Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence

Request For Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 1, 1999

AMENDMENTS ARE BEING PROPOSED TO:

Civil Rules	4, 5, 12, 14, 26, 30, 34, and 37, and Admiralty Rules B, C, and E
Evidence Rules	103, 404, 701, 702, 703, 803, and 902

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

- Civil Rules in Baltimore, Maryland on December 7, 1998; in San Francisco, California on January 22, 1999; and in Chicago, Illinois on January 29, 1999.
- Evidence Rules in Washington, D.C. on October 22, 1998; in Dallas, Texas on December 4, 1998; and in San Francisco, California on January 25, 1999.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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Address all communications on rules to
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, D.C. 20544

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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JUDICIAL CONFERENCE OF THE UNITED STATES

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TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Evidence Rules have proposed amendments to the federal rules and requested that the proposals be circulated to the bench, bar, and public for comment. The advisory committee notes explain the proposals. (The proposed amendments to the Bankruptcy Rules are contained in a separate pamphlet and are posted at <www.uscourts.gov>.)

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than February 1, 1999.** (Comments on the proposed Bankruptcy Rule amendments are due no later than January 1, 1999.) All communications on the rules should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. As part of a two-year pilot project, comments may be sent electronically via the Internet at <www.uscourts.gov>.

To provide persons and organizations wishing an opportunity to comment orally on the proposed amendments, hearings are scheduled to be held on the amendments to the Civil Rules in Baltimore, Maryland on December 7, 1998; in San Francisco, California on January 22, 1999; and in Chicago, Illinois on January 29, 1999. Hearings are scheduled to be held on the amendments to the Evidence Rules in Washington, D.C. on October 22, 1998; in Dallas, Texas on December 4, 1998; and in San Francisco, California on January 25, 1999.

Those wishing to testify should contact the Secretary of the Committee at the above address **at least 30 days before the hearing.** The advisory committees will review all timely received comments and will take a fresh look at the proposals in light of the comments. If an advisory committee approves a proposal, it and any revisions as well as a summary of all comments received from the public will then be considered by the Standing Committee. All comments are made part of the official record and are available for public inspection.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals**, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

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

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EVIDENCE RULES

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

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

Date: **June 30, 1998**

Re: **Reports of the Advisory Committee on Civil Rules**

I INTRODUCTION

The Advisory Committee on Civil Rules met on March 16-17, 1998, at the Duke University School of Law. At this meeting, it approved proposed amendments to several discovery rules with the recommendation that they be published for comment. It also approved for publication proposed amendments to Civil Rules 4 and 12 to provide, in an action against a federal officer or employee in an individual capacity, service on the United States and 60 days to answer.

The Committee also met on October 6-7, 1997, in Deer Valley, Utah. At this meeting, it approved proposed amendments to Supplemental Admiralty Rules B, C, and E, and a parallel change in Civil Rule 14 with the recommendation that they be published for comment.

The background and explanation for the changes are provided in Part II of this report, and the proposed amendments follow thereafter.

II ACTION ITEMS
RULES PROPOSED FOR PUBLICATION

Discovery Rules

When I assumed responsibilities as Chair of the Civil Rules Advisory Committee, existing proposals for change to the discovery rules had been pending for years. The American Bar Association had suggested narrowing the scope of discovery in the 1970s and this proposal to change Rule 26 has been the centerpiece of a more recent proposal by the American College of Trial Lawyers. Also, members of Congress had been pressing the Committee to make changes to the protective order rule. And finally, complaints persisted about the overall cost of discovery. In addition, the Committee was beginning to receive the results from its 1993 experimental changes

to authorize local courts to opt out of the new mandatory disclosure requirement. To focus a project on these discovery proposals and to attempt to put all open items to rest, I posed the following questions to the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Following the guidance of the Advisory Committee, the discovery subcommittee met in January 1998 to frame specific proposals and alternatives. These proposals were studied by the Advisory Committee at its March 1998 meeting at Duke University and gave rise to the proposals now recommended for publication and public comment.

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

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

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

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

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

The initial disclosure procedure adopted as Rule 26(a)(1) in 1993 would be significantly limited. National uniformity is established by rescinding the portion that authorizes individual districts to opt out by local rule. The scope of the disclosure obligation is substantially reduced, however, so that it would require disclosure only of the identity of witnesses and documents that support the disclosing party's position. Even supporting information need not be disclosed if it is aimed solely at impeachment. Other changes are proposed in addition to these major changes. In part because local rules are now barred, the rule lists eight categories of proceedings that are exempt from disclosure requirements. A party who believes that disclosure is not appropriate in the circumstances of the action can secure a judicial determination by stating the objection in the Rule 26(f) report. Explicit provision is made for disclosure by late-added parties. And, to be consistent with the proposed Rule 5(d) amendments, the present Rule 26(a)(4) provision for filing all disclosures is moved to Rule 26(a)(3) and limited to pretrial disclosures under (a)(3).

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

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

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

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

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[1] See note 3, p. 16 below.

for conferring and reporting are changed to ensure the court an adequate opportunity to consider the report before a scheduling conference.

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

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

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

As a final preliminary note, it should be explained that the Committee has made a deliberate decision not to attempt to restyle the subdivisions that would be changed by these proposed amendments. Discovery remains a controversial subject. The Committee believes that these proposals are carefully calculated to maintain all of the useful effects of present discovery practice, and at the same time to reduce unnecessary costs. But it is important to focus public comment and testimony on the substance of the intended changes. To couple general style revision with these changes would be to incite suspicions about the purposes of the style revisions and to diffuse comments.

Disclosure

National Uniformity. Rule 26(a)(1), first added in 1993, permitted local defection by local rule. This express invitation to disuniform practice arose from a two-fold concern for experiments under the Civil Justice Reform Act. In part, the Committee was moved by the fact that some districts had adopted local rules modeled on the draft proposal published by the Committee in 1991; it was anxious not to defeat this reliance by adopting a different national rule, even as it believed that the first proposal must be improved before adoption as a national rule. And in part, the Committee believed that local experimentation might provide valuable information for future refinements of disclosure practice.

However good these motives were, the wide disparities of practice from district to district have been found undesirable for several reasons. One set of reasons is practical. There are increasing numbers of lawyers who practice in different districts, and many clients who have litigation in several districts. Attorneys find it confusing to shift from one system to another. Clients are even more baffled by the different obligations they encounter. The other set of reasons is more

conceptual. There is a strong belief that the Rules Enabling Act contemplates a uniform national procedure. This belief allies with an increasing concern that local rules have proliferated on a variety of subjects, undesirably diluting the values of uniform federal procedure.

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

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

Set against this course is the concern that local variations should not be endured any longer than necessary. Remembering the controversy that swirled around Rule 26(a)(1) — and particularly remembering that it became effective only because Congress ran out of time to reject it — the Committee concluded that it is better to propose a less controversial rule for national uniformity. The beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.

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

This proposal responds to one of the fundamental objections that has been addressed to current initial disclosure practice. Opposition to present Rule 26(a)(1) draws great force from the belief that one side should not be forced to work for the other side. A party who understands the litigation better than its adversary may, by disclosing the identity of witnesses and documents, reveal

damaging theories of law or fact that, absent disclosure, would never be recognized by the adversary. Some proponents of broad disclosure believe that this is a desirable consequence. Others believe that it is a price to be paid for the benefit of "jump-starting" the discovery process by requiring disclosure of information that otherwise would inevitably be demanded in the first wave of any competent discovery program. Whatever the best long-term accommodation of these competing arguments may be, the better answer for the time being is clear. Initial disclosure remains highly controversial. The adversary system should not yet be qualified by disclosure to the extent of forcing the more sophisticated litigant to disclose even the mere identity of witnesses and documents that a less sophisticated adversary may not manage to uncover by discovery.

The Committee divided on a drafting question. As determined by the majority, the draft Rule 26(a)(1) refers to "supporting information." The alternative preferred by a few would refer to information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment."

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

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

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

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

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

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

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

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

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

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

The American College of Trial Lawyers has revived, and urged on the Committee, a proposal first advanced in 1977 by an ABA Section of Litigation Special Committee for the Study of

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[2] See note 3, p. 16 below.

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

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

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

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

Rule 26(b)(1) is changed in two additional respects. A new emphasis is added to the present final sentence. Discovery of information inadmissible at trial is retained, but it is emphasized that the information must be relevant. Although it is difficult to imagine that information not relevant to the parties' claims or defenses might be reasonably calculated to lead to the discovery of admissible evidence, the new emphasis will stop up one possible argument for excessive inquiry. The second change adds an explicit reminder that all discovery is subject to the limitations imposed by Rule 26(b)(2). There is widespread feeling that at least some courts are not using as vigorously as should be the power to control excessive discovery established by subdivision (b)(2). The new reminder is intended to encourage more frequent consideration of the (b)(2) principles.

Local Rules: Rule 26(b)(2)

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

Discovery Moratorium: Rule 26(d)

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

Rule 26(f) Conference

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

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

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

Deposition Length

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

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

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

Other Rule 30(d) Changes

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

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

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

Cost-Bearing: Rule 34(b)

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

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

the needs of modest cases even if the discovery itself would be clearly appropriate in larger-scale litigation. The guides of Rule 26(b)(2)(i), (ii), and (iii) are sufficient.

Cost-bearing is likely to be faced in one of two procedural settings. In the first, the party resisting discovery may move for a Rule 26(c) protective order; cost-bearing may be an appropriate response, even if the requested relief is an outright denial of discovery. In the second, the party seeking discovery may move to compel discovery under Rule 37(a); it is expected that the party resisting discovery will have raised the Rule 26(b)(2) objection in response to the discovery request, and the cost-bearing issue will be framed naturally. Both Rules 26(c) and 37(a) require that before making a motion the moving party confer, or attempt to confer, with the opposing party; the conference should be a fruitful occasion for resolving these matters on a pragmatic basis.

Alternative to Rule 34(b) Change

In proposed Rule 34(b), the Committee proposes an amendment that makes explicit the court's authority to condition document production exceeding the limitations of Rule 26(b)(2)(i), (ii), and (iii) on the payment of reasonable costs of their production. The Committee concluded that this limitation has most practical relevance to document production and therefore included this clarification in Rule 34, recognizing in the Note, however, the court's similar authority with respect to other discovery devices. The Discovery Subcommittee originally proposed that cost-bearing be added to Rule 26(b)(2) rather than Rule 34(b). This question continues to stir differences of opinion. The Committee would like to receive public comment on the inclusion of this cost-bearing provision alternatively in Rule 26(b)(2), in the following form:

RULE 26(b)

* * * * *

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

There are two arguments for inclusion of this cost-bearing provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs, and the placement of the provision in Rule 26(b)(2) would make explicit its application to other forms of discovery, including depositions.

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

Failure To Supplement Discovery Responses

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

Filing Discovery Materials

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

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

It is proposed to amend Rule 5(d) to provide that Rule 26(a)(1) and (2) disclosures and Rule 30, 31, 33, 34, and 36 discovery materials "need not be filed until they are used in the proceeding or the court orders filing."[3] Any use of discovery materials will require filing of the materials used — the most common illustrations will be uses to support motions, including summary-judgment motions, or use at trial. The filing requirement is limited to the materials used, although the court may order filing of additional materials to support its deliberations or to ensure public access to information of interest to the public.

Further Work of the Discovery Subcommittee

The Discovery Subcommittee continues to address issues of cost and delay in discovery. Among other things, it is exploring the question whether some means can be found to reduce the costs incurred to avoid inadvertent privilege waivers. One device that has been proposed is to allow an initial examination of documents covered by a Rule 34 request, without formally producing them, so that the requesting party can narrow the scope of the request and enable the responding party to undertake a thorough privilege review at lower cost.

Civil Rules 4, 12

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

Civil Rule 4(i) would be changed in two ways. New subparagraph (2)(B) covers "[s]ervice on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." Service is made on the United States in the usual manner under Rule 4(i)(1), and service is made on the individual defendant in the usual manner under Rule 4(e), (f), or (g). The Note reminds readers that reliance on Rule 4(e), (f), or (g) also invokes the waiver-of-service provisions of Rule 4(d).

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[3] The Committee on Rules of Practice and Procedure revised the proposal to read "but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses ~~need~~ must not be filed until they are used in the proceeding or the court orders filing . . . ."

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

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

Rule 12(a)(3) would be amended by adding a new subparagraph (B). A 60-day answer period is allowed in an action against an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. This period is allowed whether or not the United States decides to provide representation or to substitute the United States as defendant. The additional time is required to determine whether to do these things, even if it is decided not to do them.

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

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

These proposals have been developed over a long period. The initial work was done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Advisory Committee's Admiralty Rules Subcommittee. The chair of the MLA rules committee and a representative of the Department of Justice attended the Advisory Committee's October meeting and participated in the discussion that led to some final revisions of the proposals.

The proposals draw two major distinctions between forfeiture and admiralty proceedings, reflected in Rule C(6)(a) and (b). A longer time to respond is provided in forfeiture proceedings. And forfeiture proceedings allow an automatic right to participate to a broader range of those who assert rights against the forfeiture property than is permitted in maritime proceedings; the maritime procedure will continue to require intervention, rather than more direct participation, where intervention has been required in the past. These topics may be caught up in pending forfeiture legislation. Careful efforts are being made through the Administrative Office, in coordination with the Department of Justice, to keep abreast of legislative developments.

The portions of the rules affected by the proposed changes have been revised to incorporate current style conventions. These changes have included substantial reorganization of current rule provisions. Style suggestions were received from the Style Subcommittee after the Advisory Committee meeting. The suggestions were based on the pre-meeting draft, a matter of little consequence since few changes were made at the meeting.

Admiralty Rule B

Rule B governs maritime attachment, a procedure that can be used for one or both of two purposes. Maritime attachment may be used to establish quasi-in-rem jurisdiction when personal jurisdiction is not available and the claim does not support a true in rem claim against the attached property. Maritime attachment also is available as a security device when personal jurisdiction is available, so long as the defendant is not "found within the district."

Rule B(1)(d)(ii) is new. Rule C(3) was amended in 1993 to provide that in an in rem action service need not be made by a United States Marshal if the property seized is not a vessel or tangible property on board a vessel. Although a parallel change was considered for Rule B maritime attachment, for reasons that cannot be discovered only Rule C was changed. The Rule C(3) alternative is adopted by proposed Rule B(1)(d)(ii). The change reflects a continuing process of reducing the demands placed on the Marshals Service. Admiralty practitioners believe that service on board a vessel continues to involve sensitive and potentially dangerous circumstances that require the authority of an armed public official. Other attachments can be made effectively by any of the persons listed in the rule.

Rule B(1)(e) represents a significant change in a peculiar corner of present Rule B(1). Rule B(1) now provides that in addition to maritime attachment, the plaintiff may invoke state-law remedies for attachment and garnishment "pursuant to Rule 4(e)." Until 1993, Rule 4(e) allowed

use of state attachment and garnishment procedures in an action against "a party not an inhabitant of or found within the state." In 1993, Rule 4(e) was revised and redesignated as Rule 4(n)(2). At a minimum, Rule B(1) must be revised to incorporate the correct portion of Rule 4. Present Rule 4(n)(2), however, allows invocation of state remedies as to assets "found within the district" only on "showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule." Maritime attachment is available in every such case. After lengthy discussion, it was concluded that nothing significant would be accomplished by continuing to incorporate Rule 4(n)(2) in Rule B. At the same time, admiralty practitioners have found it helpful to invoke state-law security devices under Rule 64. There was some fear that reliance on Rule 64 might be found inconsistent with Rule B. Under Rule A, the Civil Rules apply in admiralty "except to the extent that they are inconsistent with these Supplemental Rules." To avoid any risk that Rule 64 might not continue to be available in admiralty, Rule B(1)(e) expressly incorporates Rule 64.

Admiralty Rule C

Rule C(2)(d)(ii) is new. It reflects statutory provisions that permit a forfeiture proceeding against property that is not in the district.

Rule C(4) is amended to reflect the changes in terminology made in Rule C(6). In addition, an apparent gap is filled by providing for the first time that publication of notice of an in rem proceeding can be terminated if the property is released after the 10-day period that triggers the obligation to publish but before publication is completed.

Rule C(6) is split into separate subdivisions to reflect the distinctions between forfeiture and maritime in rem proceedings. Subdivision (a), governing forfeiture, reflects the two central distinctions. One distinction involves the nature of the interests that establish an automatic right to participate in the proceeding. Present Rule C(6) refers to the "claimant." This reference has generated confusion. "Claimant" is replaced in subdivision (a)(i) by "a person who asserts an interest in or right against the property." This phrase includes those who assert any sort of interest, including such non-ownership and nonpossessory interests as liens. Such a person can assert the interest or right by filing a statement of interest or right, and later filing an answer. Proposed subdivision (b)(i), governing admiralty proceedings, replaces "claimant" with the phrase "[a] person who asserts a right of possession or any ownership interest in the property." This phrase is narrower than the parallel phrase in (a)(i), and is intended to capture the traditional and still continuing admiralty practice. Under this practice a person who asserts an interest or right less than possession or ownership — such as many varieties of lien — can participate only by intervention, not by simply filing a statement of right or interest.

Admiralty Rule E

Rule E(3) is amended to reflect statutory provisions that permit service of process outside the district in some forfeiture proceedings. (The parallel pleading change is made in Rule

C(2)(d)(ii), described above; the statutes are illustrated in the Rule C Note.) The Advisory Committee, on recommendation of its Subcommittee, voted for the lengthier version set out as paragraphs (a) and (b). The alternative version is set out because both Garner and Spaniol preferred it.

Rule E(7) is amended to make it clear that if Defendant A gives security, the plaintiff need not give security when Defendant B counterclaims.

Rule E(8) is amended to delete the provision for a restricted appearance when state quasi-in-rem jurisdiction provisions are invoked. This change reflects the amendment of Rule B(1)(e) that deletes the Rule B(1) provision invoking what now is Civil Rule 4(n)(2), as described above.

Rule E(9) is amended to reflect the changes in terminology in Rule C(6).

Rule E(10) is new. It provides for protection of attached or arrested property that remains in the possession of the owner or another person.

Finally, the change in Rule C(6) terminology requires parallel changes in Civil Rule 14(a) and (c).

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PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

1 * * * * *

2 **(i) Serving~~ee Upon~~ the United States, ~~and~~ Its**
3 **Agencies, Corporations, or Officers.**

4 * * * * *

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

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

17 with the performance of duties on behalf of
18 the United States is effected by serving the
19 United States in the manner prescribed by
20 paragraph (1) of this subdivision and by
21 serving the officer or employee in the manner
22 prescribed by subdivisions (e), (f), or (g).

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

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

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

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

employment that requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

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

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

Rule 5. Service and Filing ~~of~~ Pleadings and Other Papers

1 * * * * *

2 **(d) Filing; Certificate of Service.** All papers after
3 the complaint required to be served upon a party, together
4 with a certificate of service, shall be filed with the court
5 within a reasonable time after service, but disclosures under
6 Rule 26(a)(1) or (2) and the following discovery requests and
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~~.

COMMITTEE NOTE

Subdivision (d). Rule 5(d) is amended to provide that disclosure under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 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."

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

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. Accordingly, "use" of discovery materials such as documents in other discovery activities, such as depositions, would not trigger the filing requirement. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other

pertinent portions of materials that are so used. *See* Fed. R. Evid. 106; *cf.* Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

Rule 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
6 official capacity, shall serve an answer to the
7 complaint or ~~to a~~ cross-claim~~,~~ — or a reply to
8 a counterclaim~~,~~ — within 60 days after ~~the~~
9 ~~service upon~~ the United States attorney is
10 served with ~~of~~ the pleading ~~in which~~ asserting
11 the claim ~~is asserted~~.
12 (B) An officer or employee of the United
13 States sued in an individual capacity for acts
14 or omissions occurring in connection with the

15 performance of duties on behalf of the United
16 States shall serve an answer to the complaint
17 or ~~to a~~ cross-claim~~,~~ — or a reply to a
18 counterclaim~~,~~ — within 60 days after service
19 on the officer or employee, or service on the
20 United States Attorney, whichever is later.
21 * * * * *

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.

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
44 plaintiff asserts an admiralty or maritime claim within the
45 meaning of Rule 9(h), the defendant or ~~claimant~~ person who
46 asserts a right under Supplemental Rule C(6)(b)(i), as a third-
47 party plaintiff, may bring in a third-party defendant who may

48 be 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).

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
4 of proceedings specified in subparagraph (E), or to
5 the extent otherwise stipulated or directed by order ~~or~~
6 ~~local rule~~, a party shall, without awaiting a discovery
7 request, provide to other parties:
8 (A) the name and, if known, the address and
9 telephone number of each individual likely to
10 have discoverable information supporting its
11 claims or defenses, unless solely for
12 impeachment ~~relevant to disputed facts~~
13 ~~alleged with particularity in the pleadings~~,
14 identifying the subjects of the information;

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

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

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

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

76 * * * * *

77 **(3) Pretrial Disclosures.** In addition to the
78 disclosures required by Rule 26(a)(1) and (2) ~~in the~~

79 ~~preceding paragraphs~~, a party shall provide to other
80 parties and promptly file with the court the following
81 information regarding the evidence that it may present
82 at trial other than solely for impeachment ~~purposes~~:
83 (A) the name and, if not previously provided,
84 the address and telephone number of each
85 witness, separately identifying those whom the
86 party expects to present and those whom the
87 party may call if the need arises;
88 (B) the designation of those witnesses whose
89 testimony is expected to be presented by
90 means of a deposition and, if not taken
91 stenographically, a transcript of the pertinent
92 portions of the deposition testimony; and
93 (C) an appropriate identification of each
94 document or other exhibit, including

95 summaries of other evidence, separately
96 identifying those which the party expects to
97 offer and those which the party may offer if
98 the need arises.

99 Unless otherwise directed by the court, these
100 disclosures shall be made at least 30 days before trial.
101 Within 14 days thereafter, unless a different time is
102 specified by the court, a party may serve and promptly
103 file a list disclosing (i) any objections to the use under
104 Rule 32(a) of a deposition designated by another party
105 under subparagraph (B) and (ii) any objection,
106 together with the grounds therefor, that may be made
107 to the admissibility of materials identified under
108 subparagraph (C). Objections not so disclosed, other
109 than objections under Rules 402 and 403 of the

110 Federal Rules of Evidence, shall be deemed waived
111 unless excused by the court for good cause shown.
112 **(4) Form of Disclosures~~; Filing~~.** Unless the
113 court orders otherwise ~~directed by order or local rule~~,
114 all disclosures under paragraphs (1) through (3) must
115 ~~shall~~ be made in writing, signed, and served.~~, and~~
116 ~~promptly filed with the court.~~
117 * * * * *
118 **(b) Discovery Scope and Limits.** Unless otherwise
119 limited by order of the court in accordance with these rules,
120 the scope of discovery is as follows:
121 **(1) In General.** Parties may obtain discovery
122 regarding any matter, not privileged, that ~~which~~ is
123 relevant to ~~the subject matter involved in the pending~~
124 ~~action, whether it relates to~~ the claim or defense of ~~the~~
125 ~~party seeking discovery or to the claim or defense of~~

126 any ~~other~~ party, including the existence, description,
127 nature, custody, condition, and location of any books,
128 documents, or other tangible things and the identity
129 and location of persons having knowledge of any
130 discoverable matter. For good cause shown, the court
131 may order discovery of any information relevant to the
132 subject matter involved in the action. Relevant ~~The~~
133 information ~~sought~~ need not be admissible at the trial
134 if the discovery ~~information sought~~ appears
135 reasonably calculated to lead to the discovery of
136 admissible evidence. All discovery is subject to the
137 limitations imposed by subdivision (b)(2)(i), (ii), and
138 (iii).

139 **(2) Limitations.** By order ~~or by local rule~~, the
140 court may alter the limits in these rules on the number
141 of depositions and interrogatories, or ~~and may also~~

142 ~~limit~~ the length of depositions under Rule 30. ~~and~~ By
143 order or local rule, the court may also limit the
144 number of requests under Rule 36. The frequency or
145 extent of use of the discovery methods otherwise
146 permitted under these rules and by any local rule shall
147 be limited by the court if it determines that: (i) the
148 discovery sought is unreasonably cumulative or
149 duplicative, or is obtainable from some other source
150 that is more convenient, less burdensome, or less
151 expensive; (ii) the party seeking discovery has had
152 ample opportunity by discovery in the action to obtain
153 the information sought; or (iii) the burden or expense
154 of the proposed discovery outweighs its likely benefit,
155 taking into account the needs of the case, the amount
156 in controversy, the parties' resources, the importance
157 of the issues at stake in the litigation, and the

158 importance of the proposed discovery in resolving the
159 issues. The court may act upon its own initiative after
160 reasonable notice or pursuant to a motion under
161 subdivision (c).

162 * * * * *

163 **(d) Timing and Sequence of Discovery.** Except in
164 categories of proceedings exempted from initial disclosure
165 under subdivision (a)(1)(E), or when authorized under these
166 rules or by ~~local rule,~~ order~~,~~ or agreement of the parties, a
167 party may not seek discovery from any source before the
168 parties have ~~met and~~ conferred as required by subdivision (f).
169 Unless the court upon motion, for the convenience of parties
170 and witnesses and in the interests of justice, orders otherwise,
171 methods of discovery may be used in any sequence, and the
172 fact that a party is conducting discovery, whether by

173 deposition or otherwise, shall not operate to delay any other
174 party's discovery.

175 * * * * *

176 **(f) Conference ~~Meeting~~ of Parties; Planning for**
177 **Discovery.** Except in categories of proceedings ~~actions~~
178 exempted from initial disclosure under subdivision (a)(1)(E)
179 ~~by local rule~~ or when otherwise ordered, the parties shall, as
180 soon as practicable and in any event at least 21 ~~14~~ days before
181 a scheduling conference is held or a scheduling order is due
182 under Rule 16(b), confer ~~meet~~ to consider ~~discuss~~ the nature
183 and basis of their claims and defenses and the possibilities for
184 a prompt settlement or resolution of the case, to make or
185 arrange for the disclosures required by subdivision (a)(1), and
186 to develop a proposed discovery plan. The plan shall indicate
187 the parties' views and proposals concerning:

188 (1) what changes should be made in the
189 timing, form, or requirement for disclosures under
190 subdivision (a) ~~or local rule~~, including a statement as
191 to when disclosures under subdivision (a)(1) were
192 made or will be made;
193 (2) the subjects on which discovery may be
194 needed, when discovery should be completed, and
195 whether discovery should be conducted in phases or
196 be limited to or focused upon particular issues;
197 (3) what changes should be made in the
198 limitations on discovery imposed under these rules or
199 by local rule, and what other limitations should be
200 imposed; and
201 (4) any other orders that should be entered by
202 the court under subdivision (c) or under Rule 16(b)
203 and (c).

204 The attorneys of record and all unrepresented parties that have
205 appeared in the case are jointly responsible for arranging the
206 conference ~~and being present or represented at the meeting~~,
207 for attempting in good faith to agree on the proposed
208 discovery plan, and for submitting to the court within 14~~10~~
209 days after the conference ~~meeting~~ a written report outlining
210 the plan. A court may by local rule or order require that the
211 parties or attorneys attend the conference in person.
212 * * * * *

COMMITTEE NOTE

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

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

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

Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 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. Clients can be bewildered by the conflicting obligations they face when sued in different districts. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, *supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. § 2072.

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

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

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

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

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

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

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

New subdivision (a)(1)(E) excludes 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.

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 therefore encouraged in appropriate cases.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. 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 subparagraphs (a)(1)(C) and (D) — may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a 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 retained and moved 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.

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

of the action. The good-cause standard warranting broader discovery is meant to be flexible.

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

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on 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.

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 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

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

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of

proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case.

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

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

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the 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.

Rule 30. Depositions Upon Oral Examination

1 * * * * *

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

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

11 (2) Unless otherwise authorized by the court or
12 stipulated by the parties and the deponent, a
13 deposition is limited to one day of seven hours. ~~By~~
14 ~~order or local rule, t~~The court ~~may limit the time~~
15 ~~permitted for the conduct of a deposition, but~~ shall
16 allow additional time consistent with Rule 26(b)(2) if
17 needed for a fair examination of the deponent or if the
18 deponent or another person ~~party~~, or other
19 circumstance, impedes or delays the examination.
20 (3) If the court finds that any ~~such an~~
21 impediment, delay, or other conduct ~~that~~ has
22 frustrated the fair examination of the deponent, it may
23 impose upon the persons responsible an appropriate
24 sanction, including the reasonable costs and attorney's
25 fees incurred by any parties as a result thereof.

26 (~~4~~3) At any time during a deposition, on
27 motion of a party or of the deponent and upon a
28 showing that the examination is being conducted in
29 bad faith or in such manner as unreasonably to annoy,
30 embarrass, or oppress the deponent or party, the court
31 in which the action is pending or the court in the
32 district where the deposition is being taken may order
33 the officer conducting the examination to cease
34 forthwith from taking the deposition, or may limit the
35 scope and manner of the taking of the deposition as
36 provided in Rule 26(c). If the order made terminates
37 the examination, it shall be resumed thereafter only
38 upon the order of the court in which the action is
39 pending. Upon demand of the objecting party or
40 deponent, the taking of the deposition shall be
41 suspended for the time necessary to make a motion for

42 an order. The provisions of Rule 37(a)(4) apply to the

43 award of expenses incurred in relation to the motion.

44 * * * * *

COMMITTEE NOTE

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

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

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. The presumptive duration may be extended, or otherwise altered, by agreement. Because this provision is designed partly to protect the deponent, an agreement by the parties

to exceed the limitation is not sufficient unless the deponent also agrees. Absent such an agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

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

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

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

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

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

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

1 * * * * *

2 **(b) Procedure.** The request shall set forth, either by
3 individual item or by category, the items to be inspected, and
4 describe each with reasonable particularity. The request shall
5 specify a reasonable time, place, and manner of making the
6 inspection and performing the related acts. Without leave of
7 court or written stipulation, a request may not be served
8 before the time specified in Rule 26(d).

9 The party upon whom the request is served shall serve
10 a written response within 30 days after the service of the
11 request. A shorter or longer time may be directed by the court
12 or, in the absence of such an order, agreed to in writing by the
13 parties, subject to Rule 29. The response shall state, with
14 respect to each item or category, that inspection and related
15 activities will be permitted as requested, unless the request is
16 objected to, in which event the reasons for the objection shall
17 be stated. If objection is made to part of an item or category,
18 the part shall be specified and inspection permitted of the
19 remaining parts.

20 The party submitting the request may move for an
21 order under Rule 37(a) with respect to any objection to or
22 other failure to respond to the request or any part thereof, or
23 any failure to permit inspection as requested. <u>On motion</u>
24 <u>under Rule 37(a) or Rule 26(c), or on its own motion, the</u>

25 court shall — if appropriate to implement the limitations of
26 Rule 26(b)(2)(i), (ii), or (iii) — limit the discovery or require
27 the party seeking discovery to pay part or all of the reasonable
28 expenses incurred by the responding party.

29 A party who produces documents for inspection shall
30 produce them as they are kept in the usual course of business
31 or shall organize and label them to correspond with the
32 categories in the request.

33 * * * * *

COMMITTEE NOTE

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

of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

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

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

possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

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

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

1 * * * * *

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

4 (1) A party that without substantial
5 justification fails to disclose information required by
6 Rule 26(a), ~~or~~ 26(e)(1), or 26(e)(2) shall not, unless
7 such failure is harmless, be permitted to use as
8 evidence at a trial, at a hearing, or on a motion any
9 witness or information not so disclosed. In addition
10 to or in lieu of this sanction, the court, on motion and
11 after affording an opportunity to be heard, may
12 impose other appropriate sanctions. In addition to
13 requiring payment of reasonable expenses, including
14 attorney's fees, caused by the failure, these sanctions
15 may include any of the actions authorized under

50

16 subparagraphs (A), (B), and (C) of subdivision (b)(2)

17 of this rule and may include informing the jury of the

18 failure 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," and a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

Rule B. In Personam Actions: 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~~
30 ~~shall be entered except upon proof, which may be by~~

31 ~~affidavit. (a) that the plaintiff or the garnishee has given~~
32 ~~notice of the action to the defendant by mailing to the~~
33 ~~defendant a copy of the complaint, summons, and process of~~
34 ~~attachment or garnishment, using any form of mail requiring~~
35 ~~a return receipt, or (b) that the complaint, summons, and~~
36 ~~process of attachment or garnishment have been served on the~~
37 ~~defendant in a manner authorized by Rule 4(d) or (i), or (c)~~
38 ~~that the plaintiff or the garnishee has made diligent efforts to~~
39 ~~give notice of the action to the defendant and has been unable~~
40 ~~to do so.~~

41 **(1) When Available; Complaint, Affidavit, Judicial**
42 **Authorization, and Process.**

43 (a) If a defendant in an in personam action is
44 not found within the district, a verified complaint may
45 contain a prayer for process to attach the defendant's
46 tangible or intangible personal property — up to the

47 amount sued for — in the hands of garnishees named
48 in the process.

49 (b) The plaintiff or the plaintiff's attorney
50 must sign and file with the complaint an affidavit
51 stating that, to the affiant's knowledge, or on
52 information and belief, the defendant cannot be found
53 within the district. The court must review the
54 complaint and affidavit and, if the conditions of this
55 Rule B appear to exist, enter an order so stating and
56 authorizing process of attachment and garnishment.
57 The clerk may issue supplemental process enforcing
58 the court's order upon application without further
59 court order.

60 (c) If the plaintiff or the plaintiff's attorney
61 certifies that exigent circumstances make court review
62 impracticable, the clerk must issue the summons and

63 process of attachment and garnishment. The plaintiff
64 has the burden in any post-attachment hearing under
65 Rule E(4)(f) to show that exigent circumstances
66 existed.

67 **(d)** (i) If the property is a vessel or
68 tangible property on board a vessel,
69 the clerk must deliver the summons,
70 process, and any supplemental process
71 to the marshal for service.

72 (ii) If the property is other tangible or
73 intangible property, the clerk must
74 deliver the summons, process, and any
75 supplemental process to a person or
76 organization authorized to serve it,
77 who may be (A) a marshal; (B)
78 someone under contract with the

79 United States; (C) someone specially
80 appointed by the court for that
81 purpose; or, (D) in an action brought
82 by the United States, any officer or
83 employee of the United States.

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

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

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

94 (b) the plaintiff or the garnishee has mailed to
95 the defendant the complaint, summons, and process of
96 attachment or garnishment, using any form of mail
97 requiring a return receipt; or
98 (c) the plaintiff or the garnishee has tried
99 diligently to give notice of the action to the defendant
100 but could not do so.
101 *****

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~~

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

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

5 ~~the action and state that it is within the district or will be~~
6 ~~during the pendency of the action. In actions for the~~
7 ~~enforcement of forfeitures for violation of any statute of the~~
8 ~~United States the complaint shall state the place of seizure~~
9 ~~and whether it was on land or on navigable waters, and shall~~
10 ~~contain such allegations as may be required by the statute~~
11 ~~pursuant to 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 the property, tangible or intangible is the subject of~~

23 ~~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 the Rule E(5). If~~
49 ~~the 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 (2) **Complaint.** In an action in rem the complaint
60 must:

61 (a) be verified;

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

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

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

69 (i) the place of seizure and whether it
70 was on land or on navigable waters;
71 (ii) whether the property is within the
72 district, and if the property is not
73 within the district the statutory basis
74 for the court's exercise of jurisdiction
75 over the property; and
76 (iii) all allegations required by the
77 statute under which the action is
78 brought.
79 **(3) Judicial Authorization and Process.**
80 **(a) Arrest Warrant.**
81 (i) When the United States files a
82 complaint demanding a forfeiture for
83 violation of a federal statute, the clerk
84 must promptly issue a summons and a

85 warrant for the arrest of the vessel or
86 other property without requiring a
87 certification of exigent circumstances.
88 (ii) (A) In other actions, the court
89 must review the complaint and
90 any supporting papers. If the
91 conditions for an in rem action
92 appear to exist, the court must
93 issue an order directing the
94 clerk to issue a warrant for the
95 arrest of the vessel or other
96 property that is the subject of
97 the action.
98 (B) If the plaintiff or the
99 plaintiff's attorney certifies
100 that exigent circumstances

101 make court review
102 impracticable, the clerk must
103 promptly issue a summons and
104 a warrant for the arrest of the
105 vessel or other property that is
106 the subject of the action. The
107 plaintiff has the burden in any
108 post-arrest hearing under Rule
109 E(4)(f) to show that exigent
110 circumstances existed.

111 **(b) Service.**

112 (i) If the property that is the subject of
113 the action is a vessel or tangible
114 property on board a vessel, the clerk
115 must deliver the warrant and any

116 supplemental process to the marshal
117 for service.
118 (ii) If the property that is the subject
119 of the action is other property, tangible
120 or intangible, the clerk must deliver
121 the warrant and any supplemental
122 process to a person or organization
123 authorized to enforce it, who may be:
124 (A) a marshal; (B) someone under
125 contract with the United States; (C)
126 someone specially appointed by the
127 court for that purpose; or, (D) in an
128 action brought by the United States,
129 any officer or employee of the United
130 States.

131 (c) **Deposit in court.** If the property that is
132 the subject of the action consists in whole or in part of
133 freight, the proceeds of property sold, or other
134 intangible property, the clerk must issue — in addition
135 to the warrant — a summons directing any person
136 controlling the property to show cause why it should
137 not be deposited in court to abide the judgment.
138 (d) **Supplemental process.** The clerk may
139 upon application issue supplemental process to
140 enforce the court's order without further court order.
141 (4) **Notice.** No notice other than execution of process
142 is required when the property that is the subject of the action
143 has been released under Rule E(5). If the property is not
144 released within 10 days after execution, the plaintiff must
145 promptly — or within the time that the court allows — give
146 public notice of the action and arrest in a newspaper

147 designated by court order and having general circulation in
148 the district, but publication may be terminated if the property
149 is released before publication is completed. The notice must
150 specify the time under Rule C(6) to file a statement of interest
151 in or right against the seized property and to answer. This
152 rule does not affect the notice requirements in an action to
153 foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301
154 et seq., as amended.

155 * * * * *

156 ~~(6) Claim and Answer; Interrogatories. The~~
157 ~~claimant of property that is the subject of an action in rem~~
158 ~~shall file a claim within 10 days after process has been~~
159 ~~executed, or within such additional time as may be allowed by~~
160 ~~the court, and shall serve an answer within 20 days after the~~
161 ~~filing of the claim. The claim shall be verified on oath or~~
162 ~~solemn affirmation, and shall state the interest in the property~~

163 ~~by virtue of which the claimant demands its restitution and~~
164 ~~the right to defend the action. If the claim is made on behalf~~
165 ~~of the person entitled to possession by an agent, bailee, or~~
166 ~~attorney, it shall state that the agent, bailee, or attorney is duly~~
167 ~~authorized to make the claim. At the time of answering the~~
168 ~~claimant shall also serve answers to any interrogatories served~~
169 ~~with the complaint. In actions in rem interrogatories may be~~
170 ~~so served without leave of court.~~

171 **(6) Responsive pleading; Interrogatories.**

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

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

179 (A) within 20 days after the
180 earlier of (1) receiving actual
181 notice of execution of process,
182 or (2) completed publication
183 of notice under Rule C(4), or
184 (B) within the time that the
185 court allows;
186 (ii) an agent, bailee, or attorney must
187 state the authority to file a statement
188 of interest in or right against the
189 property on behalf of another; and
190 (iii) a person who files a statement of
191 interest in or right against the property
192 must serve an answer within 20 days
193 after filing the statement.

194 (b) Maritime Arrests and Other
195 Proceedings. In an in rem action not governed by
196 subdivision (a):
197 (i) A person who asserts a right of
198 possession or any ownership interest
199 in the property that is the subject of
200 the action must file a verified
201 statement of right or interest:
202 (A) within 10 days after the
203 earlier of (1) the execution of
204 process, or (2) completed
205 publication of notice under
206 Rule C(4), or
207 (B) within the time that the
208 court allows;

209 (ii) the statement of right or interest
210 must describe the interest in the
211 property that supports the person's
212 demand for its restitution or right to
213 defend the action;
214 (iii) an agent, bailee, or attorney must
215 state the authority to file a statement
216 of right or interest on behalf of
217 another; and
218 (iv) a person who asserts a right of
219 possession or any ownership interest
220 must file an answer within 20 days
221 after filing the statement of interest or
222 right.
223 (c) **Interrogatories.** Interrogatories may be
224 served with the complaint in an in rem action without

225 leave of court. Answers to the interrogatories must be

226 served with 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(a)(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.~~

3 ~~Process in rem and of maritime attachment and~~

4 ~~garnishment shall be served only within the district.~~

5 (a) In admiralty and maritime proceedings

6 process in rem or of maritime attachment and

7 garnishment may be served only within the district.

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

11 (~~b~~c) **Issuance and Delivery.** Issuance and
12 delivery of process in rem, or of maritime attachment
13 and garnishment, shall be held in abeyance if the
14 plaintiff so 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
35 that arises from the transaction or occurrence that is
36 the subject of the original action, a plaintiff for whose
37 benefit the security has been given must give security
38 for damages demanded in the counterclaim unless the
39 court, for cause shown, directs otherwise.

40 Proceedings on the original claim must be stayed until
41 this security is given, unless the court directs
42 otherwise.
43 **(b)** The plaintiff is required to give security
44 under paragraph (a) when the United States or its
45 corporate instrumentality counterclaims and would
46 have been required to give security to respond in
47 damages if a private party but is relieved by law from
48 giving security.
49 ~~(8) Restricted Appearance. An appearance to defend~~
50 ~~against an admiralty and maritime claim with respect to which~~
51 ~~there has issued process in rem, or process of attachment and~~
52 ~~garnishment whether pursuant to these Supplemental Rules or~~
53 ~~to Rule 4(e), may be expressly restricted to the defense of~~
54 ~~such claim, and in that event shall not constitute an~~

55 ~~appearance for the purposes of any other claim with respect~~
56 ~~to which such process is not available or has not been served.~~
57 **(8) Restricted Appearance.** An appearance to defend
58 against an admiralty and maritime claim with respect to which
59 there has issued process in rem, or process of attachment and
60 garnishment, may be expressly restricted to the defense of
61 such claim, and in that event is not an appearance for the
62 purposes of any other claim with respect to which such
63 process is not available or has not been served.
64 **(9) Disposition of Property; Sales.**
65 * * * * *
66 ~~(b) Interlocutory Sales. If property that has~~
67 ~~been attached or arrested is perishable, or liable to~~
68 ~~deterioration, decay, or injury by being detained in~~
69 ~~custody pending the action, or if the expense of~~
70 ~~keeping the property is excessive or disproportionate,~~

71 ~~or if there is unreasonable delay in securing the~~
72 ~~release of property, the court, on application of any~~
73 ~~party or of the marshal, or other person or~~
74 ~~organization having the warrant, may order the~~
75 ~~property or any portion thereof to be sold; and the~~
76 ~~proceeds, or so much thereof as shall be adequate to~~
77 ~~satisfy any judgment, may be ordered brought into~~
78 ~~court to abide the event of the action; or the court~~
79 ~~may, upon motion of the defendant or claimant, order~~
80 ~~delivery of the property to the defendant or claimant,~~
81 ~~upon the giving of security in accordance with these~~
82 ~~rules.~~

83 **(b) Interlocutory Sales; Delivery.**

84 (i) On application of a party, the
85 marshal, or other person having
86 custody of the property, the court may

87 order all or part of the property sold —
88 with the sales proceeds, or as much of
89 them as will satisfy the judgment, paid
90 into court to await further orders of the
91 court — if:
92 (A) the attached or arrested
93 property is perishable, or liable
94 to deterioration, decay, or
95 injury by being detained in
96 custody pending the action;
97 (B) the expense of keeping
98 the property is excessive or
99 disproportionate; or
100 (C) there is an unreasonable
101 delay in securing release of the
102 property.

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

111 * * * * *

112 **(10) Preservation of Property.** When the owner or
113 another person remains in possession of property attached or
114 arrested under the provisions of Rule E(4)(b) that permit
115 execution of process without taking actual possession, the
116 court, on a party's motion or on its own, may enter any order
117 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.

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).

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

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W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1997

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on October 20th and 21st in Charleston, S.C. At the meeting, the Committee approved three items for action by the Standing Committee--proposed amendments to Evidence Rules, with the recommendation that they be published for public comment. The Advisory Committee is submitting these proposed amendments to the Standing Committee at this time, but there is no intent to accelerate or otherwise change the regular schedule for public comment.

* * * * *

II. Action Items

A. Rule 103(a).

The proposed amendment to Rule 103 would add a new paragraph to subdivision (a). The goals of the proposal are: 1) to specify when and whether a party must renew an objection or offer of proof after losing an initial ruling on admissibility; and 2) to codify the principles of *Luce v. United States*, concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial.

The Evidence Rules Committee previously proposed an amendment to Evidence Rule

103 that would have added a new subdivision (e) to the Rule. At its June, 1997 meeting, the Standing Committee sent this proposal back for reconsideration on a number of grounds. Among the suggestions were: 1) that the *Luce* principle set forth in the Evidence Rules Committee's proposal was inappropriately limited to civil cases; and 2) that it would make more sense to amend subdivision (a), which already deals with objections and offers of proof, than it would be to add a new subdivision to the Rule. After considering these suggestions, the Evidence Rules Committee unanimously agreed upon a new proposal. This new proposal incorporates all of the suggestions for improvement made at the Standing Committee meeting, and sets forth clear-cut standards for determining when an objection or offer of proof must be renewed after an initial determination by the trial court. Both the proposed amendment and Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 103 be published for public comment, at the regularly scheduled time for publication.

B. Rule 404(a)

Congress is currently considering a proposal to amend Evidence Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. The Evidence Rules Committee reviewed this proposal and agreed, in principle, that an attack on the victim's character should open the door to permit a corresponding attack on the defendant's character. The Evidence Rules Committee was concerned, however, with the breadth of the language in the Congressional proposal, which might be read to permit an attack on the defendant's *credibility* whenever the defendant attacks the character of the victim. The Evidence Rules Committee agreed upon more limited language, and proposes an amendment to Rule 404(a) that would address Congressional concerns, and provide a more balanced use of character evidence when the defendant chooses to prove a negative character trait of the victim. Both the proposed amendment and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 404(a) be published for public comment, at the regularly scheduled time for publication.

C. Rules 803(6) and 902.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The Evidence Rules Committee unanimously agreed that an

amendment to Evidence Rule 803(6) was necessary to provide for uniform treatment of business records. The Committee also recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The Evidence Rules Committee notes that the proposed modification of Rules 803(6) and 902 to permit certification of business records is in accord with a trend in the states. The Evidence Rules Committee's proposed amendments are adapted from state versions of the Federal Rules of Evidence in Indiana, Maryland and Texas. The proposed amendments to Rules 803(6) and 902, and the Advisory Committee Notes to these amendments, are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendments to Evidence Rules 803(6) and 902 be published for public comment, at the regularly scheduled time for publication.

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FERN M. SMITH
EVIDENCE RULES

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

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: May 1, 1998

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 6th and 7th in New York City. At the meeting, the Committee approved three proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for public comment.

* * * * *

II. Action Items

A. Rule 702.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposal is also a response to bills pending in Congress that purport to "codify" *Daubert*, but that, in the Committee's view, raise more problems than they solve. The proposed amendment specifically extends the trial court's *Daubert* gatekeeping function to all expert testimony; requires a showing of reliable methodology and sufficient basis; and provides that the expert's methodology must be applied properly to the facts of the case. The Committee prepared an extensive Advisory Committee Note that will provide

guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible. Both the proposed amendment to Evidence Rule 702 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702 be approved for public comment.

B. Rule 701

The proposal to amend Evidence Rule 701 seeks to prevent the practice of proffering an expert as a lay witness and thereby end-running both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. Under the amendment, testimony cannot be admitted under Rule 701 if it is based on scientific, technical or other specialized knowledge. The language of the amendment intentionally tracks the language defining expert testimony in Rule 702. Both the proposed amendment to Evidence Rule 701 and the Advisory Committee Note to the amendment are attached to this Report. The proposed amendment does not prohibit lay witness testimony on matters of common knowledge that have traditionally been the subject of lay opinions.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701 be approved for public comment.

C. Rule 703.

The proposal to amend Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to weigh the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence. Both the proposed amendment to Evidence Rule 703 and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703 be approved for public comment.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

1 **Rule 103. Rulings on Evidence**

2 (a) Effect of erroneous ruling.—Error may not be
3 predicated upon a ruling which admits or excludes evidence
4 unless a substantial right of the party is affected, and

5 (1) Objection.—In case the ruling is one admitting
6 evidence, a timely objection or motion to strike appears of
7 record, stating the specific ground of objection, if the
8 specific ground was not apparent from the context; or

9 (2) Offer of proof.—In case the ruling is one
10 excluding evidence, the substance of the evidence was
11 made known to the court by offer or was apparent from
12 the context within which questions were asked.

---

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

13 Once the court, at or before trial, makes a definitive ruling
14 on the record admitting or excluding evidence, a party
15 need not renew an objection or offer of proof to preserve
16 a claim of error for appeal. But if under the court's ruling
17 there is a condition precedent to admission or exclusion,
18 such as the introduction of certain testimony or the pursuit
19 of a certain claim or defense, no claim of error may be
20 predicated upon the ruling unless the condition precedent
21 is satisfied.

* * * * *

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir.

1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or offer of proof once made is sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Crim.P. 51 (same); *Favala v. Cumberland Engineering Co.,* 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention

subsequently. *See, e.g., United States v. Vest,* 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence). While formal exceptions are unnecessary, the amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The amendment codifies the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to preserve

a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994), ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), *as corrected* 1997 U.S. App. LEXIS 12671 (1997).

(where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

1 (a) Character evidence generally.—Evidence of a
2 person's character or a trait of character is not admissible for
3 the purpose of proving action in conformity therewith on a
4 particular occasion, except:
5 (1) Character of accused. — Evidence of a pertinent
6 trait of character offered by an accused, or by the
7 prosecution to rebut the same~~;~~, or if evidence of a trait of

8 character of the victim of the crime is offered by the
9 accused and admitted under subdivision (a)(2), evidence
10 of a pertinent trait of character of the accused offered by
11 the prosecution;

12 (2) Character of victim.—Evidence of a pertinent trait
13 of character of the victim of the crime offered by an
14 accused, or by the prosecution to rebut the same, or
15 evidence of a character trait of peacefulness of the victim
16 offered by the prosecution in a homicide case to rebut
17 evidence that the victim was the first aggressor;

18 (3) Character of witness.— Evidence of the character
19 of a witness, as provided in rules 607, 608, and 609.

* * * * *

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding

character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule

404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

Rule 701. Opinion Testimony by Lay Witnesses

1 If the witness is not testifying as an expert, the witness'
2 testimony in the form of opinions or inferences is limited to
3 those opinions or inferences which are (a) rationally based on
4 the perception of the witness, ~~and~~ (b) helpful to a clear
5 understanding of the witness' testimony or the determination
6 of a fact in issue~~.~~ and (c) not based on scientific, technical or
7 other specialized knowledge.

COMMITTEE NOTE

Lay witnesses have often been permitted to testify on complicated, technical subjects. This permissiveness has created a problematic overlap between lay and expert witness testimony. *See, e.g., Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (insurance broker, who might have been qualified as an expert, was permitted to testify that the construction collapse at issue may have contributed to a substantial increase in the plaintiff's insurance premiums). Some courts have found it unnecessary to

decide whether a witness is offering expert or lay opinion, reasoning that the proffered opinion would be admissible under either Rule 701 or Rule 702. *See Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996) (the plaintiff's testimony as to future profits was admissible under either Rule 701 or Rule 702); *United States v. Fleishman*, 684 F.2d 1329 (9th Cir.1982) (whether the testimony was lay or expert opinion, it was permissible for an undercover agent to testify that a defendant was acting as a lookout). Other courts have held that a witness need not be qualified as an expert where the opinion is helpful and admissible under Rule 701. *See, e.g., United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (Rule 701 "blurred any rigid distinction that may have existed between" lay and expert testimony).

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony on scientific, technical, and other specialized knowledge through the rules governing expert testimony, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure,* 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and

discovery process"). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g, United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The phrase "scientific, technical or other specialized knowledge" is drawn from and is intended to have the same meaning as the identical phrase in Rule 702. *See, e.g., United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995) (law enforcement agent was properly permitted to provide expert testimony on the process of manufacturing crack cocaine; his testimony was based on specialized knowledge). The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or

things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995) .

Rule 702. Testimony by Experts

1 If scientific, technical, or other specialized knowledge will
2 assist the trier of fact to understand the evidence or to
3 determine a fact in issue, a witness qualified as an expert by
4 knowledge, skill, experience, training, or education, may
5 testify thereto in the form of an opinion or otherwise~~.~~,
6 provided that (1) the testimony is sufficiently based upon
7 reliable facts or data, (2) the testimony is the product of
8 reliable principles and methods, and (3) the witness has
9 applied the principles and methods reliably to the facts of the
10 case.

COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell*

Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying *Daubert*. In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. The Rule as amended provides that expert testimony of all types — not only the scientific testimony specifically addressed in *Daubert* — presents questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States,* 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were

neither exclusive nor dispositive. Other courts have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. *See Tyus v. Urban Search Management,* 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner,* 118 S.Ct. 512, 519 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.,* 29 F.3d

499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See also Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert "adheres to the same standards of intellectual rigor that are demanded in his professional work.").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended.

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 118 S.Ct. at 519. Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods consistent with professional standards, and yet reaches a conclusion that other experts in the field would not

reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994): "*any* step that renders the analysis unreliable . . . *renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

Daubert involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir. 1996) (*Daubert* inapplicable to expert testimony of automotive engineer); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by an accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the specific *Daubert* factors can be applied readily to the testimony of experts who are not scientists. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience," but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether

the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American

College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey one impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are sufficiently reliable, and so long as the proponent demonstrates that these principles and methods are applied reliably to the facts of the case, this type of testimony should be admitted.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's

inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

The amendment requires that expert testimony must be based upon reliable and sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the adequacy of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on a *sufficient* and reliable basis of information — whether admissible information or not — is governed by the reliability requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony, such as are discussed in, e.g, Margaret Berger,

Procedural Paradigms for Applying the Daubert Test, 78 Minn. L. Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

Rule 703. Bases of Opinion Testimony by Experts

1 The facts or data in the particular case upon which an
2 expert bases an opinion or inference may be those perceived
3 by or made known to the expert at or before the hearing. If
4 of a type reasonably relied upon by experts in the particular
5 field in forming opinions or inferences upon the subject, the
6 facts or data need not be admissible in evidence in order for
7 the opinion or inference to be admitted. If the facts or data
8 are otherwise inadmissible, they shall not be disclosed to the
9 jury by the proponent of the opinion or inference unless their
10 probative value substantially outweighs their prejudicial
11 effect.

COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted as evidence. Courts have reached different results on how to treat otherwise inadmissible information that is reasonably relied

upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand. L. Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand. L. Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information on the other. If the trial court finds that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect, the information may be disclosed to the jury, and a limiting instruction must be given upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances. Furthermore, the trial court must keep in mind that disclosure of the inadmissible information is permitted only if the probative value of the information, in the manner that it is disclosed

to the jury, substantially outweighs its prejudicial effect.

The amendment governs the use before the jury of otherwise inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's testimony, nor to deprive an expert of the use of inadmissible information to form and propound an expert opinion or inference. Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705.

The amendment provides a presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference, where that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

1 The following are not excluded by the hearsay rule,

2 even though the declarant is available as a witness:

3 * * * * *

4 (6) Records of regularly conducted activity.—A

5 memorandum, report, record, or data compilation, in any

6 form, of acts, events, conditions, opinions, or diagnoses,
7 made at or near the time by, or from information
8 transmitted by, a person with knowledge, if kept in the
9 course of a regularly conducted business activity, and if it
10 was the regular practice of that business activity to make
11 the memorandum, report, record, or data compilation, all
12 as shown by the testimony of the custodian or other
13 qualified witness, <u>or by certification that complies with</u>
14 <u>Rule 902(11), Rule 902(12), or a statute permitting</u>
15 <u>certification,</u> unless the source of information or the
16 method or circumstances of preparation indicate lack of
17 trustworthiness. The term "business" as used in this
18 paragraph includes business, institution, association,
19 profession, occupation, and calling of every kind, whether
20 or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g.*, *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Rule 902. Self-authentication

1 Extrinsic evidence of authenticity as a condition precedent
2 to admissibility is not required with respect to the following:
3 * * * * *
4 (11) Certified domestic records of regularly
5 conducted activity.—The original or a duplicate of a
6 domestic record of regularly conducted activity, which

7 would be admissible under Rule 803(6), and which the
8 custodian thereof or another qualified person certifies
9 under oath—
10 (A) was made at or near the time of the
11 occurrence of the matters set forth, by or from
12 information transmitted by, a person with
13 knowledge of those matters;
14 (B) was kept in the course of the regularly
15 conducted activity; and
16 (C) was made by the regularly conducted
17 activity as a regular practice.
18 A party intending to offer a record in evidence under this
19 paragraph must provide written notice of that intention to
20 all adverse parties, and must make the record available for

21 inspection sufficiently in advance of its offer in evidence
22 to provide an adverse party with a fair opportunity to
23 challenge it.

24 (12) Certified foreign records of regularly
25 conducted activity.—In a civil case, the original or a
26 duplicate of a foreign record of regularly conducted
27 activity, which would be admissible under Rule 803(6),
28 and which is accompanied by a written declaration by the
29 custodian thereof or another qualified person that the
30 record —

31 (A) was made at or near the time of the
32 occurrence of the matters set forth, by or from
33 information transmitted by, a person with
34 knowledge of those matters;

35 (B) was kept in the course of the regularly
36 conducted activity; and

37 (C) was made by the regularly conducted
38 activity as a regular practice.
39 The declaration must be signed in a manner which, if
40 falsely made, would subject the maker to criminal penalty
41 under the laws of the country where the declaration is
42 signed. A party intending to offer a record in evidence
43 under this paragraph must provide written notice of that
44 intention to all adverse parties, and must make the record
45 available for inspection sufficiently in advance of its offer
46 in evidence to provide an adverse party with a fair
47 opportunity to challenge it.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure

for domestic records, and for foreign records offered in civil cases. The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing

Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the

Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to

the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions

as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

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