafter only upon the order of the court in
37 which the action is pending. Upon demand of the
38 objecting party or deponent, the taking of the deposition
39 ~~shall~~ must be suspended for the time necessary to make a
40 motion for an order. The provisions of Rule 37(a)(4)
41 apply to the award of expenses incurred in relation to the
42 motion.

43 * * * * *

44 **(f) Certification and Delivery ~~Filing~~ by Officer;**
45 **Exhibits; Copies.~~; Notice of Filing.~~**

46 (1) The officer ~~shall~~ must certify that the witness was
47 duly sworn by the officer and that the deposition is a true
48 record of the testimony given by the witness. This
49 certificate ~~shall~~ must be in writing and accompany the
50 record of the deposition. Unless otherwise ordered by the

51 court, the officer ~~shall~~ must securely seal the deposition in
52 an envelope or package indorsed with the title of the
53 action and marked "Deposition of [here insert name of
54 witness]" and ~~shall~~ must promptly ~~file it with the court in~~
55 ~~which the action is pending or~~ send it to the attorney who
56 arranged for the transcript or recording, who ~~shall~~ must
57 store it under conditions that will protect it against loss,
58 destruction, tampering, or deterioration. Documents and
59 things produced for inspection during the examination of
60 the witness~~, shall~~ must, upon the request of a party, be
61 marked for identification and annexed to the deposition
62 and may be inspected and copied by any party, except that
63 if the person producing the materials desires to retain
64 them the person may (A) offer copies to be marked for
65 identification and annexed to the deposition and to serve
66 thereafter as originals if the person affords to all parties
67 fair opportunity to verify the copies by comparison with

68 the originals, or (B) offer the originals to be marked for
69 identification, after giving to each party an opportunity to
70 inspect and copy them, in which event the materials may
71 then be used in the same manner as if annexed to the
72 deposition. Any party may move for an order that the
73 original be annexed to and returned with the deposition to
74 the court, pending final disposition of the case.
75 * * * * *

COMMITTEE NOTE

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

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

amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition — and courts asked to order an extension — might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not

produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time — even after the submission of the report required by Rule 26(a)(2) — for full exploration of the theories upon which the witness relies.

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

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

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all

depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

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

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

Subdivision (f)(1): This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcript or recording preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney must file it with the court.

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d)

regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree — or the court order — that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

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

1 * * * * *

2 **(c) Failure to Disclose; False or Misleading Disclosure;**

3 **Refusal to Admit.**

4 (1) A party that without substantial justification fails

5 to disclose information required by Rule 26(a) or 26(e)(1),

6 or to amend a prior response to discovery as required by

7 Rule 26(e)(2), ~~shall~~ is not, unless such failure is harmless,

8 ~~be~~ permitted to use as evidence at a trial, at a hearing, or

9 on a motion any witness or information not so disclosed.

10 In addition to or in lieu of this sanction, the court, on

11 motion and after affording an opportunity to be heard,
12 may impose other appropriate sanctions. In addition to
13 requiring payment of reasonable expenses, including
14 attorney's fees, caused by the failure, these sanctions may
15 include any of the actions authorized under ~~subparagraphs~~
16 Rule 37(b)(2)(A), (B), and (C) ~~of subdivision (b)(2) of~~
17 ~~this rule~~ and may include informing the jury of the failure
18 to make the disclosure.
19 * * * * *

COMMITTEE NOTE

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

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

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure "to amend a prior response to discovery as required by Rule 26(e)(2)." In addition, one minor phrasing change is recommended for the Committee Note.