Federal Rules of Civil Procedure Rule 1

Rule 1. Scope and Purpose

Currentness

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

3. These rules are drawn under the authority of the Act of June 19, 1934, U.S.C., Title 28, § 723b [see 2072] (Rules in actions at law; Supreme Court authorized to make), and § 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court) and also other grants of rule making power to the Court. See Clark and Moore, *A New Federal Civil Procedure--I. The Background,* 44 Yale L.J. 387, 391 (1935). Under § 723b after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with § 723c the Court has united the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. See Rule 2 (One Form of Action). For the former practice in equity and at law see U.S.C.A., Title 28, §§ 723 and 730 [see 2071 et seq.] (conferring power on the Supreme Court to make rules of practice in equity) and the [former] Equity Rules promulgated thereunder; U.S.C., Title 28, [former] § 724 (Conformity act); [former] Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity--Transfer); [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein); U.S.C., Title 28, [former] §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

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

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

1948 Amendment

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

1966 Amendment

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

1993 Amendments

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

2007 Amendment

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

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

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

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

4. Rule Numbers

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. Other Changes

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

Notes of Decisions (330)

Fed. Rules Civ. Proc. Rule 1, 28 U.S.C.A., FRCP Rule 1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 2

Rule 2. One Form of Action

Currentness

There is one form of action--the civil action.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N.Y. Code 1848 (Laws 1848, ch. 379) § 62; N.Y.C.P.A. (1937) § 8; Calif.Code Civ.Proc. (Deering, 1937) § 307; 2 Minn.Stat.Ann.1945 § 540.01; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§ 153, 255.

2007 Amendment

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

Notes of Decisions (56)

Fed. Rules Civ. Proc. Rule 2, 28 U.S.C.A., FRCP Rule 2
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294056.1

Federal Rules of Civil Procedure Rule 3

Rule 3. Commencing an Action

Currentness

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

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

PRACTICE COMMENTARY

by David D. Siegel

Paradoxically, most of what has to be said about Rule 3 is said in the course of the extensive Commentaries on Rule 4, set out following Rule 4 further on in this volume. But a warning to plaintiffs about to rely on Rule 3 in a case in which subject matter jurisdiction is based on diversity of citizenship is urgent enough to repeat here, under Rule 3 itself.

Rule 3 provides the rule of federal practice that the filing of the complaint marks the commencement of the action. The moment of filing is the key time to look to determine whether the statute of limitations has been satisfied. As long as the complaint has been filed on or before the last day--the assumption would run--the action is timely and the summons and complaint can be served at any time during the 120 days that follow. (The 120-period comes from Rule 4[j].)

The foregoing is true enough as a general principle when jurisdiction is based on a federal question, or any other ground of jurisdiction except diversity of citizenship. When diversity is the jurisdictional basis for the federal action, however, Rule 3 emphatically does not govern for purposes of the statute of limitations. The rule applicable in a diversity case to determine whether the statute of limitations has been satisfied is taken from the law of the state in which the federal court happens to be sitting.

If that state's law is the same as Rule 3, deeming the action commenced when the complaint is filed even if the summons has not yet been served, perhaps the plaintiff can take Rule 3 at face value. But even there--if the case is a diversity case--state law may have little connected tidbits that differ from federal practice. Perhaps, for limitations purposes, state law will require service in a shorter time (following the filing of the complaint) than the 120 days allowed by Federal Rule 4(j), for example. In a diversity case, all matters connected with the statute of limitations should be consulted in forum state law. Indeed, since it may be difficult to determine whether a given item is to come from state or from federal law in a particular state, or in a particular fact pattern, the best bet is to take such

proceedings--whenever the statute of limitations is in any way involved--as will satisfy both federal and forum state requirements. The governing ideology here is that discretion is the better part of valor, and even the valiant do best to bow and scrape when the statute of limitations threatens.

If forum state law is not the same as Rule 3; if the forum state deems the statute of limitations satisfied not merely upon the filing of the complaint, but at some later time, the plaintiff is at greatest risk. Obviously a diversity plaintiff who relies on Rule 3 is running the risk that the service of the summons will be made too late, and all will be lost. That is indeed in prospect for plaintiffs in those states that don't deem the statute of limitations satisfied until the summons is served.

New York is one such state, for example. See § 625 in Siegel, New York Practice 2d Ed. (West), which is part of a chapter contrasting various phases of state and federal practice. It is summons service that starts the action in New York, among other states.

The case that accounts for the perils of the diversity plaintiff who relies on Federal Rule 3 is Walker v. Armco Steel Corp., 446 U.S. 740, 100 S.Ct. 1978 (1980). It is discussed, with a series of connected matters, in the course of the Commentaries on Rule 4, below. See, e.g., Commentary C4-37.

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

3. With this rule compare [former] Equity Rule 12 (Issue of Subpoena--Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

U.S.C., Title 28:

§ 45 [former] (District courts; practice and procedure in certain cases under interstate commerce laws).

§ 762 [see 1402] (Petition in suit against United States).

§ 766 [see 2409] (Partition suits where United States is tenant in common or joint tenant).

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

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

2007 Amendments

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

WARNING TO PLAINTIFFS ABOUT RELYING ON RULE 3 IN DIVERSITY CASES

For those who might not have read the foregoing Commentary but whose eye is caught by captions, we offer the above caption and this brief statement: read the foregoing Commentary.

Notes of Decisions (185)

Fed. Rules Civ. Proc. Rule 3, 28 U.S.C.A., FRCP Rule 3
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 4

Rule 4. Summons

Currentness

(a) Contents; Amendments.

(1) ***Contents.*** A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) ***Amendments.*** The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) Service.

(1) ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

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

(A) be in writing and be addressed:

(i) to the individual defendant; or

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

(B) name the court where the complaint was filed;

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

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

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

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

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

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

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

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

(3) ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

(j) Serving a Foreign, State, or Local Government.

(1) ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(k) Territorial Limits of Effective Service.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court

that the summons and complaint were delivered to the addressee.

(3) ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; April 29, 1980, effective August 1, 1980; amended by Pub.L. 97-462, § 2, January 12, 1983, 96 Stat. 2527, effective 45 days after January 12, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007.)

PRACTICE COMMENTARY

by David D. Siegel

Table of Contents

Preliminary

C4-1. Introductory.

C4-2. Personal Jurisdiction: An Overview of Rule 4.

C4-3. Subject Matter Jurisdiction Distinguished.

C4-4. “Process” Defined.

C4-5. A Word About Forms.

C4-6. The 1983 and 1993 Amendments.

Subdivision (a)

C4-7. Form of Summons.

C4-8. Answering Time.

C4-9. Defendant’s Motion Before Answering.

C4-10. Default Notice.

C4-11. Amendment of Summons.

Subdivision (b)

C4-12. Issuance of Summons.

Subdivision (c)

C4-13. Who Makes Service?

C4-14. Service by Marshal or Appointee.

Subdivision (d)

C4-15. Waiver of Service, Generally.

C4-16. Waiver of Service Waives Nothing Else.

C4-17. Request for Waiver by Plaintiff.

C4-18. Defendant's Response to Waiver Request; Time Periods.

Subdivisions (e) through (j), Introductory

C4-19. Service, Generally.

C4-20. Service in Removed Actions.

C4-21. Person to Be Served, Generally.

Subdivision (e)

C4-22. Service on Individuals in U.S.; State Law Methods.

C4-23. Service on Individuals in U.S.; Federal Prescription.

Subdivision (f)

C4-24. Service on Individuals in Foreign Country.

Subdivision (g)

C4-25. Service on Infants and Incompetents.

Subdivision (h)

C4-26. Service on Corporations and Other Businesses.

Subdivision (i)

C4-27. Service on United States and Its Agencies.

Subdivision (j)

C4-28. Service on Foreign, State, and Local Governments.

Subdivision (k)

C4-29. Geographical Area of Service, Generally.

C4-30. Service Within State in Which Federal Court Located.

C4-31. The “100-Mile Bulge”.

C4-32. Extraterritorial Service, Generally.

C4-33. Extraterritorial Service under State Law.

C4-34. Extraterritorial Service under Federal Statutes.

C4-35. The General Federal “Longarm” Statute, Rule 4(k)(2).

C4-36. The “Corporate Presence/Doing Business” Test.

Subdivision (l)

C4-37. Proof of Service.

Subdivision (m)

C4-38. The 120-Day Time Limit on Service.

C4-39. Applying the 120-Day Time Period to Third-Party Claims, Counterclaims, Etc.

C4-40. Interplay of 120-Day Period and Statute of Limitations; Special Problems in Diversity Cases.

C4-41. “Good Cause” for Time Extension.

Subdivision (n)

C4-42. “Rem” Categories of Jurisdiction.

In General

C4-43. Raising and Preserving a Jurisdictional Objection.

C4-44. Vacating Defaults.

C4-45. Finding the Statute of Limitations.

C4-46. Leave Time for Trouble.

Preliminary

C4-1. Introductory.

Rule 4 governs the subject of personal jurisdiction in federal civil practice. Under its caption, “Summons”, it governs the summons in all its particulars: form, contents, issuance, method and place of service on various entities, amenability of the defendant to service, time of service, etc. This makes it the key instruction of the Federal Rules of Civil Procedure on the commencement of a federal civil action.

Paradoxically, it is Rule 3, not 4, that bears the caption of “Commencement of Action”. But Rule 3 contains only a single sentence, “[a] civil action is commenced by filing a complaint with the court”, and in practical terms the “commencement” of a civil action involves a whole congeries of requirements, of which the filing of the complaint is but the first. It is the summons and its service that really determines how the case gets going, and it is Rule 4 that governs the summons and its service. Hence it is far more accurate to remember that Rules 3 and 4 together govern the commencement of the action, and that Rule 4 is a good deal more demanding than Rule 3 is.

Against the line or two of type that Rule 3 occupies are the many lines that make up Rule 4. That ratio speaks worlds about the relative demands that the two rules make on the lawyer’s attention. Add in the fact that the moment of commencement of the action is all bound up with that most talented enemy of the plaintiff--the statute of limitations--and the conclusion is plain: as demanding as Rule 4 may be, a mistake in its use can be fatal. The lawyer prone to occasional error, as all of us are, had best find some other occasion for it.

The purpose of these Commentaries is to offer a practical treatment of Rule 4, giving the lawyer a broad perspective of its demands and a word of warning at its more dangerous pitfalls. It has no small number of pitfalls. Indeed, in some instances even a lawyer with an intimate knowledge of Rule 4 can get tripped up, as in a case based on diversity of citizenship, where, for a statute of limitations measure, neither Rule 3 nor Rule 4 governs. State law does, but nothing on the face of either rule warns of that because it comes from case law. We will be especially sensitive in these Commentaries to advise about things like that.

Rule 4 was extensively overhauled in an amendment that took effect in 1983, and bench and bar spent much time and effort learning and applying the amendment. Cases applying it abound, and every circuit in the federal system has had their occasions to go over it.

The 1983 amendment lasted hardly 10 years when another extensive overhaul was made, effective December 1st, 1993. The present Commentaries are built entirely around the 1993 rule..

Extensive interplay among various parts of Rule 4 makes the cross-reference an especially helpful tool. It will be freely used to inject relevant points and avoid unnecessary repetition. Reference will of course be made to the prior (1983) version of Rule 4 whenever the reference will help understanding of the present rule.

Treatment of the changes made in Rule 4 in the 1993 revision will be more detailed. This is notably the case, for example, with subdivision (d), the housing of the new provision on "waiver of service" (which replaces the mail method of service introduced in the 1983 amendment), and subdivision (k)(2), which purports in federal question cases to make a foreign defendant amenable to jurisdiction if its overall contacts with the United States are adequate even if its contacts with any individual state would not suffice to offer jurisdiction in that state. It's a kind of general federal longarm statute. It poses a number of questions. See Commentary C4-35 below.

Of course stress will also be laid on the time for making service, provisions on which have been shifted from subdivision (j) of the old rule to subdivision (m) of the present one. If the new rule relieves any of the rigors associated with the time provisions of the old rule, the relief may prove temporary, or, indeed, illusory. And when time is the issue, the statute of limitations often is, too. Discussion at those junctures will of course be more extensive than at others.

On other subdivisions, around for a long time and the subject of much case law, even if relettered in the 1993 revision--and most of them were--treatment will be terser and for the most part limited to pointing out trouble spots.

C4-2. Personal Jurisdiction: An Overview of Rule 4.

Occupying only one slot in the nearly one hundred that constitute the Federal Rules of Civil Procedure, Rule 4 has a broader mission than its single-rule occupancy suggests. In 1993 it was labeled "Summons". Before that it was entitled "Process" and purported to include governance of process in general (executions and attachments and the like included). It was so concentrated on the summons in particular, however, or in any event so much more frequently invoked in respect of the summons than any other "process", that many a lawyer regarded it as concerned with the summons alone. Recognizing this, the 1993 amendment shifted governance of process other than a summons to a new Rule 4.1 (also part of the 1993 revision), leaving Rule 4 now to do in terms what it was understood as a practical matter as doing before: governing just the summons.

That's job enough. The "summons" governs the whole topic of jurisdiction of the person, one of the great arenas of civil procedure, and Rule 4 regulates personal jurisdiction just about single-handedly. Its several parts roam from one end of the subject to the other. Here's a bird's-eye view:

Subdivision (a) addresses the form of the summons and supplies its contents. (Under the old [1983] rule, form was

addressed by subdivision [b].) Here there is some interplay with Rule 12(a), which prescribes the defendant's answering time. Detailed treatment of subdivision (a) and the effect of the Rule 12 interplay, including a look at the official form of summons contained in the Appendix of Forms annexed to the Federal Rules of Civil Procedure, is in Commentaries C4-7 through C4-11, below.

A significant change that subdivision (a) makes in respect of form concerns the case in which extraterritorial service is being made on the authority of state law, i.e., when a state "longarm" statute is being relied on. Under the old rule, it was subdivision (e) that adopted state law for that purpose, and old subdivision (b) required that in cases of such adoption the summons "correspond as nearly as may be" to that required by state law. That provision has been omitted. State law is still adopted for authorization for extraterritorial service--see subdivision (k)(A) and Commentary C4-33 below--but even if state law is adopted for that purpose, the form of the summons will remain its federal prescription. No adjustment in form need be made to suit state law. (And under a coordinate amendment of Rule 12[a], the provision that required the answering time to correspond to what state law requires in these "adoption" cases is also dropped, leaving the answering time as set forth in amended Rule 12 to govern in all cases.)

Subdivision (b) governs the issuance of the summons. Practice here is not substantially changed. It was the practice for the plaintiff's attorney to present the summons to the clerk all filled in, so that the clerk had only to scan it and, if it was in order, sign and seal it. The amendment clarifies that that's to continue to be the procedure. The attorney is not the person who may formally "issue" the summons, as permitted in some state practices.

Under the 1983 amendment, it was subdivision (a) that placed responsibility for service of the summons squarely on "the plaintiff or the plaintiff's attorney". Responsibility remains there, but the statement to that effect is now set forth in subdivision (c)(1), concerning service and who makes it.

Subdivision (c) also continues the requirement that the complaint be served with the summons, which had been in subdivision (d) of the old rule. Subdivision (c) lists the few instances in which the federal marshal continues to have the service obligation. What has come to be the usual rule--that any nonparty over 18 may serve the summons--continues.

Subdivision (d) introduces the procedure for seeking the defendant's "waiver of service". It displaces the old rule's provision for mail service, which had been part of subdivision (c). The procedure requires a number of observations, which are offered in Commentaries C4-15 thru C4-18, below.

The methods of service are set forth in subdivisions (e) through (j). Subdivision (d) of the old rule had contained them, addressing various categories of defendants in its several numbered paragraphs. The new rule separates these categories into distinct subdivisions.

Subdivision (e) governs service on an individual in the United States; subdivision (f), service on an individual in a foreign country. Subdivision (g) governs service on infants and incompetents.

Subdivision (h) is the provision that now governs service on various corporations and associations, in some measure referring back to and exploiting the methods set forth for individuals in subdivisions (e) and (f). Essentially what subdivision (h) is designed to do is list the persons who are to be served with the summons in behalf of these business entities. (The subdivision that was denominated [h] under the old rule dealt with "amendment" of process and proof of service. That subdivision has been dropped. The authorization to amend

remains, however, now covered by the last sentence of subdivision [a] in respect of the summons and by the last sentence of subdivision [l] in respect of proof of service.)

Subdivision (i) governs service on the United States and its various agencies, corporations, and officers.

Subdivision (j) governs service on state and local governments and on foreign states and their subdivisions. (As to the latter, subdivision [j] merely cross-refers to the statute that governs service on foreign entities, 28 U.S.C.A. § 1608, and leaves § 1608 in charge.) Readers should remember this new mission of subdivision (j). The subdivision (j) contained in the old (the 1983) version of Rule 4 governed the time within which summons service had to be made. It was at the heart of most of the decisions that resulted in dismissal for untimely service and was cited in scores of important cases. The mission of restricting the time for service--and the restriction indeed continues--is now carried out by subdivision (m).

Subdivision (k) prescribes the geographical area within which the summons may be served, carrying out the function that subdivisions (e) and (f) of the old rule had carried out together. The provision adopting state bases for extraterritorial jurisdiction, ever so frequently invoked, which used to be in subdivision (e), is now in subdivision (k)(1)(A). The so-called 100-mile-bulge provision of former subdivision (f) will now be found in subdivision (k)(1)(B). The provision referring to federal laws that allow nationwide service, previously the first sentence of old subdivision (e), is now covered by paragraphs (C) and (D) of subdivision (k)(1).

The provision that made the state the basic geographical unit for summons service in a federal action, which had been part of subdivision (f) under the old rule, has been dropped, the new rule apparently relying on state law to do that job under the adoptive provision of subdivision (k)(1)(A).

Subdivision (l) governs proof of service.

Subdivision (m) governs the time for serving the summons after the filing of the complaint. It replaces former subdivision (j) and will be just as important under the new practice as subdivision (j) was under the old.

The statute of limitations itself, incidentally, which is so often near if not on the scene when Rule 4 and its summons service is negotiated, is the subject of a separate Commentary, C4-45, under an “In General” caption that comes at the end of these Rule 4 Commentaries. On the subject of the statute of limitations, sure answers are often scarce. But a sure knowledge of the right questions can be just as beneficial to a plaintiff, who, forewarned about pitfalls, can avoid them.

The “In General” caption also offers housing for a few other subjects germane to Rule 4 but not covered in it, including the procedure for raising a jurisdictional objection (C4-43) and for vacating a default (C4-44). A final Commentary, C4-46, entitled “Leave Time for Trouble”, offers a general set of warnings always appropriate to sound for plaintiffs but especially fitting because of the subdivision (m) time limits on serving the summons.

Subdivision (n) governs rem jurisdiction. Old subdivision (e) had contained the provision for allowing rem jurisdiction in a federal action if it was allowable under state law. That provision was dropped from subdivision (e) in the 1993 amendment and incorporated instead into subdivision (n)(2).

C4-3. Subject Matter Jurisdiction Distinguished.

Rule 4 is concerned only with jurisdiction of the person, including the several categories of "rem" jurisdiction (see Commentary C4-42), which are in essence subcategories of personal jurisdiction. It determines how the court obtains jurisdiction over a given individual or entity so as to make its judgment binding upon that person. It is to be distinguished from subject matter jurisdiction.

Subject matter jurisdiction is concerned with the court's power to hear a given category of case. It is a vast topic in federal practice because virtually all of the federal courts, including the district courts (which are of course of primary concern in a Rule 4 treatment), are courts of limited jurisdiction. The fact that the jurisdiction is "limited" is what makes subject matter jurisdiction so vast a topic in federal practice: whether the limit has been passed is often an issue. Almost as often it's a cloudy one, generating much dispute between the parties. And since the stakes are usually high--someone, after all, is trying to make a federal case out of this--an opportunity for the other party to oust the case for want of subject matter jurisdiction, even if the chance of success is slight, is irresistible.

It's not even necessary for the defendant to raise the objection to subject matter jurisdiction, although the defendant ordinarily should and does if such an objection exists. The court can raise it sua sponte and at any time. See Rule 12(h)(3). Hence the vastness of the subject and the acres of cases on subject matter jurisdiction that swell the annotations.

The ultimate source of federal subject matter jurisdiction is the federal constitution itself, where Article 3, § 2, lists the permissible outer limits. The contents of the list are familiar: the case "arises under" federal law (commonly called "federal question" jurisdiction), or arises in admiralty, or the parties are domiciled in different states ("diversity of citizenship" jurisdiction), or the United States is a party, etc. But the constitution is not self-executing. It takes an Act of Congress--a statute--to actually confer the jurisdiction on a district court, and the presence of subject matter jurisdiction, with a citation of the jurisdiction-conferring statute, must be demonstrated by the plaintiff in every case. As far as pleading is concerned, the plaintiff fulfills this requirement simply by choosing the appropriate paragraph from Form 2 ("Allegation of Jurisdiction") of the FRCP's Appendix of Forms, and opening the complaint with it.

Statutes that confer subject matter jurisdiction on the district court abound. Most but by no means all of them are in §§ 1330-1364 of Title 28 of the United States Code. But none are in the Federal Rules of Civil Procedure. Nor can they be. Subject matter jurisdiction is altogether barred from address in the FRCP. See Rule 82. The reason is that in giving the U.S. Supreme Court the rule-making power in 28 U.S.C.A. § 2072, Congress wanted all rules restricted to matters of mere procedure, which subject matter jurisdiction is not.

Personal jurisdiction is, however. And with only a few exceptions, to be noted, personal jurisdiction in respect of both service of process and jurisdictional basis (sometimes described as amenability to service) has been left to the U.S. Supreme Court to govern by rule. Rule 4 is the rule adopted to do the governing.

There is an occasional overlapping between subject matter and personal jurisdiction. A doctrine long known as "pendent jurisdiction", for example, while designed to operate in the subject matter sphere, has occasionally spilled over into personal jurisdiction, creating an especially exotic species called "pendent personal jurisdiction". See Commentary C4-34. As of the adoption of § 1367 of Title 28 (effective December 1, 1990), "pendent jurisdiction" is codified as "supplemental jurisdiction", so perhaps its "personal" derivative should now be known as "supplemental personal jurisdiction".

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

With an occasional exception like that, however, subject matter and personal jurisdiction are separate subjects and Rule 4 is concerned only with the latter.

An important procedural distinction between the two jurisdictional categories is that while an objection to subject matter jurisdiction is unwaivable and can be raised at any time, see Rule 12(h)(3), an objection to personal jurisdiction is waivable and quite easily waived. The procedure for asserting and preserving an objection to personal jurisdiction is discussed in Commentary C4-43.

C4-4. "Process" Defined.

"Process" used to be the caption of Rule 4. The 1993 amendment changes the Rule 4 designation to "Summons" and cleanses the rule of all its references to other categories of process. The other categories of process, which would include such devices as the pre-judgment attachment and the post-judgment execution, are now found in a separate Rule 4.1.

"Process" has variable meanings, but the one meant here is any paper whereby a person is subjected to a court's jurisdiction or otherwise made to comply with the court's demands. A summons is process because its service subjects the person served to the court's jurisdiction, which is necessary to validate a judgment that the court might render against that person. A subpoena is also process, again in the sense of obtaining jurisdiction over the person served with it, but the subpoena acts only to exact testimony or obtain some document or other physical object from that person.

An execution is process because it implements a judgment by seizing property of the defendant to satisfy it. An order of attachment is process for a similar reason, here to hold the property out of the defendant's reach in anticipated satisfaction of a future judgment. When Rule 4 bore the "Process" caption, it technically applied to these and yet other papers that qualify as process, with the exception of the subpoena, which had and continues to have its own governing provisions in Rule 45.

The summons was always Rule 4's principal subject. Now it is the rule's only subject.

C4-5. A Word About Forms.

Several of the sample forms contained in the Appendix of Forms annexed to the Federal Rules of Civil Procedure concern the summons. Form 1, for example, is a suggested form of the summons itself. Forms 1A and 1B, added in 1993 in conjunction with the introduction of the procedure for seeking a waiver of service from the defendant, both address the waiver. Form 1A is the request for the waiver and Form 1B is the waiver itself.

All of the forms are suggestions only. There are hardly three dozen forms in all and all are designed, as FRCP Rule 84 explains, merely "to indicate the simplicity and brevity of statement which the rules [the FRCP] contemplate". The lawyer can and should make use of a form whenever it is in point, but should not hesitate to make any needed or merely helpful adjustment in it to suit the case. To the "simplicity and brevity" that Rule 84 describes as an aim of the official forms we may add "clarity" as a general purpose that should be subserved by all forms. Any change that serves clarity is serving a patriotic purpose.

One of the things the summons sets forth is how much answering time the defendant has. It is usually 20 days under Rule 12(a)(1), but under Rule 12(a)(3) it becomes 60 days when the United States or its agent is the defendant. Under the pre-1993 version of the Rules, the answering time became whatever state law provided if the summons was being served extraterritorially on the authority of state law. That provision was dropped from Rule 12(a) under the 1993 amendment, making the answering time in cases of extraterritorial service the same as it is for local service within the state in which the federal court is sitting.

Superimposed on that, however, is the time reward now offered to defendants who cooperate by waiving service of the summons. For defendants who waive service, the time in which to answer is longer: either 60 or 90 days from the time the plaintiff sends the waiver request to the defendant. It's 60 days if the request for waiver is sent to the defendant within the United States, 90 if outside. See Rule 12(a)(1)(B).

In connection with service by mail, which was the major innovation of the 1983 version of Rule 4, there was a Form 18A added to the appendix of forms. With the elimination of service by mail in 1993 (in deference to the waiver system), Form 18A was abrogated.

A printed form of summons is usually available from the clerk, and photocopies of it are generally accepted, too. If the space allotment for a given item on the form is inadequate, such as to list all the parties in multi-party cases, the list can be contained on an appended typed or word-processed sheet, with a simple reference made to it in the summons. For these and all related questions an inquiry at the clerk's office is usually the most gratifying source of answers, and ultimately perhaps the most dependable one. What profit a soul to draft a perfect document if the clerk will not accept it without its customary local imperfections? In the realm of the paper of civil procedure, no higher authority has yet been found--neither law nor rule nor judge of court--to better move a piece of paper on its appointed rounds.

Form 2 of the Appendix of Forms sets forth the simple phrasings whereby to allege jurisdiction of the subject matter, an allegation that the complaint must contain. Form 2(b) was amended in 1993 to omit the references to amount in controversy in cases in which the jurisdiction of the court is based on what is known as the "general federal question" jurisdiction. Form 2(b) is regarded as the concomitant of 28 U.S.C.A. § 1331, the general federal question statute. At one time § 1331 had a monetary requirement. When that requirement was eliminated years ago, no coordinate amendment was made in Form 2(b) to recognize the change. The 1993 amendment corrects that.

C4-6. The 1983 and 1993 Amendments.

There have been various amendments of Rule 4 over the years, some of which we will have occasion to refer to in these Commentaries, but a special introductory word is in order about the extensive amendments made by Congress in two batches of amendments just a decade apart: the first effective February 26, 1983, and the second effective December 1, 1993.

The main purpose of the 1983 revision was to take the marshals out of the summons serving business except in a few instances. It placed the responsibility for service on the plaintiff. It also provided a time limit on how long the plaintiff would have, after the filing of the complaint, in which to effect summons service. The interplay of these and several other of the 1983 changes created special problems not previously met in federal practice, or made volatile certain things that had previously been quiescent. What gave them impact was that they affected the statute of limitations, and in ways the sponsors of the 1983 amendment did not anticipate.

Extensive as the 1983 revision was, in some ways the 1993 revision goes further. The marshals remain out of the general summons serving business, and, indeed, in one of the 1993 changes it would appear that the marshal's office is not even to be responsible for summons service in behalf of the United States as a plaintiff. On that, however, the advisory committee seems to have some ambivalence, saying something in their notes that seems to belie what is said in rule. See Commentary C4-14 below.

The time limit imposed on summons service--the summons is to be served within 120 days after the complaint is filed--remains in full effect under the 1993 revision. The limit was contained in subdivision (j) of the 1983 revision. In the rule as revised in 1993, it's in subdivision (m). Essentially the same demands are made in subdivision (m) as had been earlier made in subdivision (j), and the extensive case law on the latter, many of the cases producing a dismissal too late for the plaintiff to start over under the applicable statute of limitations, therefore remains applicable. See Commentaries C4-38 through C4-41, below.

Another innovation of the 1993 amendment is its attempt to expand amenability to jurisdiction in federal question cases. A new subdivision (k)(2) purports to permit the exercise of jurisdiction against any defendant whose overall contacts with the country satisfy a constitutional "contacts" test even if the defendant has no contacts with any particular state sufficient to permit such an exercise of jurisdiction in the state courts of that state. See Commentary C4-35 below.

The 1993 amendments acknowledge for the first time the Hague Convention (a treaty, to which the United States subscribes, determining, among other things, how summons service is to be effected in foreign signatory nations). In paragraph (1), a new subdivision (f), directing how service is to be made in a foreign country, the role of the Hague Convention is addressed.

A word is in order about the proceedings that produced the 1983 and 1993 amendments. It may prove helpful in a given situation.

The substance of the 1983 amendment of Rule 4 was originally the product of the Advisory Committee on Federal Civil Rules, which recommended and drafted the changes. It was submitted, through the Standing Committee on Rules of Practice and Procedure, to the United States Supreme Court, which promulgated it pursuant to 28 U.S.C.A. § 2072 (embodying the Supreme Court's rule-making power), to take effect on August 1, 1982. It did take effect on that date, but it lived for only a day. What happened was that Congress postponed the amendment, but its law doing so didn't take effect until August 2, 1982. Then Congress, responding to various criticisms of the proposal, principally from California and New York, rejected the Supreme Court's promulgated version of Rule 4 and drafted its own. It is that Congressional draft that became law, taking effect on February 26, 1983, and enduring until December 1, 1993, when the present Rule 4 took over.

The present--the 1993--rule has its own history, as follows.

The Advisory Committee on Civil Rules proposed a number of amendments to the Federal Rules of Civil Procedure in 1990, and recommended them to the U.S. Supreme Court for promulgation. (The proposal was reprinted in late 1989 in the advance sheets of the Federal Reporter, Federal Supplement, and Federal Rules Decisions.) Among the recommendations was an extensive revision of Rule 4.

Many of the recommendations were adopted by the Court pursuant to the rule-making procedure of 28 U.S.C.A. §

2072 and submitted to Congress on April 30, 1991, but the amendment of Rule 4 was not among them. The Chief Justice's letter of transmittal of that date to the Speaker of the House stated that Rule 4 (and a few other rules) "are not transmitted at the present time pending further consideration by the Court".

The Rule 4 proposal in fact left the Court and went back to the advisory committee. It was studied further, in some measure changed, and then included in another extensive package of amendments afterwards submitted to the U.S. Supreme Court for the Court's consideration. The Court accepted the rules, including the proposed Rule 4, and submitted them all to Congress on April 22, 1993. Congress had until December 1, 1993, to reject or otherwise alter them. Congress did not act, and by this inertial process that applies to federal rule making at the Congressional stage, all of the rules became effective on December 1, 1993, Rule 4 among them.

(Rule 4 at this point, incidentally, was not controversial in Congress. The rule that did arouse controversy was Rule 26[a][1], enacting a mandatory disclosure requirement in which each side must make extensive disclosure to the other early in the action and without awaiting a demand from the other side or an order of the court. The House of Representatives voted to reject that rule, but the Senate did not go along and so the Rule 26[a][1] amendment, too, became law.)

More on background can be found in this writer's articles in 96 FRD 88 on the 1983 amendment and in 151 FRD 147 on the 1993 amendment. The latter also includes a word about transition, i.e., the applicability of the amendment to cases already commenced and pending on December 1, 1993.

Subdivision (a)

C4-7. Form of Summons.

Subdivision (a) addresses the form of the summons and recites the things it should contain. (Under the pre-1993 rule it was subdivision [b] that addressed the subject.)

An equally important guide on this is Form 1 in the Appendix of Forms annexed to the Federal Rules of Civil Procedure. It should be stressed here, as it was in Commentary C4-5 on forms in general, that the lawyer should make any adjustment in the form of summons logically suggested by the needs of the case, but should be wary about omitting something.

There is no sharp line between jurisdictional and non-jurisdictional defects in a summons, but to avoid any risk on this score the lawyer should attend to the summons carefully and use the form as a firm guide.

Defects that don't prejudice the defendant are usually held to be mere irregularities rather than jurisdictional defects. In United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371 (9th Cir. 1984), for example, the court held that the inclusion of an incorrect responding time in a summons is not a jurisdictional defect and does not warrant a dismissal. Drawing on that decision, another circuit adopted a similar posture when the defect was that the summons failed to state any responding time at all. Sanderford v. Prudential Ins. Co., 902 F.2d 897 (11th Cir. 1990). The absence of any showing of prejudice by the defendant was a key factor. Still, misstating or omitting something so plainly called for by the rule is asking for trouble.

The list of summons items set forth in subdivision (a) is for the most part self-explanatory, but there are several points to make about some of them. These are addressed in ensuing Commentaries.

C4-8. Answering Time.

One of the things the summons has to do is advise the defendant of the obligation to "appear and defend" and state the time the defendant has for doing so. The appropriate time period to include can be found in Rule 12(a). In general, the period is 20 days for all defendants except the United States or a federal officer or agency, where it is 60 days. The summons should recite whichever period is applicable.

Note also that if the defendant has waived service of the summons, a procedure described in Rule 4(d) (and discussed in Commentaries C4-15 to C4-18, below), the defendant gets a longer answering time under the terms of Rule 12(a)(1)(B). This longer time (elaborated below) is explained to the defendant in the notice that the plaintiff sends to the defendant when eliciting the waiver. The notice is explicitly laid out in Form 1A, which was added to the appendix of forms as part of the 1993 amendment.

When extraterritorial service was being made on the authority of a state longarm statute under subdivision (e) of the pre-1993 Rule 4, the answering time to be included in the summons was that allowed by the state practice, and, indeed, the form of the summons was itself required to "correspond as nearly as may be" to that used in the state practice. While exploitation of state law for authorization for extraterritorial service continues under the new Rule 4--see subdivision (k)(1)(a)--it is no longer required that the form of the summons correspond to that of state law. Nor does the answering time change to conform to state law. It remains whatever it would be in a case not invoking state law at all.

When Does Answering Time Start When Defendant Waives Service?

Under the 1983 version of Rule 4, the courts periodically grappled with the question of when the defendant's answering time starts to run when the mail method of old Rule 4(c)(2)(C)(ii) was used. The new (1993) Rule 4 abolished the mail method and substituted for it the waiver of service appearing in subdivision (d).

What is the answering time for a defendant who obliges the plaintiff by returning the waiver? It is set forth in subdivision (d)(3). If the defendant returns the waiver within the period allowed for it and before being formally served with the summons, the defendant's answering time is 60 days (90 days if the waiver was sent to the defendant outside the United States), measured from the time the waiver was "sent". Since it may be sent by simple first-class mail, the defendant bent on using up as much as possible of the available time before answering will have to determine the date the waiver request was "sent", which will not necessarily be the time the plaintiff has dated it or, indeed, the postmark that it bears. To avoid difficulties on this score, the defendant should allow a few days or a week on the inside of the applicable period, or work the time element out with the plaintiff.

Under the pre-1993 rule, which used mail service instead of the request for waiver system introduced in the 1993 rule, it was the defendant's own act of acknowledging the mail service that started the defendant's answering time, and yet it, too, raised issues that the courts had to address. A detailed discussion of the point appears in Madden v. Cleland, 105 FRD 520 (ND Ga. 1985).

Under the waiver system in the present Rule 4(d), it is the plaintiff's act of sending the request that starts the

defendant's answering time. If courts should disagree on the precise moment that the request is deemed "sent", they ought to be able in any event to agree that the rule's failure to clarify the point suffices to trigger the court's general enlargement of time powers under Rule 6(b), thus earning a time extension for the defendant--in all but the most egregious cases--if the answer should, in the confusion, come in a few days late.

A defendant who does not respond to the waiver request need not worry about answering until the plaintiff effects formal service of the summons, in which event the usual period for answering, as supplied by Rule 12(a), would apply.

The Madden case also concluded that the additional three-day period allowed by Rule 6(e) for responding to a mailed paper within a litigation does not apply to the mail service of the summons under subdivision (c)(2)(C)(ii) of the pre-1993 Rule 4. The same conclusion should apply to the answering time in conjunction with the request for waiver under the present rule, which is also sent out by mail. If things are close enough to make the Rule 6(e) three-day period relevant, however, an exercise of the court's Rule 6(b) time enlargement power should be especially appropriate.

C4-9. Defendant's Motion Before Answering.

Subdivision (a) requires that the summons tell the defendant how much time there is in which to "appear and defend". And the model summons in Form 1 of the Appendix of Forms requires the defendant "to serve ... an answer to the complaint". This can be a bit misleading to those uninitiated in federal practice. Despite the seemingly mandatory tone of those statements, the defendant does not have to serve an answer within the responding time; the defendant can make a motion instead, such as a motion to dismiss under Rule 12, whenever there is ground to support such a motion. Doing so is satisfactory to Rule 4(a) and to Form 1 as well. One of the many Rule 12 grounds is a want of jurisdiction, for example, listed in Rule 12(b), and it is usually the sounder practice for a defendant with such an objection to raise it with a Rule 12 motion before answering--an alternative would be to plead it as a defense--for the obvious reason that if the objection succeeds the action may be dismissed, obviating an answer altogether.

A defendant should, before answering, read Rule 12 thoroughly to pick out any of its enumerated grounds that might be applicable, and consider making a motion in lieu of answering at the outset. (Parenthetically, the defendant will also find a Rule 12 reading at this pre-answer juncture a good reminder about possible defenses, suggesting lines of inquiry to the client that may not have been pursued in prior consultations. Rule 8(c) with its list of the most often encountered affirmative defenses serves a similar function.)

Rule 12 anticipates the defendant's use of its motion as an initial alternative to answering, altering the answering time accordingly. Under subdivision (a)(4) of Rule 12, a defendant accomplishes an automatic extension of its own answering time merely by making a Rule 12 motion. Even if the motion fails, Rule 12(a)(4) provides that the defendant's time to answer will be extended until 10 days "after notice of the court's action". The same Rule 12 options apply to a third-party defendant brought in under Rule 14, to a plaintiff counterclaimed against and a codefendant cross-claimed against under Rule 13, etc. All have to respond to the claim, see Rules 12(a)(2), 14(a), and all therefore have the Rule 12 motion available as an initial alternative to the service of a responsive pleading.

It is also permissible for the defendant (and the others just listed) to make a motion for summary judgment under Rule 56 before serving a responsive pleading. The consensus appears to be that as long as it is adequately supported by the strong proof needed to carry it, the summary judgment motion of Rule 56 need not await--although of course it can if the defendant chooses--the service of the defendant's answer..

C4-10. Default Notice.

Subdivision (a) of Rule 4 requires the summons to advise the defendant of the consequences of a default: that a failure to appear and defend "will result in a judgment by default against the defendant for the relief demanded in the complaint". (The complaint is served together with the summons in federal practice, so required by Rule 4[c].)

If the defendant does default, the plaintiff's application for a default judgment is made under Rule 55. In money actions, if the sum sought is a liquidated one, the default application may be made to the clerk under paragraph (1) of Rule 55(b); if it is unliquidated, as it almost always is in tort cases, for example, or if the action is for other than money, the default application must be made to the court under paragraph (2) of Rule 55(b). Further proceedings may be needed in the latter situation in respect of damages or the other relief sought.

If there is any expectation whatever that the defendant may default, the plaintiff had best see to it that the demand for judgment in the complaint advises the defendant of everything the plaintiff is seeking. Rule 54(c) provides that a judgment taken by default "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment". (If the defendant appears and defends, on the other hand, the court under Rule 15 can allow an amendment to increase a money demand or change the nature of the relief the plaintiff wants.)

Once a defendant has defaulted in appearing, the general rule is that no further papers in the action need be served on that defendant. Rule 5(a). That sounds like good news for plaintiffs. Bad news is carried by the same rule, however, in that if the plaintiff, after the default, wants to interpose any "new or additional claims" against that defendant--which includes the raising of the money demand contained in the original complaint--the pleading interposing such a claim will have to be served in the same manner as a summons. This means that the plaintiff will have to go back to the ritual of summons service under Rule 4 to notify the defaulting defendant of the changes--to which the defendant may object, not being foreclosed from doing so by the default made in respect of the original claim--whereas, had the defendant appeared, simple mail service could have been made under Rule 5(b).

C4-11. Amendment of Summons.

As long as the defendant can't show any "material prejudice" that would result from the plaintiff's being allowed to amend the summons, the court can allow the amendment at any time. Subdivision (h) had so provided under the pre-1993 version of Rule 4, and under the present rule subdivisions (a) and (l) share the job: subdivision (a) allowing amendment of the summons and subdivision (l) allowing amendment of proof of service of the summons, should need for amendment arise. The courts are liberal in allowing amendments.

A good example of the help that can be sought through an amendment of the summons is where the summons has designated the wrong person as the defendant and it would now be too late for a new action if the plaintiff had to start over. In that situation the plaintiff's case is effectively dead unless the plaintiff can amend to substitute the intended defendant. Is the amendment permissible? It isn't, if the real defendant had no notice of the suit within the applicable statute of limitations. See, e.g., Munetz v. Eaton Yale and Towne, Inc., 57 FRD 476 (ED Pa. 1973). But it is, if the intended defendant knew of the suit in time.

Suppose, for example, that the defendant is a partnership but that the plaintiff, unaware of this, named and sued it as a corporation (or vice-versa), a not uncommon situation in litigation. If the court can conclude that the intended

defendant knew of the suit within the applicable statute of limitations and knew further that it was the intended party, the amendment, which in this instance is the equivalent of an order of substitution, may be allowed. See, e.g., Hirsch v. Bruchhausen, 284 F.2d 783 (CA2 1960).

In these situations, in which the statute of limitations is on the scene--which makes them the most delicate of all amendment cases--Rule 4(a) and Rule 15(c) overlap. Rule 15(c) treats the relation back of amendments. (When an amendment is allowed to "relate back" to an earlier time, statute of limitations consequences are avoided.)

It has been held that the amendment authorized by what is presently Rule 4(a) "concerns only paper and looks only to the fact of the process and of the proof of service". Wood & Locker, Inc. v. Doran and Associates, 708 F.Supp. 684 (WD Pa. 1989). It is not designed to cure defects in service. A request by the plaintiff to make "amended service" on the authority of the earlier equivalent of Rule 4(a) was therefore denied in Wood, the court remarking that the most common illustration of the amendment rule in action is to cure the improper identification of a defendant when the defendant has been properly served and the error goes only to "form".

But it has also been held that when a proper summons did reach the hands of the defendant, but did not qualify as good service for technical reasons of method--it was served by the mail method under the pre-1993 Rule 4 and the defendant refused to acknowledge it--and the follow-up summons that was properly served was improper in form because it was unsigned and unsealed, the later (and improper) summons could be amended and new service of it allowed with nunc pro tunc effect. Reiff v. Ballard, 134 FRD 269 (D So.Dak. 1991).

Subdivision (b)

C4-12. Issuance of Summons.

In federal practice the clerk issues the summons. That was the practice under the pre-1993 rule, when the matter was governed by subdivision (a), and that remains the practice under the 1993 revision, where it is governed by subdivision (b).

The usual practice is for the plaintiff's attorney to secure a blank of the summons from the clerk, fill it in at the office when the complaint is drawn, and then take it to the clerk along with the complaint. When the clerk files the complaint, the clerk checks over the summons and if it's in order signs it and affixes the court's seal to it. It is then returned to the plaintiff for service. (It is the plaintiff who is responsible for service. Subdivision [c][1] so provides, carrying forward a provision that first appeared in subdivision [a] of the 1983 revision.)

Far reaching as the 1983 and 1993 amendments of Rule 4 were, they made no change in who issues the summons. When the 1983 revision first adopted the general procedure of making a private person over age 18 (instead of the marshal) responsible for service, a few plaintiffs, notably a few pro se plaintiffs at some state prisons, read the new service provision of subdivision (c) as in some way infiltrating the issuance procedure. They assumed that they could themselves issue the summons, and in a few federal civil rights cases they tried to. Their summonses were held void. Whoever may serve the summons, it is still the clerk who issues it.

In general, the step that starts a federal civil action is the filing of the complaint with the court. So Rule 3 of the Federal Rules of Civil Procedure provides. The service of the summons is not, as it is in some state courts, the action starter. But in a diversity case the plaintiff must always keep in mind that for statute of limitations purposes

it is state law that determines the precise moment the action is commenced and that dependence on Rule 3 to determine "commencement" in that situation is therefore unwise. It can even be fatal, depending on what the particular state law provides. See Commentary C4-40 below.

Usually one summons will do, even in multi-defendant cases, because a common practice is for the process server to serve only a conformed copy or even a photostatic copy on the defendant, merely displaying the original. Sometimes several "issued" summonses are needed, as where the use of several different process servers is anticipated. (Each server should have an original to display.) The plaintiff may ask the clerk to issue as many summons copies as are needed. This is of course based largely on how many defendants there are to serve.

The plaintiff does best to secure the needed copies at the outset, thus sparing the need to apply to the clerk for the issuance of additional copies later. But if for any reason such an additional application is needed after the initial filing of the complaint, such as when more defendants have been added, or when insufficient copies were initially obtained, or some were lost, etc., such an application is permissible. A 1993 addition, appearing in subdivision (b), clarifies that the plaintiff may apply for summonses upon "or after" the filing of the complaint. Indeed, when the waiver of service procedure of Rule 4(d) is used, a summons may not have been drawn up at all when the complaint is first filed. (Subdivision [b] seems clearly to say that no summons need be presented for issuance when the complaint is filed, but if a given clerk should insist on the summons, its probably best to submit one, even if it may never be used. Obliging the clerk is not the only cure for clerkitis, but it is usually the least expensive.)

As noted, a copy of the summons will usually suffice for service, with the original merely displayed. Display becomes impractical, of course, when the summons is served by a method other than personal delivery. Any defendant wanting to see the original can inquire of the plaintiff's attorney, and in due course should in any event be able to find the original in the court's file, where the plaintiff should make sure it is, along with the process server's affidavit, after service has been made. Subdivision (l), the proof of service provision, requires the filing.

At one time, when the marshals were the chief summons servers in federal practice, the clerk would either forward the summons through channels to the marshal's office or give it to the plaintiff to deliver to the marshal. Now, with service permissible by any nonparty over the age of 18 (see Commentary C4-13), the standard practice is for the clerk, after "issuance", merely to hand the summons or summonses back to the plaintiff for service.

Problem of Delay in Issuance of Summons When Pauperis Application Made

The clerk ordinarily issues the summons when the complaint is filed, and with the filing ordinarily accompanied by the applicable fee. What happens when the plaintiff, without funds, submits the complaint without a fee, making instead an application to proceed in forma pauperis pursuant to 28 U.S.C.A. § 1915?

Assume no filing takes place and no summons is issued. There may even be a significant delay as the pauperis application is processed. The Seventh Circuit notes the problem in Robinson v. America's Best Contacts and Eyeglasses, 876 F.2d 596 (1989), citing other cases that have had occasion to address it.

The clerk in Robinson just marked the pro se plaintiff's complaint "received", postponing its formal filing and the issuance of the summons until the pauperis application could be decided. The application was ultimately denied, and now the plaintiff needed still more time to raise the money to pay the filing fee. The plaintiff finally raised the money, but there arose the question of when the 120 days of what is now Rule 4(m), in which to effect service of the summons, would start to run. If the original presentation of the complaint to the clerk started the 120-day

period, the service would have been too late, which is what the district court had held. Reversing, the court of appeals held that the 120 days did not start until the summons was finally issued by the clerk. Service having been made within the 120 days as so measured, the court held that it was an abuse of discretion for the district court to dismiss the action. (The result found added support in a local rule clearly postponing the filing of the complaint and issuance of the summons until disposition of the pauperis application, but the emanations of the case suggest that the result would have been the same even in the absence of a local rule in point.)

Subdivision (c)

C4-13. Who Makes Service?

Subdivision (c)(1) starts off with the instruction that the summons and complaint are to be served together. It then places the responsibility for service on the plaintiff. The requirements were the same under the pre-1993 version of Rule 4; the one about serving the complaint with the summons was found in old subdivision (d) and the one making the plaintiff responsible for service was found in old subdivision (a).

The summons and complaint should be served together even if a state law method of service is being used on the authority of subdivision (e)(1) and state law doesn't require that the complaint accompany the summons.

The failure to serve a complaint with the summons has been held jurisdictional, at least in the sense that service may be quashed and new service required, but in federal practice, where the mere filing of the complaint marks "commencement" under Rule 3, the quashing will not necessarily require a dismissal of the action. The court can permit new service (see Commentary C4-41) and allow it to relate back to the filing of the original complaint for statute of limitations' purposes. In a diversity case, however, statute of limitations' considerations like these are governed by state law, even on what might seem minute procedural points (see the discussion of the Walker case in Commentary C4-40), and dismissal too late to start over can indeed be the result if state law so provides.

Paragraph (2) continues the general rule, first introduced as such in 1983, that process service may be made by any nonparty over the age of 18. Before that, the marshal was the usual process server unless the court made an order permitting service by someone else. (The instances in which the marshal still makes service are discussed in Commentary C4-14 below.) Some courts had rules permitting the clerk to enter an order authorizing service by someone besides the marshal, making a judge's attention to the matter unnecessary. The 1983 amendment made such local rules unnecessary by standardizing the practice of letting any nonparty adult make the service, and the 1993 revision continues the practice. This has more serious implications for the plaintiff, however, than when the marshals were doing the serving, especially when the statute of limitations is close by.

When, before 1983, the marshals were the principal summons servers, there was no provision laying the onus of process service on the plaintiff. Nor, for that matter, was there any explicit statement in the rule imposing the onus on the marshal. As a disinterested federal official, however, the marshal could be trusted to effect service with appropriate diligence and care. The major purpose of the 1983 amendment was to relieve the marshals of summons service, and this the amendment accomplished with changes making any nonparty over 18 a proper process server, severely curtailing the instances in which the marshal was to continue the service task.

It seemed reasonable to the drafters that with a private process server of the plaintiff's hiring now doing the serving, the time for service should be limited. Hence the introduction, in 1983, of a time limit, following the filing of the complaint, within which the summons had to be served. The time limit appeared in subdivision (j) of the

1983 revision. It is continued in the current rule, where it appears in subdivision (m).

The requirement is that service be made within 120 days after the filing of the complaint, an arbitrary time limit on service that did not exist before 1983. The 120 days seems time enough, but given the vagaries of litigation and the unpredictable events that can loom up out of any case, delays will be experienced from time to time and the lawyer is wise to keep alert to the question: What are the consequences of not effecting service within the 120-day period?

Discussion of the point appears in the treatment of subdivision (m) in Commentaries C4-38 through C4-41, below, but it is wise to note preliminarily, right here under subdivision (c), that the consequence of a subdivision (m) violation is often fatal and that the requirement of subdivision (c) making the plaintiff responsible for summons service plays a major role in making it so. And one point that must be made here, there, and everywhere, is that the consequence of a process server's negligence or misconduct becomes especially serious when the statute of limitations is on the scene and a new action would now be too late if the present one should be dismissed. It is in that situation that the intertwining coils of (c) and (m) can between them squeeze all life out of the plaintiff's case. For example:

Subdivision (m) permits the court to extend the 120-day period if the plaintiff can show "good cause" why service was not made within it. See Commentary C4-41. Can an omission of a process server qualify as "good cause" to earn the plaintiff an extension of the 120 days, given the agency spelled out between plaintiff and process server by subdivision (c)(1)?

Suppose yourself the plaintiff's lawyer. You promptly turn the summons over to a process server after the clerk issues it. You give the server all the data needed to locate the defendant. You get back from the server in due course, and well within the 120 days stipulated by subdivision (m), an affidavit swearing to service on the defendant by a proper method. You are likely to put the affidavit into your file of the case and turn to something else. But now suppose that after a time you get from the defendant's lawyer, instead of an answer, a motion to dismiss based on a deficiency in service. What the defendant says about the service in an affidavit on the motion to dismiss is in direct conflict with what the server's affidavit, relaxing in your file, recites. The server says he served the defendant; the defendant says it isn't so. If this question of fact is resolved in favor of the defendant, vitiating the service, and the 120-day period has expired, can the court extend the period under subdivision (m) in view of the "responsibility" for the service placed on the plaintiff by subdivision (c)? If the court can, should it? And if it should, would it, or would all judges?

Cases have gone both ways, as might be suspected. In Smith v. Sentry Insurance, 674 F.Supp. 1459 (ND Ga. 1987), for example, where the process server made certain statements about one defendant having authority to accept service for another and the defendants effectively refuted that assertion, the court was indulgent. It could have laid the misstated return at the plaintiff's door and dismissed the case. But while acknowledging that the plaintiff could have been more diligent, the court accepted the excuse and gave the plaintiff an additional two weeks.

Unfortunately for plaintiffs, the result in Smith is not typical. Perhaps more typical is Cox v. Sandia Corp., 941 F.2d 1124 (10th Cir. 1991), in which a process server's delay (he claimed a sore foot held him up) was laid at the plaintiff's door and a time extension under what is now Rule 4(m) refused. Citing and discussing other circuit cases to similar effect, the court in Cox held that "counsel must assume responsibility for the failure of a hired process server to timely effect service" and that it is no excuse that plaintiff's counsel "had no notice of the server's unreliability". Cox also warns that cases involving pro se plaintiffs, where the courts have often been more indulgent, are not safe precedents for represented plaintiffs to rely on.

One illustrative pro se case is Romandette v. Weetabix Co., 807 F.2d 309 (2d Cir. 1986), in which the marshal was the server for the pro se plaintiff. The court held that the plaintiff was entitled to rely on the marshal's service of the summons and should not be penalized for the marshal's delay in making it. (In Romandette, there was even the added factor that the pro se plaintiff was incarcerated.) The Fifth Circuit agreed, Rochon v. Dawson, 828 F.2d 1107 (1987), but added the warning that if the marshal's failure is traceable to the plaintiff's own "dilatoriness or fault", dismissal will result (as it in fact did in Rochon).

A hope expressed when U.S.C.A. Commentaries on Rule 4 were first written in the early 1980's, before any case law developed, was that the delays of the server might be a ground for an extension of the 120-day period of what was then Rule 4(j), but with the admonition that there was no assurance of such a result and that the better practice was to oversee the process server carefully, especially when the statute of limitations was at hand. As things have worked out, those who absorbed the admonition did better than those who depended on the hope. The prevalent indications are that the sins of the process server are indeed visited on the plaintiff.

Even a private process server appointed by the court--a procedure permitted under subdivision (c)(2)--whatever may have occasioned such an appointment, has been held in effect to be the agent of the plaintiff. Hence the plaintiff's reliance on the assurances of the process server did not avail in Braxton v. United States, 817 F.2d 238 (1987), for example, where the Third Circuit said that the plaintiff knew of the server's delay and should have taken steps to assure timely service.

The plaintiff's lawyer researching these matters always does best to take as gospel the strictest cases, whatever the circuit deciding them. There's an obvious a fortiori lesson here, too. If the courts are laying the deficiencies of court-appointed process servers at the door of the plaintiff, that will also be where the faults of the usual plaintiff-designated process server end up.

The lesson is that plaintiffs' lawyers must always be prudent in their choice of process servers and in the confidence they repose in a process server's affidavit. Let that confidence not be too serene. Peruse the affidavit with both eyes, and then immediately turn them and all other senses to the statute of limitations and where it now stands.

It is bad business for a plaintiff's lawyer to plan on judicial indulgence. The plaintiff who wants to be free of any serious consequences appending to the acts of a dishonest or negligent or lazy or mistaken process server must sue with much time to spare. Always sue, if suit is unavoidable, with at least six or eight months before the statute of limitations expires, is our suggestion. That leaves time for trouble and as a general matter--regardless of a given judge's view of Rule 4--the worst that can happen is a dismissal made early enough to permit a new and still timely action. "Leave Time for Trouble" is the caption of Commentary C4-46, below, a collection of reminders about how much sweeter is the life of a litigator who leaves ample time to correct unanticipated difficulties.

This writer suggested in an F.R.D. article on the 1983 amendment (96 F.R.D. at 113) that the lawyer might hedge bets by trying to find a bonded process server. Inquiry suggests that at least in some states that's a rare commodity, but the 1983 amendment making plaintiffs themselves responsible for service, and the 1993 revision continuing that rule, may create a new market. If a private process server, or some imaginative entrepreneur about to go into the business, obtains some kind of bond, backed by a reputable insurer or private (and manifestly solvent) surety running to the customer's protection, the process server can advertise the fact and perhaps thereby generate a lot of customers willing to pay a higher price than the going rate otherwise is for process service. Certainly the lawyer who knows that the process server will be able to make good any damages the lawyer or client may suffer because of the server's omission will rest easier in that knowledge and probably be willing to pay a higher price for the peace it offers. Again, the only lawyers who have to think about these things are those who wait until they're down

to the statute of limitations wire before bringing suit. They are a small but lively fraternity, however.

Service by Plaintiff's Lawyer; How Much Weight for It?

"While service by counsel for plaintiff may not be the most preferable method, service by counsel is proper", said the court in Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48 (ND Ill. 1989). And the court saw "no reason why a return of service executed by one other than a United States Marshal should be given any less weight" than the marshal's. The result was a sustaining of service in the face of the defendants' contentions, and a refusal to vacate a default judgment.

Service by the plaintiff's attorney does carry an additional risk, however. If there is a head-on dispute on the facts, with the defendant denying service vehemently, the interest that the plaintiff's lawyer has in the matter may well count as a factor in gauging the lawyer's credibility when he attests to service. Credibility, in fact, is what counted--albeit in the plaintiff's favor--in the Trustees case. There had apparently been several incidents in the case in which credibility was involved, and the defendants didn't fare well. "If defendants urged only a single misadventure [the court said], the court might be receptive. But this in conjunction with the other events of this case the defendants relate, is too much."

The return of service is prima facie evidence of valid service, the court held, which can be overcome only by "strong and convincing evidence". Defendants with undermined credibility are less likely to be able to present that evidence, and that was the problem in the Trustees case. Hence the case can be viewed more as a conventional service-of-process dispute--an issue of fact with the defendants subverted by the low level of their own credibility--than a rule of law giving the return of the plaintiff's lawyer the same standing as that of a disinterested marshal.

In Prisoner's Civil Action, Fellow Prisoner Can Be Process Server

The description of Rule 4(c)(2), permitting service "by any person who is not a party and who is at least 18 years of age", leaves little to argue about, but there will occasionally be some interesting point to take note of. A Ninth Circuit case, Benny v. Pipes, 799 F.2d 489 (1986), cert. denied 484 U.S. 870, 108 S.Ct. 198 (1987), makes such a point, for example. In an action by a prisoner--in that case a civil rights action by two of them under 42 U.S.C.A. § 1983 against several prison guards--service was made by a fellow prisoner, not a party to the suit. The guards apparently rejected out of hand the notion that service could be effective from the hands of a prisoner--"a convicted felon", as the court recites--so they "reacted to the service by crumpling the papers and throwing them to one side as trash".

They apparently changed their minds later, moving for and getting several time extensions but apparently still not taking things seriously enough to respond. Finally the plaintiffs applied for a default. The defendants afterwards moved to vacate the default, waiting six months even to do that. Their vacatur motion failed and an evidentiary hearing on the merits resulted in a $2000 damages judgment for the plaintiffs. On appeal, the Ninth Circuit affirmed.

The court reviewed the grounds it looks for in vacating a default. One is the requirement that the defendant show that its own "culpable conduct" did not contribute to the default. These defendants failed that test.

On the process-server point, the court observed that nothing in the history of Rule 4 offers any "reason to believe

that Congress intended to exclude prisoners" as process servers. The defendants argued that under state law--Arizona law in this case--prisoners were so excluded because the right to serve process was among the rights a prisoner forfeits. Even if that were so under state law, answered the court, the argument misses the point: the point is a procedural one and in a federal court must therefore be governed by federal, not state law.

C4-14. Service by Marshal or Appointee.

The surviving instances in which the marshal is to serve the summons are enumerated in paragraph (2) of subdivision (c).

The marshal can be directed to serve the summons when the plaintiff has been authorized to proceed as a poor person pursuant to § 1915 or is a seaman qualifying for a costs dispensation under § 1916 of Title 28. That §§ 1915 and 1916 are both in Title 28's "Fees and Costs" chapter (Chapter 123) clarify that in this instance the purpose of having the marshal do the serving is to recognize the economic status of the plaintiff and spare the expense of a private process server.

Under the 1983 provision in point, which was then subdivision (c)(2)(B)(ii), the marshal continued to be the process server when the United States or a federal officer or agency was the plaintiff. That provision was dropped in the 1993 revision, which can create the implication that the marshal need no longer serve the summons in actions by the government, but a comment in the committee note appears to cancel the implication. Apparently the purpose of the change is to permit the government to use a private person as process server instead of the marshal if it wishes. The prior provision could also be viewed as permitting that, but the present language firms up the point. The committee also observes, in its note of the 1993 revision of subdivision (c), that the marshal would have to continue to make service in behalf of the United States if so requested by the Department of Justice. The committee cites for the proposition § 651 of Title 28, which is not in point (it deals with arbitration, not process service); the reference intended may have been to what is now § 566 of Title 28.

When any plaintiff requests it, the court is also empowered, as a general matter under subdivision (c)(2), to direct the marshal to serve the summons. Leaving the matter in the court's discretion permits the exigencies of each case--assuming the case has any, as it should be shown to have in order to invoke this provision--to be taken into account. Cited in the committee notes on the 1993 revision as an appropriate circumstance to invoke this provision is where "a law enforcement presence appears to be necessary or advisable to keep the peace", an observation that follows through on the legislative note made on the 1983 revision, which referred to the situation in which the defendant's hostility suggests a risk of injury to a private process server.

There may be other and less obvious situations in which a court order directing the marshal to make service may prove helpful. Suppose, for example, that in a diversity case a delivery of the summons to the marshal--extrapolating from some state statute (applicable in a diversity case under the Erie doctrine, see Commentary C4-40)--tolls the statute of limitations and gives the plaintiff some extra service time. Ability to earn that toll by mere delivery of the summons to the marshal is no small gift when the statute of limitations is on the scene, as elaborated in this writer's article on the 1983 Rule 4 amendment in 96 FRD 81, 106-107, but today a marshal would probably not accept the delivery without a court order. When this was pointed out at a bar association seminar on the 1983 amendment of Rule 4, in which several U.S. district judges participated, one of them volunteered that in such an instance he would be amenable to making an order directing the marshal to serve the summons so as to require the marshal to accept its delivery and thereby enable the plaintiff to invoke the limitations' toll. Of course, one cannot predict whether a different judge would read the provision so indulgently, or, indeed, what a court of appeals' attitude might be. The point is raised merely to illustrate that there are possible fringe benefits to court-ordered marshal service.

Suppose the marshal serves a defendant in an instance not falling under any of the enumerated categories. The plaintiff is not a pauper or seaman and has no court order directing marshal service. It is an unlikely situation, but if the service is duly established it should nevertheless be valid on the basis that the marshal was merely acting as an ordinary process server, i.e., a person over 18 and not a party.

Before the 1988 addition of what is now subdivision (c) of § 566 of Title 28, there was a kind of competition between Rule 4 and the statute then in point, § 569(b). The latter said that the marshal "shall execute all lawful ... process" of the federal courts, which would of course include the summons, while Rule 4 (as produced in 1983) severely restricted instances of summons service by the marshal. Rule 4 apparently had the upper hand in the matter, on the authority of 28 U.S.C.A. § 2072(b), the statute on the rule-making power, which purports to subordinate even statutes to the rules. It still does, but there exists now a further statutory statement of deference to the rules that would confirm Rule 4's authority to determine the marshal's summons-serving duties. The present § 566(c) (a product of a 1988 revision), in directing the marshal to serve federal process, says that it shall do so "[e]xcept as otherwise provided by law or Rule of Procedure".

A proposal to eliminate from § 2072 this "supersession" clause, incidentally, as subdivision (b) is sometimes referred to, so as to prevent a rule from superseding a statute, came close but didn't make it in the 1988 Judicial Improvements and Access to Justice Act (Pub.L. 100-702). See the Commentary on 28 U.S.C.A. § 2072.

Appointee Other Than Marshal, Including State Sheriff, Must Assent to Be Server

Since the marshal is an officer of the federal court, the court does not need the marshal's permission before directing the marshal to serve a summons. But in respect of any other proposed appointee, it was held in Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526 (SD Texas 1988), that the appointee must accede to the appointment.

The process involved in the Potomac case was an execution on a judgment. (The execution would now fall under Rule 4.1, which deals with process other than a summons or subpoena.) The plaintiff (judgment creditor) wanted the local county sheriff to levy it, but the sheriff refused. The plaintiff then sought to have the federal court specially appoint the sheriff to the task on the authority of Rule 4. The court denied the motion:

This federal Court should no more exercise its power to order a County Sheriff to execute on a federal judgment than should a state court try and order the U.S. Marshal to execute on a state judgment.

If state law in the particular state offers a procedure for converting the federal judgment into a state judgment, the plaintiff should pursue the steps the state law prescribes to accomplish that. The federal judgment then becomes a state judgment and may be enforced as such. That should then permit levy on the federal judgment through the state sheriff. See, for example, § 5018(b) of the New York Civil Practice Law and Rules, which permits conversion of a federal judgment into a state judgment through the simple expedient of filing a transcript.

Subdivision (d)

C4-15. Waiver of Service, Generally.

Having addressed the form of the summons in subdivision (a), its issuance in subdivision (b), and who may serve it in subdivision (c), Rule 4 would seem poised to step right into the methods of service. But those begin with subdivision (e). Into the hiatus comes subdivision (d), with a procedure that may make a summons unnecessary. This is the new provision through which the plaintiff may seek to have the defendant waive the formal ritual of summons service altogether.

The waiver of service concept really began with the adoption of the service by mail provision of subdivision (c)(2)(C)(ii) of the 1983 version of Rule 4, which provided for mailing summons and complaint to the defendant along with an acknowledgment form which the defendant was asked to sign and send back in an also-enclosed stamped envelope. The service by mail provision is abolished in the 1993 revision and into its place goes the "waiver" procedure of subdivision (d).

In many particulars the two procedures are the same. The mail method of the 1983 rule was designed to make formal summons service unnecessary if the defendant would just sign and return the acknowledgment. That's what the waiver provision of subdivision (d) of the new (1993) rule accomplishes, too, if the defendant just signs and returns the waiver. The defendant could frustrate the mail service of old Rule 4 and thus compel formal service merely by refusing to acknowledge. Same thing with the waiver under the new rule. If the defendant refuses to return the waiver, the plaintiff must turn to formal service. Under old Rule 4, the punishment to the defendant who made formal service necessary was that the defendant could be made to pay the costs of such service; again, the same punishment obtains under the new rule when a waiver is refused. What, then, are the attainments of this substitution of the waiver procedure for the old procedure of service by mail?

There aren't many, but there appear to be some, at least in the thinking of the advisory committee, to whom the chief benefit is that the waiver procedure is easier to use when the defendant is in a foreign country. The old provision for service by mail was nevertheless the formal "service" of judicial process and had to satisfy international conventions, formal or unwritten, by conforming to whatever the foreign sovereign had to say about such an act. To continue the mail service provision would have been to continue to dress the procedure in its "judicial process" robe and thus possibly create international difficulties by purporting to lend the imprimatur of American government to a hostile act on foreign soil.

The mere request for a waiver, on the other hand, is in the committee's eyes the private and nonjudicial act of an individual: a simple request by plaintiff P advising potential defendant D that P has commenced an action against D and is asking D to make formal service unnecessary by sending back a paper agreeing to waive it. That, in the committee's eyes, can't offend the foreign sovereign. The committee notes are quite clear about that, and between the lines one can read further that if a given sovereign should object even to that, it is not an objection that merits such deference as to keep the procedure out of the rule altogether.

A further concession to potential international objections is that the provision that requires the defendant to pay the costs of formal service, if the defendant makes formal service necessary by refusing a waiver, does not apply when the defendant is not "located within the United States". (See the last paragraph of subdivision [d][2].)

The provision uses the carrot as well as the stick. The would-be defendant--and here the defendant served abroad is included--is offered more answering time by making the waiver, subdivision (d)(3), although the interplay of that provision with several others suggests that this gift of time may be illusory. See Commentary C4-18 below.

Only individuals and private business entities are subject to the waiver procedure, which is what paragraph (2) of

subdivision (d) means by its reference to subdivisions (e), (f), and (h), which govern those categories of defendant. This means the waiver procedure may not be used against infants or incompetents, service on whom is governed by subdivision (g), or on governmental units--national, state, municipal, or foreign--for which subdivisions (i) and (j) contain the service provisions.

There is a statement in the introductory notes of the advisory committee that the waiver procedure "is made available in actions against defendants who cannot be served in the districts in which the actions are brought", and in such context as might suggest that only in such instances may it be used. That is of course not the case. The waiver procedure may be used against individual and business defendants whether they are servable locally or not.

There are two reasons cited in the notes of the advisory committee for making the waiver provision inapplicable to a governmental unit. The first is that "its mail receiving facilities are inadequate", a difficult proposition to reconcile with several other facts. One is that in other parts of Rule 4 the use of mail against governmental units is significantly expanded, such as under subdivision (i)(1)(A), which applies to service on the U.S. Attorney's office in all actions against the United States or a federal agency. (See Commentary C4-27 below.) When mail is not used, moreover, delivery in hand to some agent of the governmental unit is likely to be the method used, and it is difficult to understand how governmental "facilities" are any less imposed on when their higher echelon employees--and proper servees are usually those at or near the top echelon of the governmental structure--are made to receive a summons in hand than when an employee at any level is able to handle the same thing at a desk by just opening an envelope.

The other reason cited is one of "policy": that a governmental unit "should not be confronted with the potential for bearing costs of service". But that "policy" could have been implemented merely by dispensing with the costs-shifting feature of the waiver device, as it was in fact dispensed with in the case of service outside the country when objections were put by some foreign nations.

When the waiver procedure is used against a proper defendant, subdivision (2) obliges the defendant "to avoid unnecessary costs of serving the summons". It's in the threat of costs that the waiver procedure is supposed to have teeth, but it doesn't appear to have very sharp ones. See Commentary C4-17 below.

C4-16. Waiver of Service Waives Nothing Else.

If the plaintiff resorts to the waiver request and the defendant furnishes the waiver, the defendant concedes only the receipt of the complaint and makes efforts at further service unnecessary. Paragraph (1) of subdivision (d) states that giving the waiver does not forfeit any objection to venue or to personal jurisdiction, to which we may add that neither does it waive anything else. It concedes only the fact that the defendant has the complaint and is not insisting that a formal summons be issued or served.

If the defendant in a federal action in New York is reached with a waiver request in California and sends it back from there, an objection that the defendant is not amenable to jurisdiction in the New York action for want of New York contacts (etc.) remains available. Same thing on the foreign scene. If the defendant receives the waiver request in France and sends it back from there, but maintains that there is no basis in the action for extraterritorial service such as to make the defendant amenable to jurisdiction of an American court, the objection remains available.

All objections remain alive, in other words, except those concerning the ritual of the summons and its service.

Perhaps the reason for singling out objections to personal jurisdiction and venue for assurances against inadvertent forfeiture is their association with summons service under the common roof of Rule 12(b).

Subdivision (b) of Rule 12 of the Federal Rules of Civil Procedure has seven numbered grounds of objection. Of the seven, two are waived when the request for waiver is honored by the defendant: the objections numbered 4, on insufficiency of process, and 5, on insufficiency of service of process. Since there is no summons in the picture at all when the waiver procedure is fulfilled, objection 4 has nothing to operate on, and dispensing with formal service is of course the very purpose of the waiver procedure, thus taking objection 5 out of the picture as well.

Venue and personal jurisdiction are also on the Rule 12(b) list, as items 3 and 2. It was obviously found unnecessary to offer in Rule 4(d)(1) any assurance about the possible inadvertent waiver of the other three objections on the Rule 12(b) list, which are subject matter jurisdiction (item 1), failure to state a claim (6), and failure to join a party (7). Those objections were apparently not felt to be at all in jeopardy should the service waiver of Rule 4(d) be returned, but in that light one may wonder why an objection to venue was felt to require an explicit reassurance, since agreeing to waive service would seem in no way to waive an objection to venue. Perhaps it has something to do with the interplay between venue and amenability to jurisdiction presently found in the venue statutes. See the Commentaries on 28 U.S.C.A. § 1391.

C4-17. Request for Waiver by Plaintiff.

The plaintiff who would take advantage of the waiver procedure must consult the requirements enumerated in subdivision (d)(2) of Rule 4, and should follow them to the letter, especially during the early months or even years in which the new procedure is going through its expected court tests.

There are many things to note about the waiver device. Right up front, for example, it must be observed that the time that the plaintiff must allow the defendant for the waiver--the time periods for it are stated in paragraph (2)(F)--will come out of the overall period that the plaintiff is allowed for service by subdivision (m), which is the 120 days following the filing of the complaint. There is no automatic extension of the 120 days for service merely because the plaintiff tried to secure a waiver before resorting to formal service. Thus the plaintiff must be especially conscious of the time elements connected with the new waiver procedure if the statute of limitations is anywhere near the scene.

Should the service come too late under the statute of limitations because the plaintiff has let too much time pass in anticipating a waiver and the defendant has not obliged with one, the fact that the dismissal may ultimately lead to a barred action under the statute of limitations instead of res judicata will be little consolation to the plaintiff.

The waiver request must be in writing and addressed directly to an individual defendant, or to a specific officer or agent of a corporate or association defendant. A waiver request sent to the general address of a corporate defendant, for example, won't do. And remember that the waiver procedure does not apply to infants or incompetents or to governmental defendants of any category.

Little is left to the plaintiff's imagination in devising the waiver request because there's an official form for it: the new form 1A adopted as part of the same 1993 promulgation that adopted the revised Rule 4 itself. (The forms are in an appendix to the rules.)

The request for waiver is accompanied by the complaint, but not a summons (unlike the procedure of service by mail in the pre-1993 version of Rule 4, which included a summons). As noted in Commentary C4-15 above, anything even called a "summons" is deliberately kept out of the picture to help assure that the request will not be taken by any foreign nation--should it reach the defendant on foreign soil--as a judicial or governmental act to which the foreign nation might take umbrage.

Ordinary first-class mail may be used, as was also true of the pre-1993 service-by-mail procedure, but for the waiver procedure under the 1993 revision any "other reliable means" may be used as an alternative to ordinary mail. Registered or certified mail would be satisfactory, for example, as would express mail or a sending through any of the overnight services. Fax can be used, or a messenger can deliver it. The rule appears to be little concerned with the method of sending the waiver request for the reason that the plaintiff has every incentive to use a method that will work. After all, if the defendant doesn't get actual hold of the waiver request, the plaintiff can hardly expect to get back a waiver. (Many lawyers don't like the certified and registered mail categories, incidentally, with or without return receipts, because they require the post office to secure signatures at the other end, which often postpones delivery and even creates a limbo when the post office can't locate the defendant to secure the signature.)

The plaintiff's lawyer or the plaintiff proper, when not represented, does the mailing. The signature slot on form 1A makes this clear. Obviously the mailing does not need a process server.

The mail may be addressed to the defendant wherever the plaintiff thinks the defendant can be found. There is no requirement that it go to the defendant's residence or place of business or any other prescribed place. Since the defendant must cooperate or the waiver procedure won't work, it matters little where the defendant can be reached with the mail that elicits the waiver. The same was true of the service-by-mail procedure under the pre-1993 Rule 4, and there's case law on it. See, e.g., Jaffe v. Federal Reserve Bank of Chicago, 100 FRD 443 (ND Ill. 1983), which observed that since the requirement demands actual notice to the defendant in order to be effective, "it matters not a whit whether he or she receives [the mail] at home, at work, at play or anywhere else".

A capacious envelope should be used because it must contain several things, including the complaint and two copies of the form 1A request for waiver. Of course it must also contain a form of the waiver itself, as prescribed in official form 1B, which is also part of the 1993 revision. Curiously, Rule 4(d)(2) itself does not explicitly say that the plaintiff must include the waiver form, which would be an obvious part of the list on which the paragraph embarks, but the matter is of small moment. Form 1A, the request form, makes clear that the waiver form must also be among the enclosures.

Also included must be a "prepaid means of compliance in writing". A self-addressed and adequately stamped envelope will ordinarily do for that.

The waiver request advises the defendant about its obligation to answer the complaint (should the defendant sign and return the waiver) and of the time the defendant has for answering. It also warns that the costs of service may be imposed on the defendant if formal service is made necessary because the waiver is refused.

The request for waiver must also include the date it is "sent", and, according to paragraph (2)(E) of Rule 4(d), that's the date that appears at the bottom of form 1A, to be filled in by the plaintiff. This can make trouble in cases unusually close to the line of the statute of limitations. The time the defendant has for returning the waiver (elaborated in the discussion of the defendant's obligations in Commentary C4-18 below), is measured from this "sent" date. It is of course anticipated that the envelope containing the waiver request and all the other required material will be dispatched on the "sent" day recited in the request itself. The attorney or plaintiff attests that this is

so, in the form of an affirmation right on the request. If there should be some delay in the dispatching, however, and this is not reflected in the date recited, an argument can arise about whether the defendant is entitled to have the responding time measured by the actual day of dispatching instead of the day recited on the request. If the difference is slight, and unintentional, and there is no statute of limitations consequence that might be traced to it, it should be harmless enough.

The plaintiff should be at least a bit wary about the signature on the returned waiver form, and be sure it is the defendant's signature. It may be illegible. The plaintiff can help protect against that prospect by including on the form a line, under the signature line, for the signer to print her name. Form 1B doesn't call for that, but it's a good idea. Neither did a "print name" line appear on old form 18A, which contained the acknowledgment form of the now-superseded service-by-mail procedure, but some of the district courts added such a line to the acknowledgment forms they distributed.

The plaintiff who has any doubt about whether the signature, legible or not, is the defendant's rather than some mistaken victim's, or interloper's, or vindictive neighbor's, etc., had best ascertain the state of things. If the statute of limitations is closing in, the plaintiff should not rest at all on this front unless and until an attorney puts in an appearance for the defendant and the time for raising a jurisdictional objection passes.

The various time elements that become relevant with this waiver procedure can be sticky. But unless the statute of limitations is nearby, they shouldn't lead to any fatalities.

The plaintiff's obligations in respect of the periods allowed for the waiver's return are set forth in paragraph (2)(F) of subdivision (d). The plaintiff must give the defendant a "reasonable time to return the waiver", which must be at least 30 days (60 days for defendants served abroad). As noted at the outset of this Commentary, whatever time is offered comes out of the 120 days allowed by subdivision (m) for service. While nothing is stopping the plaintiff from waiting longer than the allotted time to see whether a waiver materializes, the longer the plaintiff waits, the less time there will be to effect service by some formal means during the declining balance of the 120 days. The period is extendable by the court for good cause (see subdivision [m]), but plaintiffs can't be too optimistic about what will qualify as "good cause". Merely hanging around in the hope that a tardy waiver will appear is not likely to be good cause, or, in a statute of limitations context, good sense.

When the time does come for the plaintiff to give up hope about getting the waiver back from the defendant, as when the plaintiff wants to do things according to the letter, or the waiver is unduly delayed, or the statute of limitations is moving towards its end and the plaintiff doesn't want to waste a moment (for which see Commentary C4-40), the plaintiff must now resort to formal service under the appropriate one of the subdivisions that run from (e) through (j) (which contain the service methods). This ordinarily means that service must now be made either by a process server or by the marshal--the latter, of course, only if the case otherwise falls within subdivision (c)(2)'s narrow permission for marshal service.

Further reference is made to the time periods in the next Commentary, C4-18, which takes a closer look at things from the defendant's point of view.

Some important questions that arise in connection with the waiver procedure can be treated under distinct captions, and we've broken them down that way for the reader's convenience. They follow.

Assessing Service Costs Against Defendants Who Fail To Waive Service; Are Attorneys' Fees Included?

The concluding portion of paragraph (2) of Rule 4(d) permits the court to impose on the defendant who refuses to waive service the costs of the formal service that must afterwards be undertaken, and paragraph (5) says that these costs may include "a reasonable attorney's fee". But an attorney's fee may be imposed only for the attorney's effort in making a motion to collect the costs of service. The time of the attorney in arranging for formal service after the defendant has refused a waiver is not a compensable item.

Under the old service-by-mail provision, no attorneys' fees were referred to at all. That offered at least some room for construction, and some courts allowed attorneys' fees to cover the time spent in arranging for service. The first decision to come to this writer's attention allowing such fees was C.I.T. Leasing Corp. v. Manth Machine & Tool Corp., WD NY (per Curtin, CJ), CIV-85-261C, Sept. 3, 1985, where the court included, as part of the cost of personal service, the fee of the plaintiff's attorney in arranging for personal service ($32) as well as bringing on the motion to get costs ($300, allowed for six hours at a $50 rate). The case, which is unreported, was incidentally noted by the Third Circuit in Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (1987).

A reported decision that cites both C.I.T. and Green and assesses an attorney's fee under the prior rule is Premier Bank, National Association v. Ward, 129 FRD 500 (MD La. 1990), where the cost of the process server was only $50, but to that was added $1237.50 as attorneys' fees incurred in both arranging for service by other means and in making the motion for the costs assessment.

Under present Rule 4(d)(5), the explicit allowance of an attorney's fee for making a motion to collect costs seems by implication to negate the award of an attorney's fee for the time spent in arranging for formal service. That's unfortunate. The amount would in most cases be small, but it can become substantial when service has been made difficult, such as where the defendant is evading service. Many lawyers can report long hours spent in trying to pin a defendant down for service. It would be a big bonus--and a grand encouragement to defendants to cooperate in the waiver procedure--if the fee assessment against the defendant could include the additional time required of the plaintiff's lawyer in arranging for personal service. But under the new subdivision (d)(5), it's apparently not to be.

No Costs at All Against Defendant Reached Abroad

Reading Rule 4(d)(5), one would conclude that the costs of service may be imposed on a refusal to waive whether the refusal is made by a defendant who receives the request to waive in the United States or abroad. This would be spelled out by the references the cited provision makes to subdivisions (e), (f), and (h) of Rule 4. The cited subdivisions are among the provisions for service looked to when a waiver does not materialize, and the reference to subdivision (f), governing defendants served in a foreign country, would seem clearly to suggest that foreign-served defendants are just as subject to the costs assessment as are domestic defendants.

But look at the last part of paragraph (2) of Rule 4(d), which speaks of allowing a costs assessment only against a defendant "located within the United States".

There's an obvious conflict here, but paragraph (2) seems to make the stronger statement on the subject. And the advisory committee notes, perhaps unmindful of the ambiguity on this point created by the reference that subdivision (d)(5) makes to subdivision (f), conclude that defendants reached abroad are not subject to the imposition of service costs for not offering a waiver (although they might have to pay the costs of service as an ordinary disbursement if they are subsequently served, and defend, and lose on the merits).

There's also this peculiarity. The last sentence of paragraph (2) of subdivision (d) allows recovery of costs (for not waiving service) in behalf of the plaintiff only if the plaintiff, too, is "located within the United States". Perhaps this seeks to bar such costs to foreign plaintiffs, but it seems awkward to describe them by their "location". Suppose, for example, that a plaintiff brings suit in the Southern District of New York and reaches the defendant with a waiver request in the United States. May the plaintiff invoke the costs provision only if the plaintiff mailed the request to waive from the United States? Does it make any difference whether the plaintiff is an alien or a citizen? Is the word "located" to be applied to the citizenship or at least residency status of the plaintiff, or does it mean to apply only to the place where the plaintiff happens to be when mailing the request to waive? If the latter, does this mean that an alien can invoke the costs provision just by stepping across the border into the United States to post the envelope, or merely to stand by when the lawyer mails it?

The latter possibilities border on the frivolous. Requiring the plaintiff to be "located within the United States" should be taken to mean something more substantial than the mere place of posting. It should mean that the plaintiff is a citizen, or a domestic corporation or association or governmental unit; if an alien, it should at least mean an alien residing in the United States, or if a foreign nation corporation, one with an office in the United States. If this provision is to be taken as excluding alien plaintiffs from a costs award altogether, it would appear unfair, and even vindictive, since an alien defendant "located within the United States" would be subject to a costs award for not offering a waiver.

Failure to Waive Can't Confer Jurisdiction

Plaintiffs should keep in mind a salient distinction between the waiver procedure of the present Rule 4 and the service-by-mail provision of subdivision (c)(2)(C)(ii) of the pre-1993 version of the rule. If the defendant actually received the mailed papers under the old rule but deliberately refused to acknowledge them, could the actual receipt qualify as service, or was the plaintiff now absolutely obliged to put the summons and complaint into the hands of a process server so as to effect service by other means?

The question arose time and again under the prior rule. It arose so often that it sooner or later reached just about every court of appeals in the country. The holding was uniformly--with one exception--that unacknowledged mail service conferred no jurisdiction over the defendant. The point was such a key one that we note the cases so holding. They include Media Duplication Services, Ltd. v. HDG Software, Inc., 928 F.2d 1228 (CA1 1991); Stranahan Gear Co. v. NL Industries, 800 F.2d 53 (CA3 1986), and Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (CA3 1987); Armco, Inc. v. Penrod-Stauffer Building Systems, Inc., 733 F.2d 1087 (CA4 1984); McDonald v. United States, 898 F.2d 466 (CA5 1990); Friedman v. Presser, 929 F.2d 1151 (CA6 1991); Geiger v. Allen, 850 F.2d 330 (CA7 1988) (citing earlier CA7 decision in Del Raine v. Carlson, 826 F.2d 698 [1987]); Young v. Mt. Hawley Insurance Co., 864 F.2d 81 (CA8 1988), reiterated in Gulley v. Mayo Foundation, 886 F.2d 161 (1989); Worrell v. B.F. Goodrich Co., 845 F.2d 840 (CA9 1988), cert. denied 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989); Schnabel v. Wells, 922 F.2d 726 (CA11 1991); Combs v. Nick Garin Trucking, 825 F.2d 437 (DofC 1987). Standing by itself as the exception was the Second Circuit in Morse v. Elmira Country Club, 752 F.2d 35 (1984), one of the earliest decisions on the matter. It held that as long as it was shown that the defendant actually received the mail, service would be deemed made even though the defendant did not return the acknowledgment.

We refer to the matter here, and take note of the judicial energy expended in resolving it, just to stress that a similar issue should not arise under the waiver procedure of the new Rule 4, even though it is in effect a replacement of the old service-by-mail provision under which all the above cases arose.

The mail service under the old rule was a category of actual service of process, albeit (in the majority view) it took a voluntary acknowledgment to effectuate it. The waiver provision under Rule 4(d) of the present rule, on the other hand, is not process service at all and can't be taken as such in any sense. It's just a request that the defendant make formal service unnecessary. Ignoring the waiver request, while it has in common with an ignoring of the acknowledgment under the prior rule that it can invoke a costs award, does not have the prior rule's potential, even under an approach like the maverick Morse case, of itself qualifying as service and securing jurisdiction of the defendant's person by that means.

Translation of Request and Waiver Needed?

There is no stated requirement that the waiver and request for it be translated into the language of the person it's directed to. Formal service may require that, as when it turns out to be one of the requirements of the foreign nation in which service is being made and is stipulated as a requirement under the Hague Convention (see Commentary C4-24 below).

Still, the plaintiff must consider that the purpose of using the waiver request is to convince the defendant to make the waiver. If the defendant would find it more convincing if written in the defendant's own tongue, the worthwhileness of including an accompanying translation is self-evident. If it's used with the request and waiver, moreover, it should for obvious reasons be used with the complaint itself.

Rule 11 Sanctions Applied for Plaintiff's Misconduct Connected with Summons Service

Costs that may be assessed against a defendant under Rule 4(d)(5), whether they include an attorney's fee or not, may look modest when sanctions under the infamous Rule 11 enter the picture, as they have already done. In several cases, moreover, they entered it not against the defendant for failing to respond to summons service, but against the plaintiff for dishonesty or overly clever tactics connected with summons service in the first place.

In one case, Ordower v. Feldman, 826 F.2d 1569 (CA7 1987), for example, the plaintiff, with special motivations unique to the case, adopted what the court described as "a strategy of serving the defendants piecemeal, most of them untimely". The court rejected the tactic. Quoting from Excalibur Oil, Inc. v. Gable, 105 FRD 543 at 544 (ND Ill. 1985), the court said that the 120-day period of what is now Rule 4(m) "establishes not some kind of norm, but rather an outside not-to-be-exceeded date". A sanction of $1000 imposed on the plaintiff by the trial court under Rule 11 of the FRCP and under 28 U.S.C.A. § 1927 was upheld.

Much more money--some $14,700--was exacted of the plaintiff and its lawyer as Rule 11 sanctions in Gas Reclamation, Inc. v. Jones, 113 FRD 1 (SD Texas 1985), for what the court found to be the plaintiff's lawyer's "unconscionable conduct", questionable "veracity", and "bad faith" in connection with process service. One of the main offenses taken note of was an attempt to obtain a default judgment with no notice at all to the other side.

An even heavier Rule 11 assessment, some $15,798, was made against a plaintiff's lawyer in Stinson v. American Sterilizer Co., 127 FRD 689 (MD Ala. 1989), for process-serving misconduct. The court accepted the defendant's lawyers' accounting of some 164.9 hours of additional effort engendered by the plaintiff's lawyer's conduct.

The Stinson case may illustrate with unusual force the great range of differences that can be met from court to court in applying the same rule. An analysis of the decisions in which plaintiffs have applied for enlargements of time in

which to serve process (see Rule 4[m] and the Commentaries on it) would doubtless reveal many cases in which a plaintiff's lawyer not much less negligent or culpable than the lawyers in some of the above cases was subjected to no sanction at all, whatever the court's action on the enlargement motion.

C4-18. Defendant's Response to Waiver Request; Time Periods.

The duty imposed on a defendant who receives a waiver request is "to avoid unnecessary costs of serving the summons". If the defendant responds to the request and sends the waiver back, the plaintiff is spared those costs. If the defendant doesn't, and the plaintiff has to effect service by formal means, the costs of the service may be imposed on the defendant, and that is so no matter which way the case may ultimately go on the merits. The amount of the costs assessment, and what may be included in the attorney's fee that subdivision (d)(5) allows as part of costs, are discussed in Commentary C4-17 above.

Under the prior rule on mail service, the acknowledgment of service had to be made under oath. No oath is required for the waiver under the revised rule.

The time within which D is expected to respond to the waiver request is whatever P has offered in the request itself, but the time P offers may not be fewer than 30 days (60 if the waiver request is sent to the defendant outside the United States). Rule 4(d)(2)(F). (An occasional issue may arise about the precise moment the request is deemed "sent", but this should be neither a serious problem nor a frequent one. See Commentary C4-17, above, on that issue.)

If D properly responds, then, in addition to being spared the costs of service, D is entitled to a longer time to answer the complaint. A defendant served with a summons and complaint in the usual fashion has 20 days in which to answer the complaint, measured from the moment of service. Rule 12(a)(1)(A). If the defendant waives service under Rule 4(d), the answering time is the 60-day period following the initial sending of the waiver request by the plaintiff. (The period is 90 days if the request is sent to the defendant outside the United States.) So provide Rule 4(d)(3) as well as Rule 12(a)(1)(B). This may not be quite the gift it first appears to be, however, as some examples can illustrate.

If P effects formal service on D on April 1st, D has until April 21st to answer. Assume P instead sends D a waiver request on April 1st, and that it's sent to D somewhere in the United States, invoking the 60-day answering period. On the face of things, if D chooses to sign and return the waiver, D has until the very end of May in which to answer, obviously a good deal longer than had formal service been made. The suggestion is that D really does benefit from responding to the waiver.

But now assume that D does not cooperate. P sends the waiver request on April 1st, calling for D to send the waiver in by May 1st. D doesn't. P will probably wait a week or so after May 1st to see whether the waiver materializes, allowing time for the return through the mails or whatever other means is used. It is now somewhere around May 5th or May 10th. P, giving up on getting the waiver back, must now arrange for formal service. It takes P a few days to do that. In busy law offices it will take still more than that. Say it takes a week. We're now around May 15th. The process server must now find and serve D, and does, on May 25th. D is served formally on that day, and on that day starts the usual 20-day answering period. So D's time to answer does not expire until about June 14th. By not cooperating, D has gotten a total of some 2 1/2 months in which to answer, as against the two months that D would have had by cooperating and sending the waiver in. And the time periods assumed in this example, in which P awaits the waiver, gives up on it, and arranges for a process server, and the time the process server then takes to effect the service, are, in practical experience, on the short side, not the long side.

And whatever longer time D has managed to secure for answering by not offering the waiver is also extra time D gets in which to go over and think about the complaint, which, under the waiver procedure, is placed in D's hands right at the outset, arriving in the same envelope as the waiver request.

If extra answering time is supposed to be the spur that prompts D to cooperate, it would appear to be a spur that leaves no scar.

Perhaps P can counter this by offering D far more than the minimal 60 days in which to answer if D returns the waiver. P should not just add more answering time in the waiver request itself, however, because that will just give D the longer time to pursue the tactics noted above. But P might find it helpful to enclose a note with the waiver request, telling D that if D returns the request within the 30 days, P will agree to extend D's answering time substantially beyond where it would be by the operation of the Rule 4 provisions alone. In the example, P should tell D that if D returns the waiver request within the 30 days, P will allow (e.g.) an additional month or two in which to answer, or will be amenable to discussing the point with D, etc.

Unless the plaintiff does something of that sort, a wily defendant, calculating the additional time to be amassed by not cooperating, will not cooperate, and that will almost surely be the case when a statute of limitations defense might just be secured in the process. (See the caption below.)

Of course, there's that other incentive: D's saving of the costs of service. In the context of a big case, however--and federal cases tend to be big cases--such an award is likely to hold so little terror for the defendant as to become no consideration at all. (For the amounts assessable for not waiving, see Commentary C4-17 above.) So, if D can manipulate time to make it an advantage not to cooperate, and if the money threat is de minimis in context, the waiver procedure may be seen as toothless by canny defendants. And can't the defendant avoid what is most likely to be the greatest part of the award----the plaintiff's attorney's fee in making a motion for the costs----just by sending the plaintiff's lawyer a letter asking how much the cost was to effect formal service and offering to the pay the bill for it? That may not work, but it seems a nice tactical touch to take a stab at. The court can't be too happy with a plaintiff who makes a motion for something she could have had without moving. We suspect that if the waiver procedure works, it will be because the delays that a refusal to cooperate can engender will just not be that earth-shaking. P can see that that is so by making sure that the statute of limitations is nowhere about. That's a separate question, discussed below under a distinct caption.

Another consideration will be the extent to which the plaintiff wants to pressure the defendant into answering. If applying such pressure is a factor in the case, the plaintiff does best not to invoke the waiver procedure at all. The plaintiff should file the complaint and effect its prompt service, invoking the usual 20-day answering period and then refusing voluntary time extensions that the defendant may request.

The status of the action when the defendant returns a waiver is set forth in subdivision (d)(4). The plaintiff must file the waiver and the action shall proceed, the rule says, "as if a summons and complaint had been served at the time of filing the waiver". The only difference is that the defendant has the longer answering time provided by the immediately preceding paragraph (3).

Note that this status call is not pinned to the plaintiff's receipt of the waiver from the defendant, but to the time the plaintiff files it with the court, suggesting that the plaintiff does well to file the waiver promptly.

While under Rule 5(d) the burden of filing a paper is ordinarily on the person who served it, and the defendant would logically be deemed the party who "served" the waiver, the burden under Rule 4(d)(4) is clearly on the plaintiff to effect the waiver's filing. And no proof of service is required if the defendant sends in the waiver, says the rule. In the jurisdictional sense, however, it may be more accurate to regard the waiver itself as the equivalent of proof of service.

Statute of Limitations Benefit to D by Not Cooperating

Should the defendant ever intentionally refrain from signing and returning a waiver? Some lawyers looking at things from the defendants' side suggest that if the plaintiff does not commence suit until near the expiration of the statute of limitations, so that a refusal by the defendant to furnish a waiver, thus requiring the plaintiff to resort to formal service, might just put the plaintiff out of time altogether, they might counsel refusal. A defendant's lawyer so doing should also counsel that if the plot fails, there may be a substantial bill for the plaintiff's service costs.

One may question the ethics of such conduct by a defendant--upon which we do not here reflect one way or the other--but whoever does so should note that the conduct that has put such a temptation in the path of the defendant is most often that of the plaintiff's lawyer who lets the client's case get this close to the statute of limitations in the first place.

In Commentary C4-17, above, is a caption entitled "Failure to Waive Can't Confer Jurisdiction". Under it, the question is discussed about whether, under the service-by-mail procedure of the pre-1993 version of Rule 4, a defendant's deliberate refusal to sign an acknowledgment of service (although the defendant clearly received the service by mail) could be deemed service nonetheless, thus sparing the plaintiff a dismissal. The issue became a key one under the service-by-mail procedure when the statute of limitations had expired (and would bar a new action), as it had in the Second Circuit's Morse case treated in that Commentary. Morse took the position that the unacknowledged service was service nevertheless. Just about every other circuit dissented from that view.

The point to be made here is that while there may have been a little room for a Morse case under the prior rule, on service by mail, there is no room at all for one here, under the waiver of service provision. The mailed service was service under the old rule; the request for a waiver under the present rule is only that--a request--and does not even purport to be service itself. Hence a refusal to waive can't be deemed, as the refusal to acknowledge was deemed to be in Morse, the service of summons sufficient to secure personal jurisdiction over the defendant.

In the delicate situation in which time is so critical that a decision about whether to waive service can affect the statute of limitations, the defendant under the new waiver procedure does indeed have an incentive for refusing to waive. The lesson here is therefore addressed to the plaintiff: don't ever turn to the waiver procedure when there isn't substantial time still left on the statute of limitations. Enough time, in any event, to enable a process server to make formal service in time in the event that a duly sought waiver is not returned. See Commentary C4-41.

Subdivisions (e) Through (j), Introductory

C4-19. Service, Generally.

Subdivisions (e) through (j) supply the methods of service for the various categories of defendants, a separate

subdivision being allotted to each category. Under the prior rule, each category appeared merely as a paragraph under a single subdivision, which was subdivision (d) of the pre-1993 version of Rule 4.

Under the present Rule 4, subdivision (d) supplies the waiver procedure, discussed in Commentaries C4-15 through C4-18, above. If the plaintiff uses that procedure, and the defendant obliges by sending in the waiver, summons service becomes unnecessary. If the defendant doesn't return the waiver (or if the plaintiff doesn't resort to the waiver procedure at all), formal summons service becomes necessary, and subdivisions (e) through (j) supply the methods. In the absence of waiver, the service of the summons is the event that subjects the defendant to the personal jurisdiction of the court, without which the court's action would not bind the defendant.

Generally speaking, none of the methods of service that Rule 4 supplies, in subdivision (e) or anywhere else, applies to the service of papers after the summons has been served and jurisdiction of the defendant obtained. The myriad of papers that go back and forth between the parties after jurisdiction has been perfected, including those that the defendant serves in the initial response to the summons (an answer, a motion, etc.), are governed by Rule 5(b). Under Rule 5(b), ordinary mail is the method commonly used, and it is addressed to the attorney, not the party.

Before turning to the individual methods of service, a general word is appropriate about the relevance of Rule 4 and its service methods in a removed action, which is the subject of the next Commentary.

C4-20. Service in Removed Actions.

Rule 4, applicable to actions commenced in a federal court, may occasionally come into play in an action commenced in a state court but afterwards removed to federal court by the defendant. (The removability of cases is governed principally by 28 U.S.C.A. § 1441; the procedure for removal is governed by 28 U.S.C.A. §§ 1446 and 1447 and for a few particulars by Rule 81[c] of the Federal Rules of Civil Procedure.) In removal situations it's the defendant who wants federal jurisdiction and the plaintiff who resists it.

The service in the state court action will of course have followed state law, and in almost all removed cases the personal jurisdiction that it obtained will have been perfected before the removal, leaving no personal jurisdiction to be sought--and thus no business for Federal Rule 4 to handle--after the removal. But that is not always the case. If there are several named defendants in the state court action, for example, and some were served before others, the served ones may have removed the action before the others were served. This does not prevent the plaintiff from serving the others after the removal, however, and, the case now having been removed to the federal court, the plaintiff can use Rule 4 if need be to complete the service. (The plaintiff might even earn a remand to the state court in the bargain: one of the newly served defendants--and it takes only one--may prefer state jurisdiction and spoil the co-defendants' removal by insisting on the remand. The rule is that all defendants on the claim must concur in the removal, 28 U.S.C.A. § 1441[a], or removal fails.)

Rule 4 may become relevant even in an action having but a single defendant. Suppose, for example, that the defendant, ostensibly served in the state court action, has an objection to the state court's personal jurisdiction, for want of basis, defective service, etc. Instead of asserting the objection in the state court, however, the defendant chooses, if the case is removable, to remove it and raise the objection to personal jurisdiction with a dismissal motion made to the federal court after removal. The defendant can do that. The removal does not by itself waive an objection to personal jurisdiction, although a defendant so removing had best raise the objection properly (and promptly) after removal so as not to waive it. (On the way to raise a jurisdictional objection in federal practice, see Commentary C4-43.) Indeed, one of the defendant's motives in removing the action (removal is ordinarily the

defendant's option) may have been to have the federal rather than the state court pass on the jurisdictional objection. If the federal court does, however, and sustains the objection, the sustaining will not necessarily result in a dismissal. If the defect was only in the mechanics of service, the federal judge may merely quash the old service and permit new service to be made, for which Rule 4 would be used.

In yet another and perhaps more common situation the plaintiff may have occasion to invoke Rule 4 in a removed action. Under Rule 21, additional parties may be added by order of the court "at any stage", and this applies in removed as well as original actions. If the court in a removed case orders someone to be joined as a party, and that person will not appear in the action voluntarily, a summons will have to be served on that person. Rule 4 will govern that service.

With those and a few like exceptions, however, Rule 4 should be thought of as addressing the summons only in original, not removed, actions.

The relevance of Rule 4(m)'s 120-day time limit on summons service in actions that get into the federal court by removal is discussed in Commentary C4-38 below.

C4-21. Person to Be Served, Generally.

The actual mechanical methods of making service meander in and out of the several subdivisions that run from (e) to (j) under Rule 4. Sometimes enumerated methods are allowed only for the particular category of defendant being addressed in the particular subdivision. Sometimes, through cross-references, the methods stated in one subdivision are adopted for use in another.

In large measure, the function of each subdivision is to identify the individuals or offices on or through whom service may be effected on the given defendant.

Subdivision (e) governs service on individuals being served in the United States or any of its territories or associated commonwealths in which Congress has created a district as part of the federal judicial system. (We will henceforth refer to the "United States" as embracing all such districts). Here one finds the well known methods of personal delivery and the alternative of delivery to a person of suitable age and discretion at the defendant's dwelling house or place of abode, formerly found in the often cited Rule 4(d)(1). And here one also finds the authorization to use state law service methods as alternatives to those spelled out by the federal provision.

Subdivision (f) governs service on individual defendants made outside the United States. Its business is the complicated business of making service on foreign terrain without offending the foreign sovereign. Here for the first time Rule 4 acknowledges the Hague Convention, a treaty to which the United States is a party. The convention requires the plaintiff to honor any restrictions on service placed by the law of any sovereign subscribing to the treaty. Most of the world's commercial powers subscribe. See the materials on the Hague Convention appended to Rule 4.

Subdivision (g) governs service on infants and incompetents. A special indulgence appears here, carried over from prior law, in that the method used is ordinarily that of the state in which service is made. This recognizes that this category of defendant should be presumed to be a ward of the state in which the defendant is found.

Subdivision (h) governs service on corporations and associations. It sets forth its own methods of service and then, by reference back to subdivision (e)(1), permits state-law methods to be used as an alternative.

Subdivision (i) governs service on the United States and its various agencies, corporations, and officers, covering the ground previously covered in paragraphs (4) and (5) of the pre-1993 version of Rule 4(d).

Subdivision (j) addresses service on state and foreign governments and political subdivisions. The two are quite distinct entities--the individual states of the United States are the first category and foreign nations the second--and are governed by separately numbered paragraphs within subdivision (j). It would have been more consistent with the whole layout of the revised Rule 4 to assign the two categories separate subdivisions altogether, but at the rate the revision was going there may have been some fear that there would not be enough alphabet.

The Commentaries below are a broad view of subdivisions (e) through (j), and since most of the contents of these subdivisions are carried forward from prior Rule 4, there is less to be said about them. When the particular provision has been substantially amended, however, there will be more to say.

Subdivision (e)

C4-22. Service on Individuals in U.S.; State Law Methods.

There are two separate provisions on serving individuals: subdivision (e), on serving them in the United States, and subdivision (f), on serving them outside the United States. Subdivision (e) is the subject here.

Before setting forth its own well known prescription for service, in paragraph (2), subdivision (e) of Rule 4 first announces the permission, which the revised Rule 4 continues, to use methods of service allowed by state law. This it does in paragraph (1), and with an expansion from prior law. Under the pre-1993 version of Rule 4, the state law methods adopted for use against individual defendants were those of the forum state only. Paragraph (1) expands on this, making it permissible to use any method allowed by the forum state or by the state "in which service is effected". (Previously, the state of service was used only for service on infants and incompetents, which, incidentally, continues to be the only proper mode of service on such persons. See subdivision [g].)

The state methods adopted by paragraph (1) are alternatives to the methods that paragraph (2) prescribes directly, and there is no priority between them. Either may be turned to with no attempted prior resort to the other. In essence, the rule just adds the state law methods to the federal list.

This adoptive provision of paragraph (1) makes state law methods of service available without regard to the basis of subject matter jurisdiction in the action. It has nothing to do, in other words, with the Erie doctrine, which is concerned with state substantive law. Erie's main application is in actions that depend on diversity of citizenship for federal subject matter jurisdiction (see Commentary C4-40), from which an attorney might infer that paragraph (1) adopts state law service methods only in diversity cases. Not so.

Thus the plaintiff in a federal question case, admiralty action, etc., as well as the diversity plaintiff, should not overlook an opportunity that a state law service alternative might offer at the invitation of paragraph (1). An

example of such an opportunity might be a case in which there appears to be no way of effecting service on the defendant under the specific prescriptions of federal or state law, such as where the defendant has no apparent place of abode, or business agent, etc.

When service has to be made outside the country in such a case, Rule 4, in subdivision (f)(3), has a fallback provision in which the court is invited in effect to invent a method of service for the plaintiff to use, but there is no explicit counterpart authority for court-invented service under Rule 4(e) when service is made within the country. If the state law of either the forum or the place of service has such a provision, however--allowing the court to devise a method of service--that method should avail in the federal action, too, under the adoptive provision of paragraph (1) of Rule 4(e). New York procedural law contains such an authorization, for example. (See § 308[5] of the New York Civil Practice Law and Rules [CPLR].)

Does paragraph (1), in adopting state law, mean to adopt only the mechanics of service, or does it also mean to draw from state law--if state law offers it--permission to make extraterritorial service of the summons, sometimes called amenability to service? In more technical terms, is it addressed exclusively to the method of giving notice, or does it speak to jurisdictional basis, too?

The answer is that it is concerned only with mechanics. The question of where the service may be made--amenability to service or jurisdictional basis, to use other synonymous descriptions--is separately governed by subdivision (k), and insofar as adoption of state law bases is concerned, paragraph (1) of subdivision (k) adopts for federal use only the extraterritorial bases recognized by the law of the forum state, not the state of service. It is only for the mere mechanics of service that paragraph (1) of Rule 4(e) permits borrowing from either.

In using a state method, the plaintiff should of course do everything possible to see that it is carried out within the 120-day time limit imposed on summons service by subdivision (m) of Rule 4, which applies whether a state or federal method is being used. On this point, see, for example, Coutinho, Caro & Co. v. Federal Pacifica Liberia Ltd., 127 F.R.D. 150 (ND Ill. 1989), where service on the secretary of state was the state method relied on. The delivery to the secretary occurred within the 120 days but a mailing that was also required by the state statute did not occur until afterwards. The action was dismissed.

While the service-by-mail provision of the pre-1993 Rule 4, which was contained in subdivision (c)(2)(C)(ii) of that rule, was abolished by the 1993 revision, there might be a service-by-mail provision applicable under the state law of the forum state or the state of service. If that's the case, the state mail method would be available in the federal action under Rule 4(e)(1).

Under a peculiarity in the now abandoned provision on mail service--subdivision (c)(2)(C)(ii) of old Rule 4--once mail was tried and for any reason failed there was a dispute about whether any state law method of service at all could be resorted to as a follow-up. See and compare, e.g., Billy v. Ashland Oil Inc., 102 FRD 230 (WD Pa. 1984), and Humana, Inc. v. Jacobson, 804 F.2d 1390 (CA5 1986). That issue should not arise at all under the revised Rule 4. There is nothing to inhibit free resort back and forth between state law and federal law for methods of service until one is found that works, as long as time has not run out. (Time for service is governed by subdivision [m].)

C4-23. Service on Individuals in U.S.; Federal Prescription.

Paragraph (2) of subdivision (e) has been federal practice's main provision for serving individual defendants, carried over from old Rule 4, where it was subdivision (d)(1).

Paragraph (2) allows in-hand service, which always does the job. But it does not mandate that in-hand service be used, or even that it be initially tried. It allows the alternative of service by "leaving copies" at the defendant's "dwelling house or usual place of abode" with someone of "suitable age and discretion" who is "residing" there. Any one of the quoted phrases can raise an issue in a given case.

The defendant's regular residence satisfies as a "dwelling house". Generally speaking, it is perhaps the best thing for the plaintiff's lawyer to depend on. The phrase is exotic and even in the stern mind of a lawyer it can conjure up visions of trees instead of buildings, and swinging vines instead of steps. And how does a "usual place of abode" differ from a "dwelling house", or either differ from a residence? Case law explanations are not satisfactory. It has been held that a defendant can have several abodes for paragraph (2) purposes, and that a place of abode can qualify for paragraph (2) service even if the defendant is not a resident of the state and uses the place only from time to time. See, e.g., National Devel. Co. v. Triad Holding Corp., 930 F.2d 253 (CA2), cert. denied 112 S.Ct. 440 (1991).

The Triad case stressed, however, that the defendant was in residence at the time his housekeeper was served and so left open the question of whether the same result would obtain if he was not. A good counseling word here is that if the category of the defendant's living accommodation is doubtful, but it is known that he is around the place--whatever the place may be--from time to time, it is better to have the process server make in-hand service. If the affidavit of service indicates that that wasn't done, and the nature of the place at which the papers were delivered is not clear, the plaintiff should watch out for a jurisdictional objection and make sure that there is time to sue over if it prevails.

The same may be said about whether the person served was of "suitable age and discretion". The person need not be an adult. Teenage servees have been held satisfactory. The issue is often one of fact, which makes it all the less wise to depend on it, especially if time is short. Also beware the door answerer wearing overalls and carrying a monkey wrench or paint brush. He may merely be working there while the household is out, and under paragraph (2) the person served must be a person "residing" at the premises.

These points, from time to time the source of difficulty even under earlier versions of Rule 4, became potentially even more troublesome after the 1983 revision, the revision that first eliminated the marshals as process servers in all but a few cases. The marshals had a long and cumulative experience in federal summons service and were aware of these problems. And from a practical point of view their official status both discouraged defendants from taking issue with these incidents and earned the summons serving ritual a kind of de facto judicial acceptance when the marshal was its performer. When the private process server took over, and the plaintiff was made responsible for service, defendants were expected to become all the more prone to pick on little points like this and the courts were expected to be less deferential to the process servers' statements of their proceedings. That's just about how things have turned out. Commentary C4-38, below, discusses some of the cases.

As long as the plaintiff has sued early enough to be able to commence a timely new action should the worst happen--the worst would be the dismissal of the present action for want of jurisdiction--no mistake in any of these regards should be fatal. See Commentary C4-46.

The "agent" referred to towards the end of paragraph (2) is not just an employee or business agent of some kind. It must be an agent designated for process service specifically. The designation can be made in a contract, see National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), but the more common kind would be the express or implied designation of a state or court official. A frequent example of the

implied kind is under state nonresident motorist statutes. Express kinds are more commonly associated with corporations, which subdivision (h) now governs, but exist for individuals, too.

Any of the agencies under discussion here can exist pursuant to either federal or state law. Technically, paragraph (2) is an independent federal statement, but since paragraph (1) adopts state law--and state law would include service on state-law agents--as an alternative for service on individuals, which law it is would ordinarily make no difference.

Subdivision (f)

C4-24. Service on Individuals in Foreign Country.

Under the pre-1993 version of Rule 4, subdivision (i) contained the provisions for service in a foreign country. Under the current rule, subdivision (f) is the governing provision. It makes several changes in the substance of the former rule, and among other things recognizes the Hague Convention for the first time.

The Hague Convention is a treaty to which the United States is a signatory. Its formal name is Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. We'll call it simply the Hague Convention. Discussion of it appears under a separate subcaption, below.

The caption of subdivision (f), indicating that it governs service in a foreign country only on individuals, might set the reader in search of some other subdivision's caption for foreign service on corporations or associations. There is no separate subdivision for that. Service on corporations and associations generally is governed by subdivision (h), and when such entities have to be served outside the country, subdivision (h)(2) adopts the methods that subdivision (f) supplies for foreign service on individuals. Hence just about everything noted below in respect of foreign service on individuals applies to corporations and associations as well. (An exception is the personal delivery provision of paragraph [2] [C] [i] of subdivision [f], which is not adopted for extranational service.)

Another point about the old subdivision (i) is that its various methods for foreign service were mere alternatives. The usual methods set forth elsewhere in the rule for domestic service applied to foreign service, too, and even the caption of old subdivision (i) noted that its list was just some "alternative" offerings. Subdivision (f) of the current rule, on the other hand, is an independent instruction about service that does not borrow from any other part of the rule.

In going through the several provisions of subdivision (f), and especially in consulting the advisory committee notes in point, one finds much talk about whether any method alighted upon under the subdivision can ever be allowed to violate the law of the place where service is made. It may be possible to do that, as will be noted, but it is important to point out right up front that displeasing the foreign country with the manner of service used may prompt it to withhold enforcement of the judgment later, a matter the plaintiff's lawyer should keep in mind at the outset. The plaintiff should research the particular country's law before presuming to serve someone there, and pick, from the list of Rule 4(f)'s alternatives, a service method that will propitiate the nation involved.

Perhaps the only time a judgment in some ways violative of foreign law may nevertheless have some clear sailing is where the defendant has property locally out of which the judgment may be enforced, obviating dependence on the foreign nation for enforcement.

Paragraph (1): Service Abroad under the Hague Convention

Subdivision (f)'s offerings open with the instruction that if there is any "internationally agreed means" for giving notice, that means must be used. So states paragraph (1), citing the Hague Convention as the prime example. A proviso is that the means selected be "reasonably calculated to give notice", a domestic due process concept on which the rule insists whether the foreign country does or not.

The Hague Convention applies whenever service is made in a foreign country that is a party to the Convention, and it mandates (among other things) that the plaintiff fulfill any requirements and honor any restrictions the particular country has imposed on service within its territory. As will be seen, failure to inquire into whatever restrictions or instructions the nation of service has imposed can void the service, which can of course have repercussions on that most sensitive of all procedural fronts, the statute of limitations.

The Convention and its updatings are set forth following Rule 4. Depending on whether or not a given nation has ratified the Convention, and, if it has, then depending also on any conditions it may have imposed in so doing--these matters, too, are tracked in the place just cited--the Convention can have a direct impact on service made in the particular country. Lawyers contemplating service in a signatory country should therefore peruse the Convention and its accompanying materials, notably those reflecting on the steps taken by the particular nation pursuant to the prerogatives the Convention confers on it.

Note should also be taken of the forms appended to the Convention's text. They will prove helpful. The reading--which goes surprisingly fast and quickly reduces to a negotiable instrument what seems a tome at the outset--should be done with a special eye towards learning what the "central authority" is in the nation in which service is sought. Under the Convention, each nation designates a "central authority" through which service may be effected. In the United States, the Department of Justice has been designated the central authority "to receive requests for service from other Contracting States", and the marshals' offices assist by providing the certificates called for by the Convention. (See the materials at the tail end of the Convention materials cited, including the footnotes, many of which also set forth what other nations have done.)

Also to be absorbed at the outset of any Hague Convention discussion is that the whole subject can become academic--happily academic and even irrelevant for the plaintiff--if there is any way to serve the foreign defendant locally. The Hague Convention applies only when the service has to be made abroad, and very often service abroad proves unnecessary because the foreign defendant has a local presence or a local agent for service. Extended discussion of this point, including the U.S. Supreme Court's Schlunk case that speaks to it, appears below under the caption "Avoiding Hague Convention Restrictions by Finding Way to Effect Service in U.S.". Avoiding the Convention is the subject of that discussion; fulfilling the Convention is the subject of the present one.

The Convention is not, as has occasionally been supposed, automatically preemptive of all methods that may be used for service abroad. As long as the nation concerned has not, in its ratification or in any other part of its law, imposed any limits on particular methods, or made an unequivocal statement that only specifically listed methods may be used, other methods, like those set forth in paragraph (2) of Rule 4(f), may be resorted to, as the opening words of paragraph (2) recites. As the Third Circuit observed in DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (CA3), cert. denied 454 U.S. 1085, 102 S.Ct. 642 (1981), Rule 4's service methods "may be used as long as the nation receiving service has not objected to them".

In this respect Article 19 of the Convention is relevant. It says that if the internal law of the nation concerned "permits methods of transmission, other than those provided for in [the Convention]", the Convention doesn't affect them. We should be able to read the word "permits" in Article 19 to mean "does not prohibit". In order to use one of the methods Rule 4(f) authorizes in paragraph (2), for example, one should not have to show that the method has a precise counterpart (and just how precise?) in the foreign nation's internal law. It should suffice that there is nothing in the foreign law, either explicitly or by compelling implication, to suggest that the method violates some deep-rooted policy of the nation involved. In this respect, we can draw on a well known principle often met in conflict of laws and having perhaps its most celebrated articulation in Judge Cardozo's opinion in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918): that a state's public policy is not to be deemed violated merely because a foreign law seeking local implementation has no precise cognate in local law.

Reference to the Convention in the ensuing discussion will be made only to those parts of it relevant to the special problems raised and to the specific cases treated. Especially noteworthy among the cases are those in which service was upset for what amounted in fact or in effect to a failure to take the Convention into consideration. Or, more particularly, for a failure to check into the predilections of the foreign nation as reflected in the conditions it imposed when it ratified the Convention.

In assessing the impact of using in a foreign nation a method which--as matters evolve--that nation bars, several things have to be noted. One is the jurisdictional validity of the service as the federal court assesses it in the action. Another, already referred to briefly, is the foreign nation's willingness to recognize the judgment if enforcement of it is later needed. Still another is the consequence that the use of the particular method may have for the plaintiff and its process server if either is within the grasp of the foreign sovereign. Even if the federal court sustains the service for jurisdictional purposes, the plaintiff or process server may face some foreign penalty disproportionate to the benefit of having obtained personal jurisdiction of the defendant. When service is made in a nation that has adopted the Convention, moreover, anything that displeases the foreign sovereign is likely to void jurisdiction in the eyes of the U.S. court, too. This suggests that the prospect just mentioned--of the plaintiff having jurisdiction upheld here while still facing a penalty there--is more likely (if likely at all) when service is made in a country that has not adopted the Convention, and with which the United States has no other treaty in point.

As to those that subscribe to the Hague Convention, we can do some examples. In several cases, notably those attempting service in Germany, service was quashed because it conflicted with conditions Germany imposed in adopting the Convention. One condition Germany has imposed is that the papers served bear a German translation. Another is that service not be made by direct mail. In Vorhees v. Fischer & Krecke, 697 F.2d 574 (CA4 1983), both conditions were breached and service was quashed. Fortunately, the mere quashing avoided a dismissal, thus permitting service anew, which preserved the action from what would otherwise have been the bar of an expired statute of limitations. A similar quashing of service in Germany was the result in Harris v. Browning-Ferris Industries Chemical Services, Inc., 100 FRD 775 (MD La. 1984), where the mail method used was one authorized by state law, adopted for federal use and available even for foreign service under the pre-1993 version of Rule 4, and where again the papers served carried no translation.

State courts, of course equally bound by the Convention, hold the same way. An example is Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982). An additional and more serious consequence becomes a possibility in a state court case if the statute of limitations has expired and if, under state procedural law, defective service brings dismissal of the action instead of a mere quashing of service. The plaintiff's attorney must be on guard against all of these prospects.

When the foreign nation recorded no objection to mail service, such service has been held permissible, as in Chrysler Corp. v. General Motors Corp., 589 F.Supp. 1182 (D D.C. 1984), involving service in Japan. Cases like Chrysler are further confirmation that Rule 4 and its methods are not preempted by the mere fact of ratification of

the Convention by the foreign nation concerned. All depends on the terms of the ratification.

In proposing in 1984 to add a new provision to Rule 4, as it then was, in order to permit service "pursuant to any applicable treaty or convention", the advisory committee said that "to the extent that the procedures set out in the Hague Convention ... conflict with the Federal Rules of Civil Procedure, ... [the new provision] harmonizes them." But since all the proposed new clause would have done is mention the Convention--in fact, it mentioned only a "treaty or convention" generally--it did no harmonizing. On the contrary, it left the impression that methods authorized by other parts of Rule 4 would be permissible despite the Convention, and therefore despite the conditions a given foreign nation may have imposed in adopting the Convention. Since what the 1984 proposal sought was "harmony" between Rule 4 and the Convention, however, such an impression was probably unintended, even if we assume--and a "dubious assumption" it is in the eyes of some courts, see Amella v. United States, 732 F.2d 711 (CA9 1984)--that a rule amendment could so casually supersede a treaty.

In another note appended to the abortive 1984 proposal, the committee suggested that it would "authorize" the use of the Hague Convention. The clause would have been a nice reminder about the Convention, but, had it gotten through in those terms, it would have been more than a mite presumptuous in purporting to "authorize" the use of the Convention. The Fourth Circuit notes in the Vorhees case (above), for example, that the Convention is a self-executing treaty carrying the weight of a statute. With those credentials, it would hardly have to depend for its validity on the indulgence of a federal rule.

Paragraph (1) of the subdivision (f) adopted in the 1993 revision abandons all such ideas about the Hague Convention and gives it its due: whatever the particular nation imposes by way of a service requirement is a requirement that paragraph (1) imposes as well. This would appear to be confirmed by the language that opens paragraph (2) of subdivision (f): an "if" clause that makes paragraph (2)'s methods available only if they are not barred by any "international agreement", and all such agreements (the Hague Convention of course among them) are recognized by paragraph (1).

Avoiding Hague Convention Restrictions by Finding Way to Effect Service in U.S.

When it applies, the Hague Convention governs service abroad in both state and federal actions. Suppose, however, that a foreign defendant maintains some kind of local presence, and that service would therefore be possible on the defendant locally. Would the Convention still be applicable? Cases in the trial and intermediate appellate courts, including state courts (e.g., Luciano v. Garvey Volkswagen, Inc., 131 A.D.2d 253, 521 N.Y.S.2d 119 [3d Dep't App.Div. 1987]), indicated that it would not; that when domestic service is possible, based on a presence that the foreign defendant maintains in this country, the Convention's prescriptions don't apply. The point remained open until the U.S. Supreme Court adopted the same position in Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). In the Schlunk case, an action for wrongful death alleged to have been caused by defects in one of its cars, the service was made on a German corporation through service on its wholly-owned American subsidiary as authorized by Illinois law. The court said that it is forum law--in this case the Illinois longarm statute and its concomitant notions of amenability to service--that determines the issue. All the Convention says, observed the court in an opinion by Justice O'Connor, is that the Convention applies when there is "occasion to transmit" a document abroad; it "does not specify the circumstances" that create the "occasion". If forum state law says that service may be made on the defendant through service on the defendant's agent or on the legal counterpart of such an agent locally, then under the Convention's own language there is no "occasion" to serve the defendant in the foreign country and the Convention's prescriptions don't apply.

A proviso throughout, of course, is that in determining who shall be served with the summons, the state law must satisfy the minimal standards of federal procedural due process (which it did in the Schlunk case):

Where service on a domestic agent [said Schlunk] is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.

The court pointedly rejected the defendant's contention that the due process clause itself requires transmittal abroad of every document served domestically on a foreign national or corporation. There is no such constitutional requirement, the court answered. The court did point out, however, that the plaintiff's voluntarily undertaking such foreign transmittal, meeting the Convention's prescription even when by its terms the forum has found it inapplicable, can enhance the prospect of getting a judgment recognized by the foreign nation afterwards.

That is of course a factor requiring consideration when the defendant lacks local assets adequate to satisfy a potential judgment and when enforcement will therefore need the cooperation of the foreign nation. But if local assets suffice, in the forum state or any sister state (which would be bound under the full faith and credit clause to recognize and lend its aid to the enforcement of the judgment), there would be no need to depend on the assistance of the foreign nation in getting the judgment enforced and voluntary fulfillment of the Convention's methods will hold no special reward.

If amenability to local jurisdiction is established under the applicable rule of federal or state law--and due process is not offended in the process--then the next step is only a matter of determining the method of service. It is only with respect to this second step that the Hague Convention becomes relevant, but it does not become applicable unless there is no one available locally--we will define below what we mean by "locally"--on whom the summons may be served in the foreign defendant's behalf.

On that point, the foreign law does not determine who the servee must be. Any person authorized by or through any provision of Rule 4 to receive the summons in the defendant's behalf may be served in a federal action if the service can be made locally--the very fact that it can be made locally removes it from the category of foreign service under subdivision (f) of Rule 4 and takes the subdivision out of the picture--and included among such persons would be state officials designated expressly or by operation of law to receive process in the defendant's behalf. The Luciano case, cited above, involves that situation, and says that the Convention

does not require that all citizens of the signatory nation be served according to its methods, as it does not state when service abroad is required but only how it is to be effectuated.

The need to follow the Convention's methods of service, including such restrictions as the foreign nation in which service is being made may have promulgated (as the Convention insists), should not be all that frequent if one carefully analyzes the interplay of the two factors that reflect on jurisdiction and service.

The first is amenability to jurisdiction. This is governed by the forum as long as the forum has some basis, agreeable to due process, for asserting jurisdiction over the foreign defendant.

The second is method of service, and here, too, the forum has the say, as long as some method is used that also satisfies due process (this time the notice aspect of it). If the forum apparatus is an imaginative one, supplying a variety of service methods, it should not be hard to find one that enables service to be made locally, thus avoiding the Hague Convention altogether. If the forum is federal, the various other service provisions of Rule 4 apply and offer a variety of methods, among them, by adoption under Rule 4(e)(1) and (h), methods allowed by the state in

which the federal court happens to be sitting as well as the state in which the service is made. This is altogether quite a rich roster of alternatives, which suggests that the need to serve the defendant at its home base abroad should be limited to only the situation in which there is no possible basis, under domestic (state or federal) law, on which to find the foreign defendant amenable to service in the United States. And with the new general federal longarm statute adopted in 1993--subdivision (k)(2) of Rule 4 (discussed in Commentary C4-35 below)--amenability to domestic jurisdiction will be broader than it has ever been in the past.

As to method of service: if the forum is a state or federal court in a state like New York, which has a variety of methods capped by a provision permitting the court, if necessary, to invent a method of service on an ad hoc basis (see § 308, paragraph 5, of the New York Civil Practice Law and Rules, McKinney's New York Laws, Vol. 7B), the need to follow the Hague Convention will be rarer still, perhaps limited only to where there is nothing the court can think of, consistent with due process, that would enable service to be made in this country, so that there would be nothing for it but to have the summons served on the defendant at its foreign base. (When foreign service is necessary, a similar provision in Rule 4 [f]--paragraph [3], treated below--authorizes a court-invented method of service, but there it would have to be consistent with what the foreign nation requires if the nation subscribes to the Hague Convention. When local service in the United States is found possible, the foreign nation's pleasure need not necessarily be attended to.)

The reasoning that leads to this conclusion is the interplay between the amenability and service factors. They are really co-extensive in the sense that whenever there is basis enough for the forum to find the defendant amenable to jurisdiction, there is opportunity for the same forum to prescribe the method of service. All would thus seem to depend, if we assume constitutional amenability to jurisdiction, on how generous the forum is with methods, and on how acceptable the method chosen would be to due process requirements if it does not include service on the defendant at its foreign station.

We have spoken of "local" service several times. We use it here to mean service not only in the state in which the court sits, but anywhere in the country, because if the defendant, though an alien or a foreign corporation, is amenable to the particular court's jurisdiction sufficient to permit service abroad (invoking the Convention), it is a fortiori subject to service anywhere in the United States, which would avoid the Convention as long as some kind of service can be effected domestically.

We must sound this practical note again, however. Unless there are assets of the foreign defendant in this country that can be turned to for enforcement should a judgment be obtained, all effort will have been for naught if the enforcement must be sought in the defendant's country and that country won't recognize the judgment (whether for want of following the Convention or any other reason). If it appears that enforcement can become a problem, therefore, the matter should be analyzed at the outset, before an action is even begun, so that any initial service step may be taken in light of what post-judgment enforcement might later insist on. That may entail, despite all this lofty analysis, throwing in the towel and undertaking the possibly distasteful effort of making service in the foreign nation, pursuant to the Convention, and fulfilling any conditions imposed on service by that nation, no matter how onerous.

Paragraph (2): Rule 4's Methods for Serving the Summons Abroad

Under its opening language, the several methods that paragraph (2) supplies for foreign service are available only if there is no treaty with the foreign nation involved to offer a means of service, or, if there is a treaty, the treaty allows other means of service than those the treaty itself specifies. (On what the Hague Convention itself prescribes or allows, especially in relation to subdivision [f] of revised Rule 4, see G. Born and A. Vollmer, The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases,

150 F.R.D. 221, 237.)

The first of paragraph (2)'s listed methods, in clause (A), is service according to the law of the nation in which service is taking place. This may seem in some measure superfluous in view of the preoccupation already witnessed in paragraph (1) with the foreign nation's wishes under an applicable treaty, but it would apply in its own right if, for example, there is no treaty in point with the particular nation.

If the method authorized by the foreign law requires a court order or other form of official authorization, but it can be applied for in that nation without involving the federal court here, clause (A) permits the foreign application. If it appears that authorization is required but that it must be requested by the federal court, clause (B) comes into play. Under it the plaintiff can apply to the federal court ex parte for a letter rogatory, or "letter of request" (which the advisory committee believes to be the more current terminology), in which the court addresses the appropriate foreign tribunal and asks for its assistance, promising to return the favor sometime.

A supervening requirement of paragraph (2), applicable to all of its lettered clauses, is that the method used be "reasonably calculated to give notice", the domestic due process concept on which Rule 4 insists for foreign as well as domestic service.

Personal delivery to an individual defendant--again, if not prohibited by the nation involved--is allowed by clause (C)(i) of paragraph (2). This is restricted to individual defendants. Under the 1993 revision, this clause does not apply to corporate or association defendants, see Rule 4(h)(2), even though personal delivery to corporate officers and agents is allowed in domestic cases. If personal delivery to such persons outside the country is to be used, it will have to find authorization outside clause (C)(i).

Clause (C)(ii) of paragraph (2) authorizes as a service method "any form of mail requiring a signed receipt", and this applies to individual as well as corporate and other business defendants, but, again, only if mail service is not prohibited by the nation involved. Under this provision it must be the clerk of the court that does the mailing.

For this method the plaintiff has to determine what kind of postal contacts exist with the foreign country, and whether there is any reasonable probability of getting the receipt back signed. Under subdivision (l), the signed receipt is part of proof of service.

An important question here is whether mail service is permitted under the Hague Convention pursuant to its own terms (express or implied)--i.e., without looking to the law of the signatory nation involved--which of course affects all signatories to it. The issue has occupied many judges. When the Convention is not applicable, as where the nation in which service is made is not a party to it, it is of course no barrier to mail service. But when a signatory nation is involved, the availability of mail becomes more intricate. (We assume here that the nation to which the mail is addressed has not, in ratifying the Convention, asserted any specific objection to mail service. If it has, that would foreclose the issue.)

The problem is the language of Article 10 of the Convention. It has three lettered subdivisions concerned with serving "judicial documents". Subdivision (a) deals with mail, but refers to the freedom to "send" the documents by that method. Subdivisions (b) and (c) treat other methods, but here the reference is to the freedom "to effect service" by those other methods. Defendants have argued in several cases that while the "effect service" language of subdivisions (b) and (c) clearly includes the service of a summons, the mere "send" language of subdivision (a) does not; that "send" implies the serving of mere interlocutory papers within an action already commenced and

pending but not the initial summons that does the commencing.

Some courts have bought that argument and held that subdivision (a) does not mean to include summons service, so that mail service of the summons is barred even if the nation involved has not objected to it. Ackermann v. Levine, 610 F.Supp. 633 (SD N.Y. 1985), so held, for example, but it was reversed, the Second Circuit holding in 788 F.2d 830 (CA2 1986) that as long as mail has not been explicitly excluded by the particular signatory nation, it is permissible on the authority of Article 10(a); that "the word 'send' in Article 10(a) was intended to mean 'service' ", and that the summons is therefore among the mail-method beneficiaries. The point is disputed, however, and many cases continue to go the other way. One such, at circuit level, acknowledging the conflict and collating the cases each way, is Bankston v. Toyota Motor Corp., 889 F.2d 172 (CA8 1989).

An incidental point in the Second Circuit's Ackermann decision is that the United States is among the nations that, in adopting the Convention, have not objected to mail service. Hence a plaintiff in a foreign litigation who has from its own local procedural law the right to make extraterritorial mail service, and has to do so upon a defendant in the United States, will find no U.S. barrier to it.

Paragraph (3): Court-Invented Method of Service

Paragraph (3) of subdivision (f) is a catch-all provision that enables the court on ex parte motion to devise a method of service responsive to the unique facts of the case. A good example is the court's use of Telex to serve Iran in New England Merchants National Bank v. Iran Power Generation and Transmission Co., 508 F.Supp. 49 (SD N.Y. 1980).

The proviso appears once again that the method alighted on by the court should not be a method "prohibited by international agreement", but note that this does not mean that the method selected by the court must be congenial to the foreign nation in every case. It is only a method barred by "international agreement", and presumably specifically barred by that agreement, that the court must stay away from. If there is no treaty with the foreign nation involved, for example, then technically the court can direct a method the foreign nation does not approve. Whether this is a good idea in the particular case is once again likely to turn on whether enforcement of the judgment will have to proceed in the foreign nation, a matter noted under the above caption about avoiding the Hague Convention.

Applicability of 120-Day Time Period to Foreign Service

The variety of problems that can be met in attempting service in a foreign nation make it inappropriate to impose an arbitrary time limit on service. Hence the 120-day period following the filing of the complaint, within which service is required by subdivision (m) in domestic cases, does not apply when service has to be made abroad under subdivision (f). Subdivision (m) explicitly exempts subdivision (f) from its time demands.

When service has not even been attempted in a foreign country, however, even though it is possible to make service there, the 120-day period has been held applicable and a dismissal for a failure to satisfy it sustained. See Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737 (CA2 1985), where the court was constrained to observe that the plaintiff "has not exactly bent over backward to effect service".

The lesson to plaintiffs who have to make service abroad is to undertake it with reasonable diligence, at least

sufficient to convince the court, should the defendant raise any issue about time, that this is genuinely a case requiring foreign service and that exemption from the time requirements of subdivision (m) clearly applies to it.

If the court were not to insist on at least some showing of diligence, dilatory plaintiffs who had no real intention of making service abroad might too easily evade the 120-day time limit in every case in which the defendant merely could be served abroad, just by belatedly reciting an intention to make such foreign service even in cases in which there is no need for it at all because of the availability of the defendant for service in the United States.

Subdivision (g)

C4-25. Service on Infants and Incompetents.

The defendant who is an infant or incompetent comes in for special treatment under subdivision (g), which, under the 1993 revision of Rule 4, distinguishes between service within and service beyond the United States.

For service made on an infant or incompetent within the United States, subdivision (g), instead of prescribing a method directly, adopts the methods allowed by the state law of the state in which service is made. That was the prior rule as well.

With ordinary individuals, subdivision (e)(1) governs, and the state law adopted for service is either forum state law or state-of-service law; they're alternatives. Not so under subdivision (g), where, for infants and incompetents, it is only the law of "the state in which the service is made" that governs. It is that state which will most likely be the state of wardship and thus the one to which federal law defers. Lawyers must always be especially cautious here. In some state practices, oversights that would be disregarded as insignificant in other cases have jurisdictional impact when they touch the rights of an infant or incompetent.

The waiver-of-service procedure of subdivision (d), available for use against individuals and business organizations generally, is not available for service on infants or incompetents.

When service on an infant or incompetent has to be made outside the United States, it may be made pursuant to

(1) subdivision (f)(2)(A), which adopts the law of the foreign country in which the service is made, or

(2) subdivision (f)(2)(B), which contemplates a direction for service made by a tribunal in the foreign place pursuant to a letter rogatory issued by the federal court, or

(3) an order of the federal court.

These are set down as initial options with no prescribed priority among them.

Issues about what age constitutes infancy should be resolved by the plaintiff by taking the precaution of invoking

subdivision (g), and making service pursuant to the law of the place of service, whenever the defendant would be deemed an infant by either that law or the law of the forum state, or, for that matter, any other conceivably applicable law. As to an "incompetent", there will presumably have been some person appointed by the appropriate jurisdiction to represent the incompetent's interests, such as, in the terminology of Rule 17(c), a guardian, committee, conservator, "or other like fiduciary", and it is presumably that person who will have to be served in the disabled person's behalf under the law of the place of service.

As long as service is made along the conservative lines suggested, jurisdiction should be deemed obtained and any issues about proper representation can afterwards be controlled by the court under its Rule 17(c) powers. If need be, for example, the court can appoint a guardian ad litem even for a represented person if the court finds the representation inadequate, or a conflict of interest present.

In the case of defendants who appear to be at some distance from their senses but for whom no formal adjudication of incompetency has been made, the plaintiff should consider commencing the action in due course as if the defendant were competent, but then promptly bring the defendant's difficulties to the court's attention for a possible invocation of its Rule 17(c) powers right at the outset. As a matter of both tactics and ethics, the plaintiff can take no comfort from the prospect of obtaining a default judgment against such a disabled but not formally represented defendant: the default is likely to be vacated as soon as the court is shown that the defendant was not fit to defend the action. The vacatur is not likely to be for a want of jurisdiction in that case--as long as the unrepresented defendant was properly served as an individual--but rather a discretionary vacatur designed to offer the defendant, now with proper representation, a chance to defend on the merits.

It should not matter whether the particular terminology of "incompetent" is used in the laws of the place of service or, for that matter, in the law of the district court's location. The word is stigmatic and some jurisdictions have been moving away from it. New York, for example, began to use the terminology of "conservatee" in recent years, describing persons who could manage their personal needs but not their business affairs (a lawsuit would come under the latter category), and in the early 1990's adopted the terminology of "person under a disability" as softer still.

Whatever terminology any of the related jurisdictions may use to describe what the law--including the unchanged substance of what is now subdivision (g) of Rule 4--has traditionally called an "incompetent", it is from subdivision (g) that the plaintiff's lawyer would best take instruction on summons service in all doubtful cases.

Subdivision (h)

C4-26. Service on Corporations and Other Businesses.

Subdivision (h) governs service on corporations and other business creatures, notably partnerships and unincorporated associations. Corporations are entities distinct from their owners and can be sued in their own name. Partnerships and unincorporated associations as a general rule are not; hence, in order that they be suable without the plaintiff's having to join all of their members, some law must be found to give them the equivalent of "entity" status at least for purposes of suit. Rule 17(b) defers to forum state law for resolution of that point, but adds that in federal question (as opposed to diversity) cases the partnership and association "may sue or be sued in its common name" even if forum state law does not so provide.

The first point to note under the 1993 revision is that the new waiver-of-service procedure, supplied by subdivision

(d) and treated in Commentaries C4-15 through C4-18, applies to subdivision (h) defendants, and that if the waiver procedure is used, and works, service under subdivision (h) won't have to be made at all.

An important point is that the waiver request should not be addressed to the entity as such, but to one of the specific individuals who could, were formal service being made, be served in behalf of the entity. See subdivision (d)(2)(A).

The following discussion assumes the waiver procedure has not been used, or has not worked, and that formal service is needed.

Under the 1993 revision, service on business entities, like service on individuals, is divided into two categories, the first applicable when service is made within and the second applicable when service is made beyond the United States. In fact, some of the methods supplied by the subdivisions that govern individuals--subdivisions (e) and (f)--are merely adopted by subdivision (h) for business entities.

State law methods are available as service alternatives. The provision so stating under the revised rule is the opening clause of paragraph (1), with its reference back to subdivision (e)(1). The latter makes two state alternatives available, those of the forum state and those of the state of service, and both apply for business entities as well.

The balance of paragraph (1) of subdivision (h) is a verbatim carrying forward of the prior rule's methods of service. This federal prescription was then and remains now a list that the plaintiff can turn to instead of using state law.

The matter on which most dispute arises on this list is who qualifies as "a managing or general agent". The general rule is that the person served must have some measure of discretion in operating some phase of the defendant's business or in the management of a given office. The person must have at least such status that common sense would expect her to see that the summons gets promptly into the hands of the right corporate people. And she should be working for the defendant at the time of service. A former agent can't be depended on here. The question is usually sui generis and the cases on the subject are profuse.

Measuring who an "agent" is under paragraph (1) is probably a federal rather than state question, but once again the importance of the point is diminished by the alternative exploitability of state law as allowed by the reference to subdivision (e)(1) in the opening clause of the paragraph.

The above pertains to the "agent" first mentioned in paragraph (1). That one need not be an agent specifically designated for process service. The other two "agent" references in paragraph (1) do mean such an agent, and the designation can be made either voluntarily, as in a contract, or by law. The law agencies subdivide further into express and implied ones. The express one is common in corporate cases, in which a domestic or licensed foreign corporation is often required by state law to designate some state official as its agent for process service. As with the first "agent" that paragraph (1) mentions--the regular business employee discussed above--there is also with these other "agents" an overlap with the state law adopted through the reference to subdivision (e)(1). Together they make largely academic whether it is a federal or a state "law" or "statute" that accounts for the "agent" on whom service is being made.

If the particular statute relied on for the agency requires a mailing to the defendant, paragraph (1) requires that the mailing part also be carried out. A state scheme, for example, may entail the service of two copies of the summons on the state official, the official to mail one copy to the defendant at the defendant's address of record. If that's the case, the plaintiff should ascertain that that's been done. A different state scheme, often the case when the designation is implied instead of express, as under nonresident motorist legislation, is for the plaintiff to serve one copy on the state official while himself mailing another copy to the defendant.

When service has to be made on the business entity outside the country, paragraph (2) of subdivision (h) governs and adopts the methods that subdivision (f) allows for service outside the country on individuals. An exception is "delivery to the individual personally", contained in paragraph (2)(c)(i) of subdivision (f). That provision is not adopted for corporate and other categories of business defendants for the apparent reason that it applies generically only to individual defendants.

Subdivision (i)

C4-27. Service on United States and Its Agencies.

Service on the United States and on federal agencies, corporations, and officers is all centered under subdivision (i) under the 1993 revision, whose several paragraphs cover the ground previously covered by paragraphs (4) and (5) of subdivision (d) of the pre-1993 Rule 4.

The provisions are largely self-explanatory but some special attention should be paid to new matter included in the 1993 revision as well as some sticking points under the portions of the rule carried forward.

The first point to note is that the waiver-of-service procedure adopted in subdivision (d) as part of the 1993 revision does not apply to service on the United States or its agencies, corporations, or officers. See subdivision (d)(2).

Service on the United States itself is governed by paragraph (1) of subdivision (i). All three clauses under that paragraph must be fulfilled to the extent relevant.

Clause (A) is concerned with getting the summons and complaint into the U.S. Attorney's office for the district in which the action is brought. That's the office that will presumably have the primary responsibility for representing the government. A new provision included in clause (A) allows service by registered or certified mail "addressed to the civil process clerk" of the local U.S. Attorney's office.

A provision carried forward in clause (A) entails delivery to a designee of the U.S. Attorney. When this is relied on, it is of course implied that the process server will be allowed access to such a person. Whoever is on guard at the office, such as a receptionist, must be such a designee or must at least allow access to the proper designee. Access by the "front desk" person was apparently denied in Justice v. Lyng, 716 F.Supp. 1567 (D Ariz. 1988), for example, resulting in a denial of the government's motion to dismiss and in a new chance given the plaintiff to re-serve. Under the new clause (A), this kind of problem can apparently be avoided altogether by exploiting the permission to mail the papers to the "civil process clerk".

In all cases brought against the United States or in which the United States must for any reason be joined as a

defendant, it is required that a copy of the summons and complaint be mailed to the Attorney General's office in Washington, D.C. Clause (B) continues that requirement, and continues to allow registered or certified mail for it.

Clause (C) of paragraph (1) concerns the situation in which the action involves an attack on an order of a federal officer or agency that has not also been made a party. It requires that a registered or certified mailing of a copy of the summons and complaint be made to the officer or agency.

If the officer or agency has been made a party, paragraph (2) of subdivision (i) governs, but the service requirements come down to the same thing: the registered or certified mailing to the officer or agency as well as service on the United States pursuant to paragraph (1), which means service on the U.S. Attorney under clause (A) of that paragraph as well as a mailing to the Attorney General under clause (B). This may be a convoluted way of doing things, but so it has been done for a long time and the 1993 revision just carries it forward. Another way of analyzing service requirements when a federal officer's or agency's order is being attacked is that service must be made on the U.S. Attorney pursuant to paragraph (1)(A) and mailings must be made to the Attorney General and to the particular officer or agency, whether the officer or agency has been joined as a party or not.

A slightly different treatment has been made of U.S. corporations under the 1993 revision, which just adds the corporation to the paragraph (2) list and permits service on the corporation by the methods used to serve any other federal agency: service on the U.S. Attorney under paragraph (1)(A) plus mailings to the Attorney General and to the corporation. The pre-1993 requirement, contained in old Rule 4(d)(5), that the corporation be served by delivery in like manner as a private corporation, has been dropped.

The several registered or certified mailings provided for in subdivision (i) do not need a return receipt, as required, for example, under subdivision (f)(2)(C)(ii) for service in a foreign country.

As between registered and certified mail, incidentally, it is probably quite adequate for purposes of summons service to use the certified, which is the less expensive. It supplies the proof needed without the extra precautions taken with registered mail, which is more appropriate when articles of value are mailed.

Paragraph (3) of subdivision (i) was added in the 1993 revision and should prove helpful indeed to plaintiffs. It provides that as long as service was properly effected on either the U.S. Attorney or the Attorney General, the failure to effect required service on any other officer, agency, or corporation may be cured by the plaintiff through leave of court, with a time extension allowed for the purpose. The prerequisite is that service was properly made on either the U.S. Attorney or the Attorney General, and the provision should also be construed to allow late service on the other as long as proper service was made on one. In other words, the "officers" included in the phrase "multiple officers" in the provision allowing a cure should include both the U.S. Attorney and Attorney General and not just an executive or administrative officer whose order may be under attack in the case.

If that construction is given to the new paragraph (3), it should be unnecessary to try to reconcile the prior case law on the subject. There is caselaw on the pre-1993 version of Rule 4, for example, purporting to sustain service when something less than total fulfillment of the applicable requirement took place, as where the U.S. Attorney was properly served and himself sent copies to the Attorney General, but the cases have distinctions and fine points that make dependence on them perilous. See, for example, Zankel v. U.S., 921 F.2d 432 (CA2 1990), the distinction made of it a few days later in Frasca v. U.S., 921 F.2d 450 (CA2 1990), and then the distinction made of both of them a few months after that in McGregor v. U.S., 933 F.2d 156 (CA2 1991)--all from the same court.

The plaintiff who leaves plenty of time for trouble (see Commentary C4-46, below), or who just avoids the trouble altogether by following the service requirements of Rule 4 to the letter, and on time, may have the pleasure of noting these nice distinctions in other folks' cases, as Mark Twain might say, or the even greater pleasure of not noting them at all.

The advisory committee notes urge that the new paragraph (3), on curing an omitted service, be read in conjunction with Rule 15(c) of the Federal Rules of Civil Procedure. That's the well known "relation back" rule, concerned with whether a claim interposed at some belated stage of an action may be allowed to "relate back" to the filing of the complaint so as to preserve the claim from the bar of the statute of limitations. See the Commentary on Rule 15(c) in 142 F.R.D. 359, 362.

Under Rule 12(a)(3), the time for serving an answer is a prolonged one when the United States or a federal officer or agency is the defendant. It's 60 days instead of the more usual 20. Rule 4(a) requires the summons to reflect that.

Yet another provision to keep in mind when suing a federal-status defendant is 28 U.S.C.A. § 1391(e). It expands permissible venues (i.e., choices of district to sue in) as against federal defendants, and in so doing recognizes that it must also resolve summons-serving problems that might otherwise make the venue gift an illusory one. It therefore permits service on such defendants by certified mail beyond state borders (which would otherwise confine the service). This is a matter of the territorial reach of summons service, expanded on in the Commentaries on subdivision (k), C4-29 et seq.

Subdivision (j)

C4-28. Service on Foreign, State, and Local Governments.

Subdivision (j) addresses service on foreign nations and their subdivisions and the states of the United States and their subdivisions. It governs the state entities in paragraph (2), which was carried over almost verbatim from the pre-1993 version of Rule 4, where it was paragraph (6) of subdivision (d). But on foreign nations it contains no instructions; it just offers the reminder, in paragraph (1), that the subject is governed by 28 U.S.C.A. § 1608.

Section 1608 is part of the Foreign Sovereign Immunities Act, which takes in §§ 1602-1611 of Title 28. Actions against foreign states pose obvious problems of sovereignty and therefore need special statutory guidance. The FSIA provides it, and, through a definition in § 1603, governs also in actions against the political subdivisions, agencies, and instrumentalities of the foreign state. If the plaintiff can bring her case against such a foreign defendant under the immunity-lifting provisions of §§ 1605-6, she will find the summons-serving provisions for her lawsuit in § 1608.

None of this should be confused with the mission of subdivision (f) of Rule 4. Subdivision (f), treated in Commentary C4-24 above, is addressed to service in a foreign country on individuals and business entities. (Business entities are included in the subdivision [f] methods through a cross-reference in subdivision [h][2].) It does not apply to service on the foreign country itself or to service on its agencies and political subdivisions.

When the defendant is a state or a state agency or subdivision, including any of the myriad municipalities (counties, parishes, cities, towns, villages, etc.) seen today as defendants in federal actions, service is governed by paragraph (2) of subdivision (j).

Paragraph (2) directly authorizes service on the defendant's "chief executive officer", whatever the officer's formal title, but allows in the alternative service by any method state law allows. Here the state referred to is the state which is the defendant or of which the defendant is a unit. This will not necessarily be the forum state, although of course it usually is. This alternative will often be found to make a wide variety of servees available. Here the lawyer's inquiry into state law should be for the lists of persons servable in behalf of the particular governmental entity being sued--a given list may be a long one--as well as for the methods of service.

The waiver-of-service procedure of subdivision (d) of Rule 4 is not applicable to any of the defendants enumerated in subdivision (j), but there is nothing to prevent the plaintiff from asking the defendant to accept service without a fuss. If the defendant is willing to execute a formal admission of service, that should do in place of an affidavit, or, better still, the plaintiff's affidavit attesting to all of this can accompany the admission. Another nice part of the set would be the defendant's commitment to interpose no jurisdictional defense. Perhaps the defendant will even stipulate to summary judgment for the plaintiff, making the dream complete.

Subdivision (k)

C4-29. Geographical Area of Service, Generally.

The laity's assumption, and perhaps the inexperienced lawyer's as well, is that because a court is a federal one its process is servable anywhere in the country. That is not so. Of course Congress can, if it wishes, make the federal summons nationwide in scope, and has done so in a number of special cases, to be noted in the course of the next few Commentaries, but not as a general matter. As a general matter, the state in which the federal court sits is the basic unit in which service is permissible, or that was the way things were right up to the point of the 1993 revision of Rule 4, in any event.

Under the pre-1993 version of Rule 4, there was an explicit provision making the state the basic unit: subdivision (f) of the prior rule. Subdivision (f) also recited a few narrow instances in which the service could be made within 100 miles of the federal courthouse even if it passed the state line--the "100-mile bulge" provision, which is continued under the present rule and to which we turn in Commentary C4-31 below--but full extraterritorial service was permissible only when a federal or forum state statute or rule explicitly permitted it, and that was the instruction of old subdivision (e).

The rules are essentially still the same, but through a different route. And in one instance, set forth in subdivision (k)(2) of the revised Rule 4, the national contacts of the defendant have been made a basis for extraterritorial jurisdiction even when the defendant's contacts do not suffice to support the jurisdiction of any individual state. Subdivision (k)(2) is a far reaching innovation, literally and figuratively.

The next few Commentaries examine the territorial scope of federal judicial process in a progression. Service within the state is treated in Commentary C4-30. Service within the 100-mile bulge is treated in Commentary C4-31. Extraterritorial service in general is the subject of Commentary C4-32. Then follow separate Commentaries on extrastate service under state law (C4-33) and under federal statutes (C4-34), and finally a discussion, in Commentary C4-35, of the new subdivision (k)(2), invoking national instead of state contacts for what amounts to a new species of general federal "longarm" jurisdiction applicable in federal question cases.

Of course, no service at all is needed, and geography becomes irrelevant, if the plaintiff has used the waiver-of-service procedure of subdivision (d) and it has succeeded. (The filing of the waiver establishes service.) A reminder is in order here that the waiver device may be used only against individual and business defendants. It is not available for the plaintiff's use against infants or incompetents, or governmental units. See Commentary C4-15 above.

C4-30. Service Within State in Which Federal Court Located.

Subdivision (k) of the revised Rule 4 contains no clear statement, as old subdivision (f) did, making the forum state the basic unit of service. The forum state remains the basic unit, but the point is spelled out more by implication than explication. Clause (A) of paragraph (1) says that service of the summons establishes jurisdiction over any defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located,

and the common rule in state practice is that the service of a summons within the forum state accomplishes that. By accomplishing that in state practice, it accomplishes it for federal practice as well, under the adoptive terms of subdivision (k)(1)(A).

It was apparently intended to make the point that way, but the cited clause is just the carrying forward of the meat of the second sentence of old subdivision (e), and that part of old subdivision (e) was designed not as the general rule about securing jurisdiction by serving the summons inside the state, but as the special rule authorizing the service of the summons outside the state. It was a new course at the jurisdictional table, enabling a federal plaintiff to dip into the bowl of "longarm" jurisdiction that the states had been dishing up since they first got the recipe for it from the International Shoe case in 1945. ("Longarm" jurisdiction is discussed in more detail in Commentary C4-33 below.)

Although slightly more labored in the pronouncement, the basic unit of service remains the state in which the federal court is sitting unless some specific provision lets service go farther. Clause (A) that we quote above is the foremost of the specific provisions that let it go farther, even though, paradoxically, we have to depend on it as well for the authorization that permits the summons to be served within the state in the first place.

In any event, jurisdictional thinking under subdivision (k) moves in stages, with the first principle, exacted after a little arm twisting from paragraph (1)(A), still being that the state remains the basic unit of service unless some other provision in either state or federal law, including other parts of subdivision (k), lets service go beyond.

This notion--that service on a defendant while the defendant is physically present within the state is its own basis for jurisdiction--comes from the common law. It's a residuum of the old capias ad respondendum, the writ whereby a civil action was started through physical seizure of the defendant. That hasn't been done for a long time, but still traceable to the practice is the idea that when the defendant is on the state scene physically, even if only in transit, delivery of the summons to the defendant is all the jurisdictional basis needed. (In at least one case even service on an airplane flying over the state was allowed to exploit this notion. See Grace v. MacArthur, 170 F.Supp. 442 [ED Ark. 1959].) Other bases of personal jurisdiction, like "contacts" or "longarm" jurisdiction, have evolved in more recent years and are more congenial to current notions of due process. These other bases are heavily exploited for federal use by several parts of subdivision (k), making the need for continued use of this "transient" basis questionable. In Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), however, the U.S. Supreme Court reviewed the matter and held that service while the defendant is physically present in the state continues to satisfy due process and thus to qualify as its own jurisdictional basis.

Whatever doubts have been expressed about the continued viability of this territorial notion of jurisdiction, therefore, have now been dispelled, at least for the time being. The transient rule remains. In Burnham, the result was that a New Jersey defendant, served while in California on business and to visit his children, was held subject to the jurisdiction of the California courts in his estranged wife's divorce action. The service on him while he was in California did the jurisdictional job, the Court held, but the Court's inability to muster a majority behind any opinion makes the reasoning for the retention of the "transient" rule largely an academic exercise.

To Justice Scalia and three other justices concurring with him, the rule remains standing because of its longevity. To Justice Brennan and three other justices, an inquiry is still necessary into the contacts that the defendant and the case have with the state. Justice Stevens is the justice who concurred in neither of his colleagues' opinions in Burnham, protesting that both said too much.

The category of jurisdiction involved in Burnham, and under discussion here, includes the corporate presence doctrine (see Commentary C4-36 below) as well as this served-in-the-state rule. These bases offer jurisdiction against the defendant on any claim, related or not to the state, and more recently the description of "general jurisdiction" has been appended to them. "General" is used to distinguish "specific" jurisdiction. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). "Specific jurisdiction" is predicated not on the defendant's presence in the state, but on the claim's arising out of some in-state event for which the defendant is responsible. It is better known as "longarm" jurisdiction. "General" jurisdiction permits the exercise of jurisdiction against the defendant without regard to the relationship the particular claim may have to the state.

Forum non conveniens rules (embodied in federal practice for the most part in the transfer provisions of 28 U.S.C.A. § 1404[a]) offer some protection against serious abuses in transient service cases. Other checks on the unfair use of local service as a jurisdictional basis are the immunity and enticement doctrines. The first offers immunity from service to a nondomiciliary who enters the state voluntarily to participate in judicial and other legal proceedings. The second vitiates service made on a defendant enticed from beyond to within the court's territory, such as through a fraudulent representation. Those doctrines, although still viable, are not met as often today as they once were. The reason is that they apply as a rule only when it is shown that local service is the only way the court could have obtained jurisdiction of the defendant. If the defendant was amenable to extraterritorial service, as is so often the case today (a subject covered in subsequent Commentaries), the doctrines will usually be held inapplicable.

If it is indeed found that state law is now to be the source of the authority for a federal court's exercise of jurisdiction based only on service in the forum state, a given state's abrogation of that basis would also have the effect of making it unavailable in the federal court. There would be some exceptions, however, that were probably not considered in this context. These would be the instances in which the "100-mile bulge" applies. There, independently of any state law, Rule 4 would allow service anywhere within a 100-mile radius of the courthouse. The 100-mile bulge is embodied in paragraph (1)(B) of subdivision (k) and is treated in Commentary C4-31 below.

C4-31. The "100-Mile Bulge".

Paragraph (1)(B) of subdivision (k) permits service within a 100-mile radius of the courthouse, whether it crosses state lines or not, and without depending on any other provision, federal or state, for assistance. But it applies only in certain defined and narrow instances.

It is available against third-party defendants, for example, impleaded by the main defendant under Rule 14, which is perhaps its most valuable use. If P sues D and D wants to implead X, but X is amenable to jurisdiction only in a neighboring state, D can serve the third-party summons and other papers on X in that state as long as the point at which X is served is within the 100-mile bulge.

The bulge is also available when the court under Rule 19 has ordered someone's joinder as an additional party to an action already pending.

Under Rule 13, a defendant with a counterclaim against the plaintiff or a cross-claim against a codefendant may want to join an additional party on the claim. The defendant may be allowed to do that under Rule 13(h), but would have to serve the new party with a summons. Under subdivision (f) of the pre-1993 Rule 4, bulge service explicitly included the joinder of additional parties on a counterclaim or cross-claim. The language so reciting has been dropped from the replacement provision, paragraph (1)(B) of subdivision (k), apparently as unnecessary: Rule 13(h) refers to Rule 19 and would be picked up for bulge service through the reference that subdivision (k)(1)(B) makes in turn to Rule 19.

The 100 miles is measured on a straight line, i.e., by air miles, or "as the crow flies". Surface routes with their bends and curves don't have to be considered. See, e.g., Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 FRD 630 (ED La. 1976). Paragraph (1)(B) permits service of the summons to be made anywhere within that circle even if it crosses state lines, as long as it doesn't go beyond the country.

The permission for bulge service is of course in addition to whatever other bases may be available to permit extraterritorial service, such as under a federal statute or under a state longarm statute applicable via the other clauses of paragraph (1). Because such statutes are quite often available, and are usually far more generous in their geographical stretch than clause (B)'s modest bulge is, the bulge proves superfluous in many cases. In federal question cases today, it may prove more superfluous still in view of the adoption, in subdivision (k)(2), of a general federal longarm statute. (See Commentary C4-35 below.)

The bulge has diminished utility for the obvious additional reason that it is not available for the plaintiff to use at the outset. The plaintiff can't plan an action with the idea of naming someone a defendant for whom "bulge" service is needed. The bulge applies only in the instances delineated in clause (B), and initial use by the plaintiff is not among them.

Under due process standards, need the party served within the bulge be shown to have contacts with the forum? Does it suffice that the party is amenable to jurisdiction within the bulge area of the neighboring state even if not amenable to jurisdiction in the forum state? A leading case, Sprow v. Hartford Ins. Co., 594 F.2d 412 (CA5 1979), holds that due process is satisfied if "the party served had minimum contacts with the forum state or the bulge area".

If the action is transferred for trial, such as with a change of venue under 28 U.S.C.A. § 1404(a), and occasion for bulge service arises after the transfer, the 100-mile radius would now be measured from the courthouse in the transferee district. Indeed, one of the factors the court may have considered in determining whether to make the § 1404(a) transfer is the joinder of other needed parties that a transfer might facilitate because of these geographical factors.

C4-32. Extraterritorial Service, Generally.

By "extraterritorial" service we mean service outside the state in which the federal court is sitting, although that terminology may no longer be appropriate. Territoriality can't really be discussed as "extra" until we know what's basic. The basic unit for the service of a summons in a federal civil action is still the state in which the federal court sits, but while the authority for that was explicit under the pre-1993 Rule 4, under the revised Rule 4 it comes about indirectly, through clause (A) of subdivision (k)(1), as noted in Commentary C4-30 above. But it is the same clause (A) that invokes state law for whatever bases state law offers for service outside the state, and it is that aspect of clause (A) that becomes relevant here, along with the other parts of subdivision (k) that address the scope of the federal summons.

So, in using "extraterritorial" here as a reference to situations in which the summons may be served outside the state in which the federal court sits, we do so as a matter of mere convenience.

The reach of the court's summons depends on explicit state or federal law. Nothing is left to "inherent" judicial powers, or to common law (on which note the Omni case discussed below). In so pronouncing at several points, subdivision (k) acts not so much as a source as it does a conduit. But a capacious conduit it is. In clause (A) of paragraph (1) it adopts state bases for extraterritorial service. In clauses (C) and (D) it calls attention to the existence of federal statutes that allow extraterritorial service. It is mainly with paragraph (2) that subdivision (k) becomes a direct source, authorizing extraterritorial service whenever the contacts that the defendant has had with the nation as a whole would support jurisdiction in the constitutional sense even if the defendant has not had an adequate set of contacts with any individual state.

When one of its adopted jurisdictional bases is invoked, subdivision (k) should apply to all instances of summons service, not just the plaintiff's initial service on the defendant. It should apply to service in third-party practice under Rule 14, for example, and to service made on a person being joined as an additional party on a counterclaim or cross-claim under Rules 13(h) and 19.

It is helpful always to keep in mind that subdivision (k) is concerned with only the "basis" for personal jurisdiction rather than with the method of service. It determines where service may be made. Much attention is devoted by Rule 4 to the methods of service: a half-dozen subdivisions running from (e) through (j). But all concern method, not place. Subdivision (k) is the chaperon of each, standing at the side of all process servers and telling them just how far they may go, as a matter of geography, to make service.

Another way of phrasing this is that subdivision (k) is concerned with "amenability" to jurisdiction, a subject reviewed by the U.S. Supreme Court in 1987 in Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987). There the court had occasion to review the two possibilities for extraterritorial jurisdiction afforded by subdivision (e) of the pre-1993 version of Rule 4, one adopting state law bases for extraterritorial service and the other referring to federal statutes authorizing service anywhere in the country (or beyond). The court in Omni determined that on the facts of that case there was no basis for extraterritorial service under either category and it therefore affirmed a dismissal of the action for want of personal jurisdiction.

The result in Omni was a want of jurisdiction to implead a third-party defendant, a loss felt all the more acutely by the third-party plaintiff (the main defendant) because what it was seeking was indemnity and it is always a tactical advantage to a defendant to have its alleged indemnitor face the same jury that is being asked to impose a liability on the defendant in the first place.

The court also rejected an invitation that the judiciary undertake to establish a kind of common law of extraterritorial jurisdiction. Note that subdivision (k)(2), treated in Commentary C4-35 below, adopts by rule what the court in Omni refused to adopt through the decisional route.

C4-33. Extraterritorial Service under State Law.

Clause (A) of subdivision (k)(1) replaces the well known and often invoked second sentence of subdivision (e) of the pre-1993 version of Rule 4. It adopts for use in the federal courts all of the bases for the territorial reach of the summons recognized by the law of the state in which the federal court sits.

This takes in all of the forum state's "longarm" jurisdiction, among other things. And Clause (A) does this regardless of the basis on which subject matter jurisdiction may rest in the action. Many lawyers looking to state law to resolve an issue in a federal court automatically assume that they are doing so under the mandate of the Erie doctrine (see Commentary C4-40), which is seen mainly in diversity cases. But this provision adopts state extraterritorial bases for personal jurisdiction in all categories of federal subject matter jurisdiction. The diversity case is of course among them, but so is the federal question ("arising under") case, e.g., State of North Carolina v. Alexander & Alexander Services, Inc., 680 F.Supp. 746 (ED No.Car. 1988), the admiralty case, e.g., W.G. Bush & Co. v. Sioux City and New Orleans Barge Lines, Inc., 474 F.Supp. 537 (MD Tenn. 1977), and the case in which the United States is a party, e.g., United States v. Montreal Trust Co., 358 F.2d 239 (CA2), cert. den. 384 U.S. 919, 86 S.Ct. 1366, 16 L.Ed.2d 440 (1966).

How far reaching this aspect of clause (A) is in a given U.S. district court depends on how far the state in which it sits goes with longarm jurisdiction. There are two kinds of longarm statute. One carves out specific categories of activity, like transacting business in the state, or shipping goods into the state, or contracting to furnish goods or services in or causing tortious injury in or operating realty in the state, etc., and exercises jurisdiction only over claims rooted in such conduct. Illinois (Ill.Ann.Stat., ch.110, § 17) and New York (New York Civil Practice Law and Rules 302) are among the states with that kind of longarm statute. California (Cal.Code Civ.Proc. § 410.10) is among the states with the other kind: the one that authorizes extraterritorial jurisdiction whenever its exercise would be consistent with the requirements of due process in the particular case.

Since procedural due process with its "minimum contacts" doctrine, as pronounced in the leading case on the subject, International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945), is always on the scene when longarm jurisdiction is attempted, a dual inquiry is needed to test out longarm jurisdiction whenever the defendant raises the issue under the law of a state that does not go to the limits of due process with its longarm statute: (1) does the state statute assume to exercise jurisdiction in the case and (2) if it does, is the exercise consistent with due process? Inquiry (1) drops out with an all-the-way type of statute like California's: the constitutional inquiry is the only one. In point of sequence, the statutory issue is usually resolved first, since a statute that doesn't go all the way and whose requirements are not fulfilled in the particular case mandates a dismissal of the claim and makes a constitutional inquiry unnecessary.

Longarm jurisdiction, when the plaintiff can get it, is of inestimable value in litigation. It means that the plaintiff doesn't have to pursue the defendant; that the plaintiff will realize all of the tactical, economic, psychological, and other advantages of making the defendant come to the plaintiff's selected forum. Hence longarm jurisdiction is a frequent battle arena and nowhere more so than in the federal courts, where the high stakes usually involved in the litigation make the plaintiff try all the harder to spell out longarm jurisdiction and the defendant try all the harder to get out from under it. The battle usually comes on through a motion to dismiss by a corporate defendant--although longarm jurisdiction usually applies to all defendants it is perhaps most often seen against corporate ones--which

wheels into court a cart of affidavits protesting that what it did does not fall under the state longarm statute, and if it does then the statute breaches due process. Then the plaintiff comes in with a similar vehicle but with affidavits pointing the other way. In the middle is the U.S. district judge, detoured from other obligations to the task of weighing the contacts on her longarm scale, battered from use, or, perhaps, from an occasional rap with a hard object when no one was looking. Longarm inquiries are sui generis, very demanding, and almost entirely fact-oriented: did the defendant in this particular case do enough to fall within jurisdiction? Longarm inquiries have been termed "interminable", see Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc., 297 F.Supp. 1149, 1150 (SD NY 1969), but they are every bit as important as they may be monotonous.

Lawyers looking into longarm jurisdiction will find many cases in the Notes of Decisions following these Commentaries, where they weave in and out of the annotations. Even more fertile sources of guidance are the annotations on the particular state longarm statute relied on.

Federal judges applying a state statute will of course deem themselves bound by its scope as the highest state court has construed it. But insofar as a due process inquiry is involved, this being a product of the federal constitution, federal judges determine that issue for themselves.

"Longarm" jurisdiction, as we have been using that term, reaches for a nondomiciliary defendant based on a claim arising out of acts the nondomiciliary is accountable for in the state, but it is not the only kind of extraterritorial jurisdiction imported through clause (A). Any other basis the state exploits is similarly available in the federal court, such as where the defendant is a domiciliary of the state and the state permits service on its domiciliaries anywhere. Under its broadest definition, in fact, "longarm" jurisdiction would apply to that and to any instance in which a court's summons is being served outside the territory in and for which the court was established.

When an appropriate state longarm statute is applicable to permit extraterritorial service under clause (A), exactly how far may the summons go? The answer is, as far as the state statute being exploited allows. If the simple effect of the state statute is to lift state lines as a barrier and thus permit service throughout the universe, then the universe it is for the federal summons, too.

What Constitutional Test When State Longarm Statute Adopted in Federal Question Case?

When a state law allowing extraterritorial service is adopted, through clause (A), for use in a federal action not based on diversity of citizenship, and a due process test of the constitutionality of the jurisdictional exercise is required, which due process clause is to be looked to for the test: that of the 14th or that of the 5th Amendment? A pair of circuit level admiralty cases illustrates a dispute on the point.

Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265 (CA6 1984), says it's the 5th. This means that the test is not necessarily whether the defendant has had adequate contacts with the forum state--the test applicable in 14th amendment cases--but only "whether the ... assertion of jurisdiction unfairly burdened [the defendant] with the requirement of litigating in an inconvenient forum." Still other cases may find a 5th amendment test satisfied if the defendant has had adequate contacts with the nation as a whole, not insisting on anything more local than that. See United Rope Distributors, Inc. v. Seatriumph Marine Corp., 930 F.2d 532 (CA7 1991). (National contacts under a constitutional test will be a more frequent inquiry under the new paragraph [2] of subdivision [k], for which see Commentary C4-35 below.)

The 1981 case of DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (CA3) cert. denied 454 U.S. 1085, 102

S.Ct. 642 (1981), says it's the 14th amendment that supplies the test. The court notes that it may be "anomalous" for a federal court sitting in a nondiversity case to have 14th rather than 5th amendment standards imposed on it, but that this is the doing of Congress, which could simply have allowed national service in all such cases had it chosen to. A divided en banc decision from the Fifth Circuit agrees, disagreeing with Handley and also taking the position that nothing less than state contacts will do for a jurisdictional test even in a federal question case if it is state law that is supplying the authority for extrastate service under the adoptive provisions of what is now clause (A) of subdivision (k)(1). Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415 (CA5 1986), aff'd sub nom. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404 (1987). The court went so far as to overrule prior cases of its own to the extent they indicated otherwise on the point.

It would seem that it is indeed Congress's wish that is being fulfilled when the 14th amendment is applied in these instances. It is applied merely because Congress has chosen to offer less in the way of territorial jurisdiction in the case than it might have, and because, instead of spelling out its preferred limits directly, Congress has chosen to act indirectly by imposing voluntarily on the federal courts the restraints that the 14th amendment imposes directly on state courts. Congress has chosen, as the point is sometimes phrased in these instances (see the Rope case above), to have the federal courts march in "lockstep" with the state courts even though the federal courts need not be so shackled and could be released for a much longer march (and for which the new subdivision (k)(2), adopted in 1993, in fact releases them, a point for which we again refer the reader to Commentary C4-35 below.) That would seem to be all that is really happening when, in a federal question or admiralty case, the federal rulemakers leave to clause (A) the determination of how far a federal district court's process can go. In yet another phrasing, the rulemakers have merely provided that state law is to control, and by that route the 14th amendment that governs in the state court under its own steam finds itself in the federal court as well with a little tow from those who make the rules.

C4-34. Extraterritorial Service under Federal Statutes.

The first sentence of subdivision (e) of the pre-1993 Rule 4 made a general reference to federal statutes that permit nationwide service in particular cases, serving essentially as a mere reminder that such statutes exist. The same task is now accomplished by clause (D) of subdivision (k)(1) of the revised rule.

Actually, clauses (C) and (D) do that job together, clause (C) for federal statutory interpleader cases specifically and clause (D) for all other federal sources of authority for nationwide service. Clause (C) is probably superfluous. The source of authority for nationwide service in cases of federal statutory interpleader, 28 U.S.C.A. § 2361, is "a statute of the United States" that would in any event fall within the embrace of clause (D).

There are a number of statutes that authorize service nationwide or beyond, of which § 2361 is just one example. Others may be found in diverse other titles of the U.S. Code. See Wright and Miller, Federal Practice and Procedure §§ 1118, 1125. Finding such a statute in a particular case comes close to doing the whole jurisdictional job on the territorial reach of the federal summons.

Necessity of 5th Amendment "Contacts" Test

There will sometimes have to be a constitutional inquiry. Under the subcaption "What Constitutional Test When State Longarm Statute Adopted in Federal Question Case?" in Commentary C4-33, above, we noted the restrictions the due process clause may impose on a judicial exercise of jurisdiction when a nondomiciliary defendant is served far from the court purporting to exercise jurisdiction. The clause requires a showing of contacts that the defendant has had with the territorial unit in which the court is set up.

When the court exercising the jurisdiction is a state court, it's the due process clause of the 14th amendment that applies, and the contacts must be demonstrated to be with the state. The inquiry in the Commentary C4-33 discussion was directed to situations in which state law was being depended on for its authorization of extrastate service, and the conclusion reached--although conflict on the matter was pointed out--is that when a federal court exercises extraterritorial jurisdiction on the authority of state law, even on a claim arising under federal law, as it does under the adoptive provision of clause (A) of subdivision (k)(1), it's the 14th amendment that applies. This means that the case must be shown to have contacts with the particular state; that a showing of sufficient contacts with the nation as a whole would not do if they can't be zeroed in on the particular state.

Perhaps such an exercise of jurisdiction--an exercise based on a state-law authorization but made in a federal court--could pass a constitutional test based on national instead of state contacts. This would be premised on the assumption that because it is a federal court that is exercising the jurisdiction, the governing provision should be the due process clause of the 5th Amendment instead of the 14th, and the 5th is a national rather than just a state guidepost. While that might be appropriate if the statute or rule at hand were shown to involve an exercise of Congress's national powers, the conclusion of the earlier Commentary is that Congress and its rulemakers had no such intention under clause (A); that by adopting state law as a standard for the jurisdiction of a federal court under clause (A), even on a claim arising under federal law, Congress intended to have the same limitations imposed on the federal court that the 14th Amendment would impose on a state court in that state.

When we turn away from clause (A), however, and arrive at clause (D), the federal court's exercise of territorial jurisdiction is based on a federal, not a state, authorization. Here Congress has not invited any narrowing through the invocation of state law, but is presumably going as far as it can when it authorizes service of process nationwide. Even there, however, there are limits on Congress's power, coming in this instance from the 5th Amendment's due process clause. The nation being the unit in this case, it is generally felt that a showing of the defendant's contacts with the United States suffices under due process criteria without more. See, e.g., Fitzsimmons v. Barton, 589 F.2d 330 (CA7 1979), and United Rope Distributors, Inc. v. Seatriumph Marine Corp., 930 F.2d 532 (CA7 1991). But there is also afoot the idea that more may be necessary, for which see Bamford v. Hobbs, 569 F.Supp. 160 (SD Texas 1983).

While the 5th Amendment is clearly the criterion under clause (D), where state law as a source of jurisdiction is not in the picture at all (as it is under clause [A]), issues may arise about the convenience of the forum even if the defendant can be shown to have the requisite national contacts for jurisdiction.

Matters of convenience are left to the governance of the venue rules. Section 1391(b) of Title 28, for example, the main venue statute in point, is structured to see to it that the action is brought in a district appropriate to the facts: the defendant's residence district, a district substantially involved with the claim, etc. (See the Commentary on 28 U.S.C.A. § 1391.) And § 1404(a), the federal courts' chief entry in the forum non conveniens realm, is always on standby to support a transfer to a more appropriate district if the court sees the one chosen as less fitting.

"Supplemental" Jurisdiction to Support Non-Federal Claim?

Suppose that the plaintiff has a federal claim, and that, under Clause (D) of subdivision (k)(1), there is a federal statute authorizing national service on it. And suppose that the plaintiff also has a nonfederal claim related to it.

If the nonfederal (i.e., state of foreign) claim arises out of the same event that the federal claim does, subject matter

jurisdiction of the nonfederal claim can be supported under the doctrine of supplemental jurisdiction, as presently embodied in 28 U.S.C.A. § 1367. (The doctrine codifies as "supplemental" jurisdiction the doctrines previous known as pendent" and "ancillary" jurisdiction. See the Commentary on 28 U.S.C.A. § 1367.) Will the federal statute that authorizes national service also lend to the nonfederal claim the territorial generosity that it offers for summons service to the federal claim? If summons service on the state claim would not be able, on its own, to reach out to every part of the nation, will the wedding that the "supplemental" doctrine conducts for subject matter jurisdiction of the nonfederal claim include personal jurisdiction as one of its bridesmaids? And if the rule intends that inclusion--as the advisory committee note on subdivision (k)(2), treated in Commentary C4-35, below, seems to imply--may it constitutionally do so as a matter of contacts?

Before the 1990 enactment of § 1367, this was sometimes called "pendant personal jurisdiction" (perhaps now to be called "supplemental personal jurisdiction"). It has some support in the cases, see, e.g., In re Penn Central Securities Litigation, 338 F.Supp. 436 (ED Pa. 1972), aff'd sub nom. Robinson v. Penn Central Co., 484 F.2d 553 (CA3 1973).

If supplemental jurisdiction is applicable to offer technical jurisdictional support to the nonfederal claim, but there appears to be a good reason for not entertaining it in the case, the court has broad discretion not to. See "Discretionary Rejection of Supplemental Jurisdiction" in the Commentary on 28 U.S.C.A. § 1367. In view of that discretion, perhaps it won't be necessary, even in respect of territorial jurisdiction, to insist on too technical a construction. If there's any significant doubt about it, the nonfederal claim can simply be dismissed, without prejudice, as a matter of judicial discretion.

If the particular statute relied on for jurisdiction prescribes a method of service, that method should be used in the case. One with its own prescription, for example, is 28 U.S.C.A. § 1391(e), which, expanding venue in actions against federal officers and agencies, also expands territorial jurisdiction as a concomitant and prescribes certified mail as the method of service. If the statute has no service prescription, the usual Rule 4 methods apply.

Since the lifting of state lines is the main attainment of these statutes, we speak in terms of "nationwide" service as if it were the ultimate gift. It may be greater. Service may reach into foreign countries as well if the statute in point so authorizes "in terms or upon proper interpretation". (The quoted words are those of the advisory committee writing on a 1963 amendment that added subdivision (i) of the pre-1993 Rule 4. The subdivision was addressed to service outside the country, a subject addressed in subdivision (f) of the revised Rule 4.)

Extraterritorial Jurisdiction Under Bankruptcy Rule

Under Bankruptcy Rule 7004(d), a federal summons and complaint may be served "anywhere in the United States". This amounts to a federal provision authorizing nationwide service, and it would avail a plaintiff well who has no longarm basis for extraterritorial jurisdiction against a given defendant under state law but who can nonetheless serve the defendant somewhere in the country.

The rule is clearly applicable to "core" proceedings in the bankruptcy court. ("Core" proceedings are defined in 28 U.S.C.A. § 157[b][2].) Will the rule also be available to subject defendants to nationwide service in non-core cases as well, and in other courts, such as in a case brought in a district court by the debtor against a third party? The Seventh Circuit says yes in an extensive review of the matter in Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233 (1990), cert. denied 498 U.S. 1089, 111 S.Ct. 968 (1991). Hence the plaintiffs in Sugar were able to obtain in a district court, under the bankruptcy rule, a personal jurisdiction of the defendants that might not have been available under a state longarm statute, adoptable pursuant to what is now clause (A) of Rule 4(k)(1) of the

Federal Rules of Civil Procedure, for want of local contacts.

C4-35. The General Federal "Longarm" Statute, Rule 4(k)(2).

An innovation under the 1993 revision of Rule 4 is paragraph (2) of subdivision (k). It operates when the defendant has had contacts with the nation as a whole sufficient to support jurisdiction along the lines of a "longarm" inquiry (see Commentary C4-33 above), but when there is no federal statute authorizing nationwide service in the case through clause (D) of paragraph (1) nor any state statute that could validly authorize jurisdiction through clause (A) of that paragraph because the defendant's contacts with no single state suffice to invoke it.

Subdivision (k)(2) dissolves all sovereign lines in such a case and allows the service of the federal summons anywhere at all--state, nation, or beyond.

The provision offers this jurisdiction only to claims arising under federal law. It does not support jurisdiction if the claim is based on state law or on foreign law, although the doctrine of supplemental jurisdiction may help for such a claim if there is otherwise a federal claim in the case. (See the discussion of supplemental jurisdiction, separately captioned below.)

Subdivision (k)(2) is a kind of general longarm statute akin to those that some states have adopted, like California, whose statute (Cal.Code Civ.Proc. § 410.10) authorizes extraterritorial jurisdiction whenever its exercise would be consistent with the requirements of due process in the particular case. The U.S. Supreme Court in Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987), was invited to establish such general longarm authority for the federal courts through the decisional route, but rejected the invitation. Subdivision (k)(2) in effect adopts by rule what the U.S. Supreme Court refused to use the common law process to do in Omni.

It must be stressed that subdivision (k)(2) jurisdiction is available only when it is shown that the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state". This means that the availability of jurisdiction in any state court at all can become a bone of contention. The defendant must be a little wary of raising such an issue, however. By raising it, the defendant may be assuming to prove that jurisdiction is available in a given state court.

Who has the burden of proof on the issue? That's always a quagmire. The objection is one that the defendant must raise, but the burden presumably shifts back to the plaintiff to prove jurisdiction whenever the defendant does raise it. If that's to be the case here, will the plaintiff be put to the burden of reviewing the longarm statutes of every state in the union in order to show that none would apply to support jurisdiction?

Requiring that would impose a burden on the plaintiff so great that it could undermine the purpose of subdivision (k)(2). It seems more consistent with the latter to burden the defendant with singling out the state in which the defendant contends that jurisdiction would be available, which is not a task the defendant can turn to happily. It amounts to a concession of jurisdiction in a designated state. Perhaps the defendant had best confine its efforts to trying to show that even its presumably national contacts in the case don't suffice for jurisdiction.

From the plaintiff's point of view, it may indeed be worthwhile to prepare proof of the unavailability of jurisdiction under any state longarm statute, even if it entails a broad and expensive research. It will all depend on the value of

the case, and on its merit. If the stakes are high enough, the plaintiff is likely to find the jurisdictional inquiry not such a strain after all.

Apprehensions About Validity under Rule-Making Authority

At the very outset of their notes, the revisors expressed the view that there might be some doubt about the validity of subdivision (k)(2) because of its expansion of jurisdiction. They cited the Rules Enabling Act, apparently referring to subdivision (b) of 28 U.S.C.A. § 2072, which bars the rules from affecting "any substantive right". It is submitted, however, that while the rights affected by subdivision (k)(2) of Rule 4 are obviously substantial, they are not "substantive" in the sense used in the statute, whose mission is to see that the rules are directed to the method--the "procedure"--half of law's procedure/substance duo.

The subdivision (k)(2) mission, however far reaching, is not designed to change in any particular the substantive law to be applied in the action against the defendant, but only to add the federal courts to the list of forums that can hear the action. That the provision was accepted and promulgated by the U.S. Supreme Court and then also got through Congress in any event creates a powerful presumption of the rule's proceduralness that should be hard to overcome. See Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

Nor should the rule be deemed a violation of Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts". "Jurisdiction" under that rule is understood to mean subject matter jurisdiction, not personal jurisdiction, and subdivision (k)(2) affects personal jurisdiction only.

Service Within Country as Itself Subdivision (k)(2) Basis?

It is not just the usual "contacts" jurisdiction that will fall within the embrace of subdivision (k)(2), i.e., a case in which the claim is shown to have arisen in the United States. If service is made somewhere in the country on a defendant servable anywhere within national borders, jurisdiction should be just as available against that person as were he served within the borders of a particular state, and without reference to where the claim arose. This is the continuing notion of physical presence within the borders of the territory serviced by the court as a basis for jurisdiction all by itself. It is discussed in Commentary C4-30 above, in the context of jurisdiction predicated on state law adopted under subdivision (k)(1)(A).

If there is a state in which the defendant can be served, and that state--as it is likely to--still exploits this "presence" basis for jurisdiction, subdivision (k)(2) should become inapplicable for that very reason: the availability of jurisdiction under any state's law makes jurisdiction unavailable under subdivision (k)(2).

But suppose that the state--and the only state (call it state S)--in which the defendant happens to be physically present and amenable to physical service has abrogated its physical presence rule about jurisdiction and will not support jurisdiction based on mere local service. Under subdivision (k)(1)(A), this means that neither can the federal court get it from that source. A tentative basis for the invoking of subdivision (k)(2) is therefore established. Suppose further that the claim arose outside the country, meaning that no state's longarm ("contacts") jurisdiction will avail, and that the defendant is not even a citizen, but an alien. Would personal delivery of the summons to the defendant in State S then be permissible under subdivision (k)(2), assuming of course that the case is a federal question case (to which the provision is restricted)? If subdivision (k)(2) means to exploit all the jurisdiction the constitution would allow it in a federal question case, upon a showing that jurisdiction would not be available in

any single state, then in the situation just put there should indeed be jurisdiction, based simply on the defendant's being physically served somewhere in the country.

It would have to be the venue rules, or the venue rules and the forum non conveniens doctrine together, that keep things in balance. (Venue is discussed under a separate caption below.)

U.S. Citizenship as Itself Subdivision (k)(2) Basis?

When defendant D is a domiciliary of State X, that state can exercise personal jurisdiction of D no matter where D is served with the summons, and it makes no difference where the claim arose. That was a basis for jurisdiction that earned constitutional approval even before the International Shoe case (see Commentary C4-33 above) approved general longarm jurisdiction in 1945. The approval of that jurisdictional ground, based in essence on the loyalty the domiciliary owes the state to respond to its processes even if served while temporarily beyond state borders, came in 1940 in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339.

Again, however, it requires a state statute to invoke such a constitutional authorization, and if a given state doesn't have one, there's none it can lend to a federal court under subdivision (k)(1)(A).

Suppose State X, D's domicile, is such a state: it has no "domicile" basis for jurisdiction. Suppose further that the claim arose outside the country, so that no state's longarm statute would help, and that D is sojourning in France, so that D is not physically present in any state for service. Subdivision (k)(1)(A) might at first seem stripped bare in such a case: it would have nothing to offer at all.

But suppose now that D is a U.S. citizen, and that Congress has enacted a statute making citizens amenable to federal process while on sojourn overseas. Suppose also, of course, that the claim arises under federal law, so that subdivision (k)(2) is at hand to exploit whatever it can as long as the constitution is satisfied. Would it be constitutionally permissible to serve D overseas in that case, and secure personal jurisdiction of D? It would appear that it would. (See Commentary C45-17 on Rule 45 of the Federal Rules of Civil Procedure in 28 U.S.C.A., treating a federal statute, 28 U.S.C.A. § 1783, that predicates extraterritorial subpoena service on the status of the witness as a resident or national of the United States.)

If a special statute or rule of extraterritorial reach based on U.S. citizenship would be valid, then such reach should be permissible without such a special statute: it should be permissible based on the full constitutional coverage that subdivision (k)(2) was intended to afford. As long as the exercise is constitutional, Rule 4(k)(2) says it's permissible.

So, just as domicile in a state would constitutionally support a state court's power to subject a domiciliary to local jurisdiction of a state court through extrastate service even if there's nothing else in the case that would do it, then so should U.S. citizenship support a federal court's power to subject a U.S. citizen to the jurisdiction of a federal court through extranational service, on the authority of subdivision (k)(2) of Rule 4, as long as the claim arises under federal law and as long as there appears to be no state that authorizes jurisdiction under subdivision (k)(1)(A).

That's going the constitutional limit, and that's where subdivision (k)(2) wants to go.

This aspect of subdivision (k)(2)'s potential should prove especially helpful in a case in which a federal statute authorizes service anywhere in the country in the particular category of case, and where subdivision (k)(1)(D) would at first seem the provision in point, but where the federal statute does not appear to allow service outside the country even though it could constitutionally do so on the facts. Subdivision (k)(2) would leap in and allow service on the defendant in the foreign country of his present sojourn.

As under the prior caption, on physical service on a defendant located in the United States, so here with foreign-country service: the venue rules and the forum non conveniens doctrine would have to be depended on to avoid undue injustice or inconvenience.

Corporate "Presence" as Itself Subdivision (k)(2) Basis?

The situation in which the defendant is a corporation doing business in the United States and therefore subject to general jurisdiction nationally, but not doing enough in any single state to subject it to general jurisdiction in that state, should also be ripe for an application of subdivision (k)(2). This is discussed more fully in Commentary C4-36, below.

Venue in Subdivision (k)(2) Case

The venue rules, as set primarily by 28 U.S.C.A. § 1391, govern in a subdivision (k)(2) case as they do in any other. The defendant in such a case is likely to be an alien, however, which for venue purposes includes a corporation or equivalent entity incorporated or formed in a foreign nation. (If the defendant were a U.S. citizen and the resident of a state, or a corporation incorporated by any state, jurisdiction would almost certainly be available under clause [A] of subdivision [k][1] and paragraph [2] would for that reason alone be inapplicable.) Under § 1391(d), any district at all is proper venue in a suit against an alien, which means that in almost all instances in which the plaintiff can base jurisdiction on subdivision (k)(2) of Rule 4, the plaintiff may have a picnic at the venue table, being able to choose any district anywhere in the federal system.

If that broad permission should result in a plaintiff's singling out a district particularly inconvenient to the defendant, the cure will almost certainly have to be § 1404(a) of Title 28, the statute that authorizes a transfer based on convenience and fairness.

Indeed, the court may find the exercise of jurisdiction by any U.S. court at all so unfair to the defendant in a particular case that it may elect to dismiss the case altogether instead of merely transfer it. This would be in the nature of a forum non conveniens dismissal. Authority for such a dismissal survives the enactment of § 1404(a) and is turned to from time to time, especially when it is found that the most appropriate forum for the case would be a foreign one. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

"Supplemental" Jurisdiction in Subdivision (k)(2) Cases?

Since subdivision (k)(2) applies only to a claim arising under federal law, it can't support an action in which federal subject matter jurisdiction is based on something else, such as diversity of citizenship. Suppose, however, that the plaintiff does have a federal claim, and that it does support subdivision (k)(2) jurisdiction, but that the plaintiff also has a nonfederal claim related to it.

If the nonfederal (i.e., state or foreign) claim arises out of the same event that the federal claim does, it could be supported-in respect of subject matter jurisdiction-as an adjunct of the federal claim under the doctrine of supplemental jurisdiction embodied in 28 U.S.C.A. § 1367. That should also be the case for personal (territorial) jurisdiction under Rule 4(k)(2). See Commentary C4-34, above, under the caption, " 'Supplemental' Jurisdiction to Support Non-Federal Claims?"

If supplemental jurisdiction is applicable to offer territorial support to the nonfederal claim, but there appears to be good reason for not entertaining it in the case, the court has broad discretion not to. See "Discretionary Rejection of Supplemental Jurisdiction" in the Commentary on 28 U.S.C.A. § 1367.

C4-36. The "Corporate Presence/Doing Business" Test.

Before leaving the subject of longarm jurisdiction, something should be said about the so-called "corporate presence" doctrine, to see how it differs from longarm jurisdiction and where it fits in in federal practice generally and under Rule 4 specifically.

Long before longarm jurisdiction arrived on the scene, principally in the International Shoe case in 1945 after a few heralds (like the nonresident motorist statutes) earlier in the century, the corporate presence doctrine was flourishing. The doctrine is in essence a fiction that enables the law to analogize the corporation, which lacks a body, to the individual, who has one, for the purpose of determining whether the corporation is physically present within the territorial area serviced by the court so as to subject it to service of the process of a local court and, hence, local jurisdiction. It's the corporate counterpart of the oldest of all ways of getting personal jurisdiction over an individual defendant: by serving the individual within the court's territorial area--we'll assume it's the state--while the defendant is physically present there. (See Commentary C4-30 above.)

The presence of the individual is determined by tracing the body down to the feet to see if they are implanted on local terrain. Unable to do that with a corporation, the law did the next best thing: it devised the "doing business" test, the agent of the "corporate presence" doctrine. The test looks at the aggregate of activities being carried on in the state by the corporation through its employees to see if those activities are regular. If they are, the corporation acting on a day to day basis rather than just occasionally, then the corporation is deemed to be as "present" within the state as would an individual be who is standing there. And, as with the individual, this means that the corporation is amenable to jurisdiction on any claim whatever, related or not to the state: under this "doing business" test it is the corporation's physical presence that accounts for jurisdiction, not the relationship that the particular claim bears to the state (as is the case with longarm jurisdiction).

How much activity does it take to spell out a corporate "presence" under this test? The cases are numerous and not all states have identical tests. Some may require more activity for a "presence" holding, some a little less. Inquiries are once again sui generis.

When the case presenting the issue is in a federal court, what test does the court apply? The forum state's? A federal test? In a diversity case it has been settled, after a much publicized dispute on the point in the Second Circuit in Arrowsmith v. United Press Int'l, 320 F.2d 219 (1963, en banc decision), that it is the state test of amenability to jurisdiction that applies. That should all the more clearly be the conclusion in a diversity case today when jurisdiction rests on clause (A) of Rule 4(k)(1), which adopts state law bases of jurisdiction for use in a federal court.

In cases in which federal subject matter jurisdiction rests on the claim's arising under federal law (instead of diversity of citizenship or some other basis), "[t]he contours of amenability ... are more fluid", Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. 1981), and there appears to be a leaning toward application of a uniform federal standard. See 4 Wright and Miller, Federal Practice and Procedure § 1075. The thinking is that it would be untenable for a federal court in a federal question case to have to depend on state law to measure its jurisdiction.

But if Rule 4's sponsors--in the aggregate the Advisory Committee and the Supreme Court explicitly and Congress tacitly (it has a veto power under the rule-making procedure, 28 U.S.C.A. § 2072)--are content to have personal jurisdiction even in federal question cases depend on the particular forum state's longarm jurisdiction, then a similar dependence on the state's "doing business" test, if that's what the rulemakers want, is just as logical, and that appears to be what the rulemakers want, as least insofar as their intent can be discerned from the language of subdivision 4(k)(1)(A).

If that were also the construction given to the provision that adopted state bases of jurisdiction under prior law--subdivision (e) of the pre-1993 Rule 4--it could have denied jurisdiction to a federal court in a federal question case in any situation in which the defendant's local presence was sufficient for jurisdiction under a constitutional test but not sufficient under the narrower test elected by the particular state. This would have put it within the power of a state to affect a federal action involving a federal claim merely by adopting a restrictive jurisdictional test, on which the federal court would then have had to depend.

Note how that changes under Rule 4(k)(2), first in the situation just described, and then on an even broader front.

In the situation described, in which a state's "corporate presence" test is too narrow to support jurisdiction even though in a constitutional sense the corporation's local activities suffice for it, subdivision (k)(2) once again appears and fills the gap: it assures the jurisdiction as long as the case is in a federal court and involves a federal claim.

It goes further. Suppose that the corporation's local activities in the state, or in any individual state, do not, and cannot constitutionally, be taken to establish a corporate "presence" under any test--state or federal--and that the state-law-adopting provision of subdivision (k)(1)(A) could therefore not help at all. But assume that the corporation's activities within the country as a whole show a "national" presence. Subdivision (k)(2) should authorize jurisdiction against the corporation based on that national presence, as long as the claim arose under federal law. And we're not at the end yet.

By analogy to what "corporate presence" based on state contacts accomplishes for a state court, "corporate presence" based on national contacts should accomplish under subdivision (k)(2) for a federal court. A corporate presence when shown to exist under state law supports jurisdiction of any claim against the corporation, related or not to the state. Under the general/specific dichotomy adopted in recent years, in other words (see Commentary C4-30 above), it supports "general" jurisdiction. It's the corporation's physical presence in the state that affords jurisdiction in this instance, not the contacts that the particular claim had with the state, which is the concept of "longarm" jurisdiction. Translated into the framework of subdivision (k)(2), finding a corporation present in the country, although not present in any individual state, should permit the federal court to entertain any federal claim at all against the corporation, even if the claim itself does not arise out of the aggregate national activities of the defendant.

Federal claims arising overseas, in other words, as long as federal law can be constitutionally applied to govern the case under choice of law standards, can also be beneficiaries of subdivision (k)(2) jurisdiction even if the claim has no relationship to the national activities of the corporation on which jurisdiction is based.

This could mean the entertaining of a claim having no roots in the United States whatever, merely because the defendant's overall activities spell out a national presence for the corporation here. (That's just what happens in state practice, too. See, e.g., Bryant v. Finnish National Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 [1965].) If this seems unfair, then the cure should be a forum non conveniens dismissal, which is a discretionary matter. As a jurisdictional matter, subdivision (k)(2) is in charge, and with its broad constitutional standard it would appear to reach for jurisdiction in this corporate presence situation. Subdivision (k)(2) may not know its own strength.

Resort to the corporate presence test is as a rule necessary only when the corporation is an unlicensed foreign one and the claim sued on lacks local contacts. Domestic corporations are always amenable to local jurisdiction, in the courts of the state of incorporation if nowhere else, and therefore to federal jurisdiction as well through the adoptive provision of subdivision (k)(1)(A). So are foreign corporations that have duly filed to do business in the forum (often with the designation of a state official on whom service may be made in court actions). This reduces dependence on the corporate presence test.

Another reducing factor is of course longarm ("specific") jurisdiction itself: if the claim has adequate longarm contacts under a state statute being adopted by subdivision (k)(1)(A), or under the federal standard newly enacted in subdivision (k)(2), longarm jurisdiction will satisfy and make a "corporate presence" test unnecessary.

Subdivision (l)

C4-37. Proof of Service.

Subdivision (l) governs proof of service, which is required only if service has not been waived. If the waiver of service procedure of subdivision (d) has been used, and succeeds, the waiver itself is filed by the plaintiff. See subdivision (d)(4).

The predecessor provision on proof of service, which was subdivision (g) of the pre-1993 Rule 4, prescribed that the proof of service had to be filed by the plaintiff "promptly", and in any event within the defendant's answering time. That's still a good rule to follow, but the provision explicitly requiring it has been omitted. The consequence of tardiness is not likely to be severe, in any event, in view of the continuance of the provision that failing to file proof of service is not jurisdictional.

If the marshal makes the service, which the marshal does today in only a few instances, see subdivision (c)(2) and Commentaries C4-13 and C4-14, above, the marshal's certificate of service suffices. Service by others requires an affidavit, but it does not have to be under oath, i.e., sworn to before a notary. Under 28 U.S.C.A. § 1746, a declaration under the penalty of perjury suffices.

The provision stating that a failure to file proof of service doesn't affect the validity of service, and the absence of any rigid time period for the filing of proof of service, means that proof can be put together later, if need arises. It is not a good idea, however, to allow any casualness to creep into the ritual of proof of service. The plaintiff should

see to obtaining all needed proof, and that it is filed in court with reasonable dispatch. If the defendant appears and defends without raising a jurisdictional objection, proof of service may of course become irrelevant. But should the defendant raise the objection, such as by motion to dismiss under Rule 12 (see Commentary C4-43), the proof of service will be a relevant (although not necessarily a decisive) paper among the plaintiff's opposing papers. And should the defendant default--not respond to the summons at all--proof of service will of course be an indispensable part of an application for a default judgment.

That subdivision (l) means what it says when it says that the validity of service is not affected by the plaintiff's failure to file proof of service is illustrated in O'Brien v. Sage Group, Inc., 136 FRD 151 (ND Ill. 1991), aff'd 998 F.2d 1394 (CA7 1993), decided on the precursor provision, subdivision (g) of the pre-1993 version of Rule 4. In O'Brien, the plaintiff effected good service but didn't file proof. The defendant defaulted. Many months passed before the plaintiff got around to seeking a default judgment, but the judgment was nevertheless granted, and it stuck. The court would not set it aside; the omission to file proof was held to be no excuse that could justify a default by the defendant.

The lesson is that a defendant can't depend on the plaintiff's proof of service as the source of information about whether service was made. If the defendant doesn't know the facts relevant to service, which is a possibility with any defendant but especially so with a corporate defendant, the defendant has to check into the facts without depending on the plaintiff's proof of service. The defendant can of course ask the plaintiff about it. If for any reason the plaintiff refuses to cooperate, however, by offering the defendant whatever proof the plaintiff has about service, the court is likely to take that into account in determining whether to vacate a default.

Of course, if the defendant was never served at all, not only will the default be vacated; the action will be dismissed as well. But if the defendant has any inkling that the plaintiff is claiming that the defendant was served with process, the defendant is put on notice to inquire further, and failing to, with or without help from the plaintiff's proof of service, runs the risk that the defendant will be defaulted and that the default will not be vacated.

If a dispute arises about whether service was made, the plaintiff contending it was but the defendant denying it, the proof of service of course takes on special importance. This was not a significant problem, or in any event not a frequent problem, when the marshals were the servers. The marshal's return was virtually inviolable and defendants either didn't bother contesting it or usually lost when they did. But the 1983 amendment of Rule 4 superseded the federal marshal with the private process server--the 1993 revision continues that--and case law has yet to define the extent to which the presumption of regularity that accompanied the marshal's proceedings will be appended to those of a private process server.

It was said in Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 FRD 48 (ND Ill. 1989), that there is "no reason why a return of service executed by one other than a United States Marshal should be given any less weight" (see Commentary C4-13 above), and perhaps that attitude will ultimately prevail. But if there is a serious dispute between the plaintiff's process server and the defendant about whether service was made, the plaintiff may find life more pleasant--should the defendant prevail in a fact contest on the point--if the plaintiff knows that the statute of limitations is still alive for a new action. (That's what we mean by the admonition to Leave Time for Trouble, the caption of Commentary C4-46 below.)

The most extensive discussion of the issue since the 1983 amendment took the marshals out of process service appears in FROF, Inc. v. Harris, 695 F.Supp. 827 (ED Pa. 1988). The court in FROF stopped short of a complete equation between private server and marshal, and may even be regarded as hinting that it would not buy such an equation if it were required to decide the issue now (which it didn't have to do in FROF), but it did hold that the defendant's mere assertion that he was not served will not suffice to refute even a private process server's return.

The court said that a defendant seeking to overcome the return will have to introduce additional evidence of some kind, such as the affidavits of third persons or "receipts that placed him elsewhere at the time process was allegedly served".

Special provisions, part of them previously found in subdivision (i) of the pre-1993 Rule 4, are made by the present subdivision (l) for proof of service made in a foreign country. These coordinate with subdivision (f), which supplies the methods of service that may be used abroad.

If service is made pursuant to the Hague Convention (for which see Commentary C4-24) or pursuant to any other treaty as recited by subdivision (f)(1), the proof of service shall be in whatever form the treaty authorizes. Under the Hague Convention, for example, each subscribing nation is required to designate a "Central Authority" through which service may be made, and Article 6 of the Convention requires the authority so designated to complete and forward to the plaintiff a "certificate" attesting to the service.

It has been held that the authority's failure to return a proper certificate is not to be imputed to the plaintiff and so cannot by itself vitiate the service. Fox v. Regie Nationale des Usines Renault, 103 FRD 453 (WD Tenn. 1984).

If service is made by the methods prescribed in paragraphs (2) or (3) of subdivision (f), a receipt signed by the addressee is proof of service, and if there's any trouble about securing such a receipt the plaintiff may seek a court order permitting some other kind of evidence of delivery to the addressee. An affidavit of a person who can state on knowledge that the addressee received the summons, for example, should be acceptable to the court.

Proof of service can be amended if occasion should arise to make it necessary or helpful. Subdivision (l) concludes with a specific authorization to that effect. It was part of a separate subdivision on amendment--subdivision (h) of the pre-1993 Rule 4--which permitted amendment of the summons as well as proof of service. (The provision allowing amendment of the summons was made part of subdivision [a] of the current Rule 4.)

Subdivision (m)

C4-38. The 120-Day Time Limit on Service.

Before 1983 there was no arbitrary time limit for summons service after the filing of the complaint. A kind of due diligence standard was applied, and it was applied flexibly. As long as the delay was not outrageous, the courts, when an issue of tardiness came before them, were disposed to allow late service, or new service to correct some perceived imperfection in the first service. The question the courts preferred to ask was whether service could yet be made, or be made right. See, for example, the Fifth Circuit's 1959 opinion in Stanga v. McCormick Shipping Corp., 268 F.2d 544, cited approvingly by the Second Circuit more than a decade later in Grammenos v. Lemos, 457 F.2d 1067 (1972). This was a healthy attitude. That the marshals were the main process servers, which they were before 1983, didn't hurt. It supported a tacit if not explicit presumption that things were proceeding reasonably.

With the removal of the marshal as the general process server in federal practice--the main purpose of Rule 4's 1983 amendment--it was thought advisable to put some kind of stated cap on the time for serving the summons. Subdivision (j) of the 1983 version of Rule 4 did that, adopting a 120-day time period, measured from the complaint's filing. The substance of that requirement is carried forward in subdivision (m) of the 1993 revision of

Rule 4.

The 120 days--that's four months--seems more than enough. Given the vagaries of litigation, however, it can frequently prove insufficient. And if it appears to be generous, its very generosity may prove the plaintiff's undoing, lulling the plaintiff into casualness until the bell is about to ring. If the period lapses when the statute of limitations is near at hand, the result can be disaster. (So enmeshed is this 120-day period with the statute of limitations, in fact, that a separate Commentary, C4-40, is devoted to the subject.)

The 120-day period is not absolute; the court has the power to extend it. Whether a showing of good cause is necessary for the extension, and what qualifies as "good cause", is also the subject of a separate Commentary, C4-41, below.

Since Rule 4(m) itself empowers the court to extend the time, the plaintiff can seek the extension pursuant to that rule, or perhaps that rule and Rule 6(b) combined--Rule 6(b) is the general provision empowering the court to extend time periods--either by motion or by way of opposing the defendant's dismissal motion. For several reasons, psychology among them, when the plaintiff knows that an extension will be needed it is best that the plaintiff take the initiative of moving for it instead of saving it for opposition to a dismissal motion.

A dismissal for failure to effect service during the 120 days, or for making service improperly if that's the ground, requires a motion. The passing of the 120 days does not result in an automatic dismissal. (See, e.g., United States v. Gluklick, 801 F.2d 834 (CA6 1986), cert. denied 480 U.S. 919, 107 S.Ct. 1376 (1987), discussed further, below, under the caption about the defendant's waiving late service.) If the motion is made by the defendant, it would of course have to be on notice to the plaintiff. Rule 5(a). If the court is disposed to dismiss sua sponte, which it can do under subdivision (m), the court itself must assure that the plaintiff has notice of its proposed action and a chance to argue against it.

In Smith-Bey v. Cripe, 852 F.2d 592 (1988), the District of Columbia Circuit stressed the requirement that the court give notice when the court is the movant. The purpose of the rule is to assure the plaintiff an opportunity to excuse a delay in service and to appeal to the court's power to grant a time extension. The plaintiff in Smith-Bey not having had such an opportunity, the dismissal ordered by the district court was vacated and the case remanded.

The unserved defendant is most likely to be the defendant who moves the dismissal. (The defendant could have found out about the pending action through a variety of means.) Or a duly served co-defendant might make the dismissal motion, with the argument that the unserved defendant is a party without whom the action should not proceed. See Rule 19.

If the dismissal is granted, it is "without prejudice". This means that it is not on the merits and that the claim cannot be met with the defense of res judicata should it be sued on anew. But if the statute of limitations has meanwhile expired it will be the limitations defense that greets a new action, which will make the case just as dead as a disposition on the merits, and with ever so much less trouble for the defendant. Hence it is to be noted that it is the statute of limitations, almost exclusively, that gives subdivision (m) its tension.

The 120-day period of subdivision (m) doesn't apply when service is made in a foreign country under subdivision (f)--which governs service abroad on individuals and applies to service on the agents of business entities as well through the adoptive provisions of subdivision (h)(2)--or when service is made on a foreign governmental unit under subdivision (j)(1).

The statement that the 120 days doesn't apply to service made abroad can mislead a plaintiff into such total laxity about service that a dismissal can result for not even attempting such foreign service within the 120 days. Otherwise, dilatory plaintiffs with no real intention of making service abroad might just evade the 120-day time limit altogether merely by putting together a showing that the defendant could be served abroad. See the concluding part of Commentary C4-24, above, discussing the Second Circuit's Montalbano case.

Many significant side issues arise in connection with the 120-day time period for service. For convenience of reference these issues will be taken up under separate captions.

The "Good Cause" Provision

The 120-day period is not absolute. It can be extended, or its being missed can be excused. But this requires a court order. The pre-1993 version of the rule required a showing of "good cause" why service wasn't made in time. Under the revised rule there is an ambiguity in the rule's language about whether good cause must be shown in all instances, and according to the notes the purpose appears to be to permit the time extension, or the excusing of late service, even when there is no "good cause" to explain it.

The "good cause" provision is explored at length in Commentary C4-41 below.

Forgiving Pro Se Plaintiffs for Marshal's Omissions

An indulgent attitude towards pro se plaintiffs suing in forma pauperis, especially when they are incarcerated, has been manifest in a number of cases, and it was the apparent purpose of the advisory committee to continue this indulgence, especially when confusion arises about time requirements because of the plaintiff's need to apply for leave to proceed in forma pauperis. (See Commentary C4-12 above.) The notes on Rule 4(m) say that the court should "take care to protect pro se plaintiffs" in that situation.

Special consideration has been given by the courts to those entitled to rely on the marshals for service pursuant to Rule 4(c)(2), which includes those proceeding in forma pauperis. Citing cases in and agreeing with the Second, Fifth, and District of Columbia circuits, the Ninth Circuit held in Puett v. Blandford, 912 F.2d 270 (1990), that

an incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint, and, having provided the necessary information to help effectuate service, plaintiff should not be penalized by having his or her action dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the duties required of each of them under 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure.

A few months later, in Sellers v. United States, 902 F.2d 598 (1990), the Seventh Circuit stated the same proposition, citing the same cases in the same three circuits and now of course citing the Ninth Circuit's Puett case as well. The marshal's failure to carry out the tasks assigned by Rule 4 is automatically "good cause" for forgiving the plaintiff within the meaning of (what is now) Rule 4(m), the court holds.

Take note, however, that this indulgence of pro se plaintiffs who depend on the marshal by no means obtains for the represented plaintiff. Nor, for that matter, does it guarantee unconditional indulgence for all pro se plaintiffs, especially those who have not secured pauperis status. Many a pro se plaintiff has been put out of court through violation of the 120-day requirement.

Service of Complaint That Differs from Filed Complaint Doesn't Satisfy Rule

The requirement that the complaint be served within 120 days after its filing is not satisfied by the service of a complaint substantially different from the one filed. The Ninth Circuit held in in West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (1990), that

service of an incomplete draft complaint which was seven pages shorter than the complaint filed cannot be deemed to constitute compliance with [Rule 4(m)]....

The result was a dismissal as against the defendants so served.

Service by State Law Method Should Be Made Within Federal 120-Day Time Limit

Even if the plaintiff is using a state method of service, as allowed by subdivisions (e)(1) and (h)(1), the plaintiff should of course do everything possible to see that it is carried out within the 120-day time limit imposed on summons service by subdivision (m) of Rule 4. On this point, see, for example, Coutinho, Caro & Co. v. Federal Pacifica Liberia Ltd., 127 F.R.D. 150 (ND Ill. 1989). Service on the secretary of state was the state method relied on in Coutinho. The delivery to the secretary occurred within the 120 days, but the mailing also required by the state statute did not occur until afterwards. The action was dismissed.

Time Limit Applied in Bankruptcy Case

An example of the application of the 120-day time limit in an adversary proceeding in a bankruptcy case appears in In re Johannsen, 82 B.R. 547 (D Mont. 1988). The applicable Bankruptcy Rule at the time adopted FRCP Rule 4(j), the predecessor of Rule 4(m), for use in the court. Rule 4(j) was not violated in this case, but practitioners should note that the potential consequences of a violation can touch bankruptcy proceedings, too.

Operation of 120-Day Period in Cases Removed from State Court

A state court action of which there is concurrent federal/state subject-matter jurisdiction, so that the action could have been brought in the federal court at the plaintiff's option, can as a general rule be removed to the federal court by the defendant. See Commentary C4-20 above. Under 28 U.S.C.A. § 1446(b), the defendant has 30 days for the removal, measured from the service of the "initial pleading" on the defendant, or from the service of the summons if the particular state's practice doesn't require service of the pleading.

In an original federal action, the plaintiff under Rule 4(m) must effect service within 120 days after the filing of the complaint, but suppose that the practice of the particular state court, in which the assumed action is commenced, has no stated time limit or the limit imposed exceeds 120 days. Suppose now that the defendant properly removes

the case from the state court during the 30-day removal period following service of the complaint, but that the complaint had not been served until after 120 days had elapsed since the commencement of the state court action. After removal, the defendant moves the federal court to dismiss the action. Should the motion be granted based on Federal Rule 4(m)?

It should not, holds Russo v. Prudential Ins. Co., 116 FRD 10 (ED Pa. 1986). The federal practice does not govern these matters in a case in which commencement and service were already effected satisfactorily to state law before removal. The main provision in point is Rule 81(c), which provides that the Federal Rules govern procedure in removed actions only "after removal".

If the service had been untimely in the state practice, and the point was still alive for the defendant to raise in the state court at the moment of removal, it can still be raised in the federal court after removal, but it will be judged by state, not federal, procedural law. (Even an objection to the personal jurisdiction of a state court can be made the basis for a federal dismissal motion after removal as long as the objection had not been waived in the state court before removal. It may even have been one of the aims of the removal to have a federal rather than a state judge pass on the jurisdictional question.)

There are instances in which the 120-day time period of Rule 4(m) may be called into play in a removed action. Suppose, for example, that after the removal the plaintiff seeks to add an additional person as a defendant, and that the court permits this, a fresh summons being issued accordingly. If the court does not prescribe time limits for the service of the new summons, the 120 days of Rule 4(m) should apply, measured from issuance of the new summons, or from the filing of an amended complaint that reflects the addition of the new defendant. Possible difficulty in determining the starting time of the 120 days in this situation can be resolved by the court.

A related point on the interplay of the removal statutes and the 120-day time period of Rule 4(m) concerns the situation in which P plans to sue several defendants in state court. After serving D1 but before serving D2, D1 removes the case. For purposes of Rule 4(m), when does the 120-day period start for service on D2? Motsinger v. Flynt, 119 FRD 373 (MD No.Car. 1988), holds that it starts from the removal of the case by D1, not from any act occurring in the state court action before removal.

Dismissal under Rule 4(m) versus Dismissal for Failure to Prosecute under Rule 41(b): Is Either Res Judicata?

Smith-Bey v. Cripe, 852 F.2d 592 (DofC 1988), noted earlier, recognizes that a delay in service of such a nature as to provoke a dismissal under what is now Rule 4(m) may additionally, or alternatively, amount to a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure and warrant a dismissal under that provision. But the court says that a Rule 41(b) dismissal is appropriate "only when there is no reasonable probability that service can be obtained" or when there has been "[a] lengthy period of inactivity".

Ordinarily it should make no difference to a dismissed plaintiff whether the dismissal is captioned under the one or the other of the two provisions. If the statute of limitations is dead, a dismissal under either provision would be fatal.

And it should make no difference even if the statute of limitations is still alive: which provision grounds the dismissal should be irrelevant because a new action would ordinarily be permissible under either of them. A Rule 4(m) dismissal is "without prejudice", which is a shorthand way of saying that it's not on the merits. And a dismissal for a delay in service under Rule 41(b) is a dismissal "for lack of jurisdiction" and under the explicit

terms of 41(b) does not operate as "an adjudication upon the merits" for that reason. See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357 (CA3 1983) ("a dismissal for want of in personam jurisdiction is not a judgment on the merits of the cause of action itself"). In either instance a new action would presumably be allowed as long as the statute of limitations is still alive.

But there may indeed be a difference based on another of Rule 41(b)'s explicit provisions. In prescribing that a jurisdictional dismissal is not on the merits, Rule 41(b) empowers the court to specify "otherwise". If such a power does not exist under Rule 4(m), but exists and is exercised under Rule 41(b) in a case in which the statute of limitations is still alive, a Rule 41(b) dismissal specifying that it is "with prejudice", or "on the merits", or using any other term to the same effect, can indeed mean an end to a case even though the case might have survived for a new day in court had Rule 4 alone grounded the dismissal.

Effect of Local Rules Requiring Service in Fewer Than 120 Days

According to Rule 83 of the Federal Rules of Civil Procedure, a local rule inconsistent with one of the Federal Rules of Civil Procedure would have to give way. Some districts have found power to sidestep this Rule 83 pronouncement, however, by relying on the powers presumably emanating from the statutory instruction that each district develop a "civil justice expense and delay reduction plan". (See 28 U.S.C.A. §§ 471-473.) The Northern District of New York, for example, in Appendix A of its rules, has cut the time for serving the summons from 120 to 60 days on the apparent authority of the cited provisions.

The plaintiff should of course follow the local rule and make service within the shorter time stipulated by the local rule, if at all possible. If the service is not made within that time, but nevertheless within the 120 days allowed by Rule 4(m), and there is any decent ground in the picture at all to explain the delay, the court should be especially sensitive to applying the broad discretion conferred on it by Rule 4(m) to accept the late service.

Defendant Can Waive Plaintiff's Delay in Service

Assume that P fails to make timely service by proper means, but believes the service was proper and takes a default judgment against D. D wants to exploit the service defect. D's remedy would be a motion to vacate the judgment and dismiss the action for insufficiency of service. If D concedes service but just wants a chance to defend on the merits, D's motion would be to vacate the judgment and open the default. Confusing those steps by moving the vacatur without asking for the dismissal can result in an inadvertent waiver of the objection to service.

A waiver of the objection will be the result a fortiori when D stipulates with P to accept the service on the condition that the default be vacated. See, e.g., United States v. Gluklick, 801 F.2d 834 (CA6 1986), cert. denied 480 U.S. 919, 107 S.Ct. 1376 (1987).

In Gluklick, D made the stipulation and afterwards moved to dismiss because the service had not been made within the 120-day period. Because of the stipulation, the court estopped D from invoking the time restriction. It held that the restriction is not self-executing, i.e., that the expiration of the period without proper service does not result in some kind of automatic dismissal, but must await a court order of dismissal, which never came about in this case because of D's waiver.

Further points about the 120-day time period of Rule 4(m) are met in the next three Commentaries, C4-39 through

C4-41.

C4-39. Applying the 120-Day Time Period to Third-Party Claims, Counterclaims, Etc.

In setting forth its time limit, the time provision of the pre-1993 Rule 4, which was subdivision (j), referred to "the party on whose behalf" service is required. The reference was intended to assure that the time limit would govern summons service by any party required to effect summons service. That's usually the plaintiff, of course, but it would also take in others, such as a defendant bringing a third-party claim under Rule 14.

The revised rule refers only to the plaintiff, and it is merely assumed that it will apply to any summons service required to be carried out by any party.

There may be occasion to apply Rule 4(m) and the 120 days to a counterclaim or cross-claim. That would be the situation, discussed in Commentary C4-31, in which the defendant is adding an additional party to the claim, as permitted by Rule 13(h). Doing that requires summons service on the new party, which would invoke Rule 4(m) and its 120 days. The 120 days would presumably start from the answer's filing in court, but if the service of the answer on some already-joined party precedes the filing, the defendant would do well to count the 120 days from that service.

The same points can be made about third-party practice (impleader) under Rule 14. Impleader requires summons service under Rule 14(a). The impleading defendant (third-party plaintiff in impleader context) should see to it that the summons is served on the third-party defendant within 120 days after filing the third-party complaint in court. To implead of right--i.e., without leave of court--under Rule 14(a) requires the defendant to file the third-party complaint "not later than 10 days after serving the original answer", so the defendant who would implead another has in effect 130 days in which to serve the third-party summons and complaint, measured from the time the defendant "serves" the original answer. That's one reading, in any event. It is suggested that even if these assumptions about time are technically correct, defendants do well to proceed expeditiously so that they come nowhere near the end of the 120-day period by any measure.

The defendant should keep in mind that the plaintiff is not going to suspend all proceedings just to accommodate the defendant's plan to join additional parties. And when the defendant deems an additional party necessary, it is likely to be a situation in which the sooner the party is joined, the more comfortable things will be for the defendant. Hence, even if the defendant technically has 120 days for the joinder, the defendant should try to carry out the service promptly.

Additional persons may be ordered joined as parties even after the litigation is under way. See, e.g., Rules 19 and 21. The court in directing such additional joinder should include directions about how and when service on the new party is to be made. Absent appropriate directions, the party effecting summons service on the new party--there being no clear-cut filing of a pleading from which to measure the 120 days--might do well to measure it from the entry of the court's order directing the joinder, if not some earlier time.

C4-40. Interplay of 120-Day Period and Statute of Limitations; Special Problems in Diversity Cases.

Under Rule 3, the formal "commencement" of a federal action occurs when the complaint is filed. For limitations purposes the summons, issued thereupon but served later, is deemed to relate back to the complaint's filing. Thus,

if the complaint is filed on or before the last day of the applicable statute of limitations, whatever the period may be--for what it may be see Commentary C4-45 below--the action is timely even if the summons is served later (but of course within the 120 days). That's the general rule in all but diversity of citizenship cases, where the demands may be greater and to which we return with a special warning in a moment.

Taking a closer look, precisely how does the 120-day period figure with respect to the statute of limitations? Assume throughout that the complaint is filed on the last day for commencing the action. If the summons is served within the 120 days following, the service should relate back to the complaint's filing without difficulty. If it is not served within the 120 days, but the period is extended for "good cause" (see Commentary C4-41 on that point), the extension should supply the needed link back to the complaint's filing, and there, too, the action should be preserved as timely.

If no extension is granted, the result will likely be a dismissal, and it will now be too late to sue over. It should therefore be plain to all lawyers that playing loose with the 120 days after having delayed suit until the eve of the expiration of the statute of limitations can easily have fatal consequences. Plaintiffs who manage to file the complaint just under the wire will have to atone with punctilio now for the laxity of which they were guilty before.

If the action is based on diversity of citizenship, the plaintiff must double the precautions: in the diversity case Rule 3 does not govern the moment of "commencement" for limitations purposes. State law does, under the doctrine of Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), as the Supreme Court explicitly held on this point in Walker v. Armco Steel Corp., 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980). Hence, if under forum state law the action is not deemed commenced until, for example, the summons is served on the defendant, the diversity plaintiff must be sure not only to file the complaint within the applicable statute of limitations, but also see to it that the summons is actually served on the defendant before the statute expires. Here the plaintiff can't rely on the relation-back that would help in a non-diversity case. Assuming a forum state with such a rule (requiring actual summons service to toll the statute of limitations), take this diversity example:

Today is the last day of the statute of limitations. P files the complaint and gets the summons issued today. Service is made on the defendant a month from today, well within the 120-day period of subdivision (m). No matter. State law says the action is too late, and state law governs. Extending the 120 days won't help. It's not the failure to serve within the 120 days--the requirement of Rule 4(m)--that has undone the plaintiff here. It is state law, which must be satisfied in addition to the Rule 4(m) requirement.

The diversity plaintiff must see to it, in other words, that the day on which the summons is served is within 120 days from the time the complaint was filed (the federal requirement) as well as within the applicable statute of limitations (the state requirement). These and related problems--including resort the diversity plaintiff may sometimes have to state tolling provisions in a tight spot at commencement time--are discussed more extensively in the Commentary on § 1658 in Title 28 of U.S.C.A.

When state law deems an action commenced at some different time than the filing of the complaint, the law will usually be found in a code of some kind--a compilation of statutes or rules. Converse v. General Motors Corp., 893 F.2d 513 (CA2 1990), makes the point, however, that the state law will govern even if it comes from court decisions instead of a code. In Converse, where the state involved was Connecticut and the point came from case law, the result of the action was nevertheless a statute of limitations dismissal.

A federal diversity court has to apply a whole variety of state procedural rules governing time elements that touch the statute of limitations. Even if state law has the equivalent of FRCP Rule 3 in providing that filing equals

commencement, for example, but has special time requirements--different from the federal 120-day period--for linking the summons to the filing, the federal court must apply the state restrictions. See, e.g., Cambridge Mut. Fire Ins. Co. v. City of Claxton, 720 F.2d 1230 (CA11 1983).

The rule that state law governs the moment of commencement applies only in a diversity case. It does not govern when subject matter jurisdiction is founded on the claim's arising under federal law, where Rule 3 remains in charge. See footnote 4 in West v. Conrail, 481 U.S. 35, 107 S.Ct. 1538 (1987).

Time Spent on Seeking "Waiver" Comes Out of the 120 Days

The plaintiff intent on using the waiver of service procedure of subdivision (d) of Rule 4 must keep a sharp eye on subdivision (m)'s 120-day requirement. There are several points to coordinate here.

First is that the waiver is not a pre-commencement procedure. The waiver procedure can be invoked only after the complaint is filed. Subdivision (d)(2) says the plaintiff may notify the defendant of "the commencement of the action", and there is of course no commencement unless the complaint is filed. The form for the eliciting of the waiver, Official Form 1A, makes this even clearer.

Second is that the filing invokes the 120-day time period that Rule 4(m) allows for summons service. Any time taken up by the waiver procedure will come out of the 120 days, shortening the time that the plaintiff will have for summons service if the waiver doesn't materialize.

Third is that the waiver procedure will need time. The sending of the waiver request will take some time, and of course the defendant has to be given at least 30 days, from the time the waiver is "sent", in which to respond to the request. So prescribes paragraph (2)(F) of subdivision (d). Then, even if the defendant responds favorably, it will take some time for the waiver to travel back to the plaintiff.

All of this time comes out of the 120 days. If the waiver does not materialize, the plaintiff may have precious little of the 120 days left when the plaintiff finally gives up hope of getting it back. The plaintiff who sees the deadline nearing had best just give up on the waiver and arrange for formal service promptly.

The lesson is that a plaintiff using the waiver procedure must not dally. Plaintiffs who wait a month or two before using it, and another month or so waiting for it to come back, only then turning to another method when the waiver doesn't materialize, may find themselves out of time under Rule 4(m).

Of course, the court should be able to take into consideration the time spent by the plaintiff in a bona fide attempt to secure a waiver, and grant an extension of the 120 days for that reason (see Commentary C4-41 below), but that depends on an exercise of judicial discretion and the plaintiff will be more comfortable seeing to the satisfaction of the 120-day period than having to impose on the court with a request to extend it.

Interplay with Special Time Periods Applicable in Given Case

A number of cases illustrate how the 120-day period of Rule 4(m) can become intertwined with another time

requirement applicable in a given case under a special statute, creating ambiguities that a plaintiff may resolve the wrong way, as happened, for example, in Amella v. United States, 732 F.2d 711 (CA9 1984).

A statutory requirement in an admiralty case provided (46 U.S.C.A. § 742) that when the United States is the defendant, service must be "forthwith". The plaintiff in Amella nevertheless assumed that the 120 days of (what is now) Rule 4(m) would apply, and that service any time within the 120 days would be "forthwith" enough. According to Amella, the plaintiff guessed wrong. The plaintiff made service on the 63d day after filing the admiralty libel but the court, acknowledging the "hidden reef" that the "forthwith" requirement could be in admiralty cases, held the service too late.

Addressing the interplay of Rule 4(m)'s 120 days and the "forthwith" requirement applicable in Amella under the special admiralty statute, the court held that Rule 4(m) merely sets the expiration of 120 days as "a presumption of unreasonable and dilatory delay". By doing so, "it fixes an outer limit on service but does not indicate what lesser time period qualifies as forthwith".

In an extensive review of the point, the Third Circuit in Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62 (CA3 1985), disagreed with the Amella case (and the Second Circuit as well, which the Ninth followed), finding that the "forthwith" requirement is not a jurisdictional one and is superseded by the Rule 4(m) 120-day period.

The foregoing merely illustrates the conflict. In circuits not on record on the matter, with respect to the "forthwith" requirement here or any similar requirement in any other case, it is obviously the safer course to make the most conservative assumption about what governs.

The six-month time period of 29 U.S.C.A. § 160(b), applicable in certain labor disputes, also occupied several circuits and produced a similar conflict. The Eleventh held that service must be made within the six months or the claim is barred. Howard v. Lockheed-Georgia Co., 742 F.2d 612 (CA11 1984). The Sixth Circuit, collating the decisions, went the other way, holding that only the filing of the complaint need occur within the six months; that service made within the following 120 days is allowable. Macon v. ITT Continental Baking Co., 779 F.2d 1166 (CA6 1985), cert. denied 481 U.S. 1013, 107 S.Ct. 1885 (1987).

The admonition to assume the worst and act quickly applies not only to the six-month provision of 29 U.S.C.A. § 160(b), which happens to put in an appearance more often than similar statutes get a chance to do, but to all such statutes that have a time provision that creates even the appearance of a competition with Rule 4(m) and its 120-day period. If the statute of limitations is anywhere near expiring, do all within the time allotment of the special statute. Having filed the complaint within that time, don't then sit back on the assumption that you now have the 120 days of Rule 4(m) in which to make service. Once the "statute of limitations" label gets appended to an issue, all mercy leaves the scene.

C4-41. "Good Cause" for Time Extension.

The 120-day period of subdivision (m) is not absolute. The court can extend the time, or excuse the lateness, with a court order.

But on what ground should the court do so? There is an ambiguity on the face of Rule 4(m) under the 1993

revision. At one point the rule says that if the time is missed the court "shall" dismiss the action "or direct that service be effected within a specified time"; nothing about good cause is said at that juncture. But in the follow-up "provided that" clause, a separate statement is made about what the court "shall" do, and here the direction is that the court "shall extend the time" for serving the summons "if" the plaintiff shows good cause for the delay.

So there are two "shalls" on the subject of excusing the tardiness, one requiring good cause and the other not. The advisory committee notes do not explain the ambiguity, but they do confirm it with the statement that the court can excuse a subdivision (m) omission "even if there is no good cause shown". What is and what is not "good cause" as pronounced in the cases on the predecessor provision of subdivision (m)--which was subdivision (j) of the pre-1993 version of Rule 4--is surveyed in a series of separate captions, below.

If the problem is not that service wasn't made, but that it was made defectively, the court can either dismiss the action or merely quash the service. The difference is that the dismissal requires a new action and poses limitations' problems, while a mere quashing permits new service with a relation back to the time of the filing of the complaint in the present action. The step to take is in the court's discretion. It was usually held under old Rule 4(j) that the absence of a good cause showing by the plaintiff should result in a dismissal instead of a mere quashing. See, e.g., Bryant v. Rohr Industries, Inc., 116 FRD 530 (WD Wash. 1987).

In an early case, involving mail service under the old subdivision (c)(2)(C)(ii) of the pre-1993 Rule 4, the defendant's failure to return the acknowledgment called for by that provision was cited as a reason for rejecting the defendant's argument about the plaintiff's delay. Prather v. Raymond Constr. Co., 570 F.Supp. 278 (ND Ga. 1983). The same considerations would seem to bear on the equivalent situation under current Rule 4(d), when the plaintiff has elicited a waiver of service but the defendant has not volunteered it. Indeed, given the greater leniency on the "good cause" issue that appears to have been embodied in current Rule 4(m), it can be argued that anything that qualified as good cause under subdivision (j) of the old rule should a fortiori qualify as such under subdivision (m) of the current rule.

However that may be, the plaintiff is still safer by not expecting any special judicial indulgence based simply on a defendant's refusal to return a waiver: the option is entirely up to the defendant and the only consequence the rule anticipates for a defendant refusing a waiver involves costs. See Commentaries C4-17 and C4-18, above.

Effect of Plaintiff's Responsibility for Process Server

A more subtle and therefore more insidious problem for the plaintiff under the "good cause" requirement of subdivision (m) is the effect of the provision of subdivision (c)(1) that makes the plaintiff "responsible for service". This aspect of subdivision (c)(1) was first adopted in the 1983 revision of Rule 4, where it was part of subdivision (a).

It will continue to be an issue. In this writer's article on the 1983 revision of Rule 4, in 96 FRD 88, 109-113, under the caption, "Effects of a Private Process Server's Omission or Wrongdoing", the question was asked whether the tardiness or omission or even dishonesty of the process server, resulting in late service, or no service at all, must always be laid at the plaintiff's door. Can it ever be "cause" for a subdivision (m) time extension? We noted that it would be unfortunate if the plaintiff and the process server were to be deemed so fused that the server's errors could not be cited by the plaintiff to earn a time extension; that such a reading would encourage defendants to pounce on every nook and cranny of the process server's procedures by raising issues from which the federal courts were largely insulated when the marshals were doing the serving.

While a case will appear from time to time holding that the plaintiff's lawyer is not to be charged with the process server's negligence, e.g., Smith v. Sentry Insurance, 674 F.Supp. 1459 (ND Ga. 1987), the more likely result in most cases is that the plaintiff will indeed be charged with it. That, alas, is what has happened in many cases--many of them noted under the diverse captions set forth below.

Never, before 1983, when the marshals were largely relieved of summons service, have the federal judges had to spend so much time and effort adjudicating problems of summons service and its timeliness. A defendant not prone to take on a marshal feels much less hesitation about crossing swords with a private process server. And an issue that can earn the defendant a dismissal at a time when it would now be too late for the plaintiff to bring a new action is too irresistible for the defendant to withhold, even where the chance of success on the issue is slim.

Lawyers otherwise prone to a casual reading of a process server's affidavit must read it more closely under Rule 4, and, if need be, corroborate its recitations. If the statute of limitations is near, mark well the last day and try to secure the defendant's appearance before it arrives. Try to find out, in any event, if the defendant has any objection based on service, and if so what it is. Don't just put the affidavit into the case file. That kind of luxury is restricted to lawyers who sue with years or at least months to spare. A plaintiff's lawyer might also consider the possibility, mentioned in Commentary C4-13 above, of using a bonded process server if one can be found, thus having a solvent surety to fall back on for damages should the process server's mistake bring damages to either the plaintiff or the plaintiff's lawyer.

Cases on what does and what doesn't qualify as "good cause" for a time extension are all over the lot. There is no way to reconcile all of them, but it is important that the plaintiff's lawyer have at least a perspective on the variations that can be met from court to court, case to case, and judge to judge. We set forth a sampling of them below, using separate captions for convenience of reference. And we set them forth with an important preliminary warning: that if a given excuse appears to have been accepted, the reader should not assume that another judge would also have accepted it. The examples--even those of excuses the court accepted in the given case--are by no means intended as a list of acceptable excuses generally. The happiest plaintiff's lawyer is the one who never has to negotiate the list. That would be the lawyer who has left so much time for trouble that even if the worst happens, and the case is dismissed for want of an acceptable excuse for a service delay, there will still be time left under the statute of limitations for a new action. To that point we have allotted a special Commentary, C4-46 below, and made it the note on which the Commentaries conclude.

Is Potential Statute of Limitations Bar an Automatic Ground for Excusing a Subdivision (m) Failure?

The most damaging Rule 4(m) dismissal, and in a real sense perhaps the only serious one, is the dismissal that occurs when it would now be too late under the statute of limitations to start a new action. The advisory committee notes make reference to the situation. They say that "[r]elief may be justified ... if the ... statute of limitations would bar the refiled action", but one can't determine whether that by itself is supposed to be "good cause" for an extension, or merely what the committee feels should be an acceptable reason for extending the time even if the plaintiff can't show any "good cause" for letting things go this far.

Under either conclusion, it would appear that every failure to serve within the 120 days "shall" be excused by the court as long as it is shown that the statute of limitations is now dead. Plaintiffs can live with that, and happily ever after, but is that really what the rule intends? Is the extent of the delay to count at all? Is a "good cause" for the delay, which we assume means a good reason for the delay, to play any role when the statute of limitations is on the scene? Or must a subdivision (m) application be granted--as long as the complaint was filed within the original statute of limitations--every time it appears that a Rule 4 dismissal would now bar a new action?

Perhaps the assumption we made above, that good "cause "means a good reason for the delay, is not what the rule means to say. Rather than being addressed to the excusability of the plaintiff's conduct, perhaps it's just addressed to the impact that the dismissal will have. If that was the intention, the judges would have welcomed a brighter light on the subject. Plaintiffs must bear in mind that in the experience of the law generally, "cause" implies a reason and "good cause" a good reason, a standard under which judges have not readily forgiven what they perceive as mere laxity or casualness.

What a place for an ambiguity! Here stands the plaintiff at the edge of the grave, and the rule doesn't tell the court whether to offer the plaintiff salvation, or a push.

Plaintiffs should certainly not factor into their plans any assumption about judicial generosity about extending the time for an unexcused late service merely because the statute of limitations would now bar a new action. On the contrary, it is on that scene that the plaintiff's efforts should be at their most intense.

The further paradox, if the prospect of a statute of limitations barrier mandates the grant of a time extension to save the plaintiff's case, is that the only time it would be proper for a court to refuse a time extension is where the statute of limitations would not bar a new action. That would in turn mean that a dismissal for failure to satisfy subdivision (m) will always result at worst in the inconvenience and expense--and not a very great expense--of having to start a new action.

All the notes really say is that the passing of the statute of limitations "may" justify a time extension, along with the statement that time can be extended "even if there is no good cause shown". That combination creates a void, not a guide. Must the extension be granted automatically merely because the statute of limitations has now expired? If so, and if good cause means a good reason, then subdivision (m) is indulging the plaintiff for the last kind of conduct one would put down as "good cause": waiting to the last minute to make service and then being careless about carrying it out.

A SAMPLING OF EXCUSES TENDERED TO SHOW "GOOD CAUSE"

Plaintiff Must Assume Burden of Locating Defendant

Geiger v. Allen, 850 F.2d 330 (CA7 1988), shows judicial impatience with plaintiffs who have delayed service because they couldn't locate the defendant and who can't show the court that they made a diligent effort to. The court in a footnote lists a few of the things a diligent plaintiff might have tried, including an inquiry at the post office or at the defendant's place of employment, or an interrogatory served on someone who might know something about the defendant's whereabouts. "Failing all else", the court concluded, the plaintiff could simply "have moved for an extension of time under Federal Rule of Civil Procedure 6(b)". (The motion after the 1993 revision could be predicated directly on Rule 4[m].)

"Half-Hearted" Efforts at Service Won't Do

"Half-hearted" efforts to effect service are not acceptable. Lovelace v. Acme Markets, Inc., 820 F.2d 81 (CA3), cert. denied 484 U.S. 965, 108 S.Ct. 455 (1987). In Erickson v. Kiddie, 1986 WL 544 (ND Cal. 2/24/86, Patel, J.),

many efforts were made to effect service, but the court was not convinced that the place of service was appropriate and required further data on the subject. Said the court:

Plaintiffs must also state the circumstances and nature of their attempts beyond simply stating the dates and times of attempted service.

From the Erickson case comes the lesson that pro forma lists won't do; that if a delay is to be excused, it will take some detailed affidavits and other supporting evidence to earn a "good cause" time enlargement.

Hire a "Tracer" to Locate Defendant?

Quite in contrast to the plaintiff's laxity in the Geiger case, above, is the effort to locate the defendant made in National Union Fire Ins. Co. v. Barney Associates, 130 FRD 291 (SD N.Y. 1990). L, the plaintiff's lawyer, who found out that the defendant had changed his address, had its usually dependable process server hire a tracing company and kept in touch with the tracer's progress. When the end of the available time was approaching, L prepared a motion for an enlargement of time, but deliberately held it in abeyance in the reasonable expectation that the tracing effort would shortly succeed. It didn't, and, through a miscalculation, the enlargement motion was made three days after the expiration of the 120-day time period.

Holding that the time lapse was short, L's conduct was not unreasonable, and "no cognizable prejudice" was shown by the defendant, the court denied a dismissal motion. It said that at least in its own bailiwick (the Second Circuit)

prejudice under Rule 4(j) [now (m)] involves impairment of the defendant's ability to defend on the merits, rather than merely foregoing ... a procedural or technical advantage.

"Heroic" Efforts to Serve Process Will Help

In United States v. Nuttall, 122 FRD 1643 (D Del. 1988), the defendant was so evasive and uncooperative that the court characterized the plaintiff's efforts to effect service as "heroic". Still, the defendant's failure to acknowledge mail service--the equivalent today would be the defendant's refusal of the plaintiff's waiver request under subdivision (d)--vitiated the service, and the court was constrained to vacate the default judgment that had been entered. But while it could not keep the default judgment, the plaintiff (the United States on a tax matter) found at least some reward. While the heroic efforts were not enough to sustain the service, they more than sufficed to earn the plaintiff an enlargement of time for it.

That's no small gift, at least when the statute of limitations has now expired. The denial of an enlargement of time would otherwise have meant a dismissal, and a dead case.

Pendency of Settlement Talks an Excuse for Delay?

It was held in Assad v. Liberty Chevrolet, Inc., 124 FRD 31 (D R.I. 1989), that a delay based on the pendency of settlement talks (which fell through) is good cause for a time extension. The delay was only about two weeks past the 120-day limit, and the shorter the delay the greater of course will be the district judge's discretion in granting a

"good cause" extension.

Still, it is a bad idea for any plaintiff to let the 120 days pass on the strength of mere settlement talks. The plaintiff should at least get a statute of limitations extension, in writing, from the defendant. If the defendant refuses it, the plaintiff should see to it that the summons is served within the 120 days. Politeness might suggest advising the defendant that service is going to be made, and if high comity is to be observed, the summons and complaint can be served with half a dozen roses.

Counsel Too Ill to Arrange for Service Should Withdraw from Case

When the excuse tendered for not serving the summons within the 120-day period is the illness of counsel, it is suggested in Vannoni v. Tso, 120 FRD 501 (ED Pa. 1988), that counsel should withdraw from the case:

Surely an illness so serious as to prevent so unstrenuous an effort as service ... should have prompted the plaintiffs' counsel to withdraw....

The holding is doubtless influenced by the fact that the plaintiffs offered "no more than the bare allegation" of counsel's illness, explaining neither "the nature of that illness nor how that illness contributed to an impossibility to make service". With a less indifferent presentation, a debilitating illness might prompt a different judicial response.

Complications in Admiralty Case and under Hague Convention Constitute Good Cause for Delay and Bring Extension

An example of the use of Rule 4 for service in an admiralty action, complicated by the involvement of both in rem and in personam jurisdiction, is Itel Container Int'l Corp. v. Atlanttrafik Express Svc., Ltd., 686 F.Supp. 438 (SD N.Y. 1988). Also involved were delays in attempting service under the Hague Convention (for treatment of which see Commentary C4-24 above). The aggregate of the complications prompted the court to excuse a delay in service and deny a dismissal motion.

In respect of the in rem claim against the vessel, the court held that the 120-day time limit does not apply because it would be in conflict with the Supplemental Admiralty Rules, which require that in rem process be served only in the district. To impose the time limit would enable the defendant in control of the vessel to compel a dismissal just by keeping the vessel out of the district. In this case, where there were also in personam defendants, the court held that it is open to the plaintiffs to perfect the rem service (by waiting until they can lay hands on the vessel) at any time during the pendency of the personam proceedings.

Failure to Seek Enlargement of Time Before Dismissal Motion Is "Some Evidence of Lack of Diligence"

A motion by the plaintiff for an enlargement of time for service, made before the expiration of the 120-day period, should serve as at least some indication of diligence.

Making the motion after the expiration of the 120 days obviously helps less, and it doesn't necessarily make any difference that the plaintiff makes the motion before the defendant moves to dismiss. Townsel v. County of Contra

Costa, 820 F.2d 319 (CA9 1987), illustrates that. And failure of the plaintiff to make the motion at all is "at least some evidence of lack of diligence". Quann v. Whitegate-Edgewater, 112 FRD 649 (D Md. 1986). Insufficient diligence was shown by the plaintiff in Quann, resulting in a dismissal.

Conflict on Whether Prejudice to Defendant Is Factor

There is a conflict among the cases on whether prejudice to the defendant, traceable to the plaintiff's delay in making service, is a factor to be considered by the court in assessing whether to excuse the delay. In Bryant v. Rohr Industries, Inc., 116 FRD 530 (WD Wash. 1987), for example, the defendant had actual notice within the requisite time because, although the plaintiff used an improper method, the defendant received the papers. No matter, held the court; prejudice is not a factor. The case was dismissed.

Illustrative of the other side is Gordon v. Hunt, 116 FRD 313 (SD), aff'd 835 F.2d 452 (CA2 1987), cert. denied 486 U.S. 1008, 108 S.Ct. 1734 (1988), noting the conflict and citing some of the cases. Gordon holds that whether the defendant is prejudiced is a relevant factor. The same court, speaking through another judge hardly a month later, also notes the problem but hints that prejudice is not a factor. Delicata v. Bowen, 116 FRD 564 (SD N.Y. 1987). In other words, a plaintiff's case may

(1) live if the defendant can't show prejudice, or

(2) die even if the defendant can't show prejudice,

literally depending on the luck of the draw: who's the judge?

Ignorance of the Rules Is No Excuse

Counsel's ignorance of the requirements of the rules is no excuse. That, too, is an observation of Townsel v. County of Contra Costa, 820 F.2d 319 (CA9 1987), cited above.

Law Office Failure Is No Excuse, and Malpractice Action Can Follow

A "clerical error in [the lawyer's] office" is no excuse. Delicata v. Bowen, 116 FRD 564 (SD N.Y. 1987). The court suggests that if the case is dismissed and it's now too late for a new action, the plaintiff "must pursue, if so advised, a remedy against her attorney".

Intent to Hold Federal Action in Abeyance Pending Outcome of State Action No Excuse for Failure to Make Service

It is not at all uncommon in our federal system for a plaintiff to face the dilemma of having a choice--or at least a potential choice--between federal and state forums, but not being able to decide with safety whether to proceed, or to proceed first, in the one or the other. There may be a close question of federal subject matter jurisdiction, for example, which may prompt the plaintiff to opt for the federal forum but with a precautionary state action brought as a back-up should federal jurisdiction fail. Or the plaintiff may have claims under both state and federal law and

attempt the state action first, the intention being to go for the federal relief only if the state action fails.

The possible scenarios of this dilemma are numerous. The ultimate question that each presents is whether either forum will allow itself to be used as a kind of "holding action" for the other. Often it will be only the fear of the statute of limitations that prompts the plaintiff to get the second action safely commenced while the first pends.

Whatever the plaintiff's reason was in Salow v. Circus-Circus Hotels, Inc., 108 FRD 394 (D Nev. 1985), the plaintiff wanted a precautionary federal action to stand in place while his state action proceeded. To that end he filed the federal action but refrained from making service in it. He felt that under what is now Rule 4(m), this was "good cause" for not making service. The court didn't agree with him and dismissed the action. It did offer good advice, however, which we repeat here:

What the plaintiff should do in a situation like this, said the court, is either commence the action and then move for an enlargement of time before the 120 days run out, or else effect service and then move for a stay of the action. Federal courts should be especially sensitive to heed requests of this kind if they are reasonable on the facts and don't violate any discernible policy. Indeed, any court should be. Categorically refusing such relief can only foster duplication and possible inconsistency.

Mere "Inadvertence" of Counsel No Excuse

Wei v. State of Hawaii, 763 F.2d 370 (CA9 1985), holds that if the mere inadvertence of counsel could qualify as an excuse, "the good cause exception would swallow the rule". It also holds that an intention to amend the complaint is another inadequate excuse for delaying service.

Warnings to Plaintiff About Service Weaken Case for Extension

In Redding v. Essex Crane Rental Corp. of Alabama, 752 F.2d 1077 (CA5 1985), the district court several times notified the plaintiff that the action would be dismissed unless service was made. The plaintiff still delayed, and with an excuse the 5th Circuit described as "remarkable": to keep the defendant from obtaining discovery of which he might make use in a pending state proceeding. The time limit passed, the action was dismissed, and the statute of limitations had expired. A dismissal was nevertheless affirmed.

"Abuse of Discretion" Standard for Appellate Review of "Good Cause"

"Abuse of discretion" is often the standard applied by a court of appeals in reviewing determinations made under Rule 4(m): the district court's determination will be overturned only when the circuit finds it to be beyond the borders within which discretion could be deemed operable on the facts. See, e.g., the Ninth Circuit decision in United States for the Use and Benefit of DeLoss v. Kenner General Contractors, 764 F.2d 707 (1985). Since that terrain is generous, a district court's holding will not be lightly overturned.

The Fifth Circuit also uses an abuse-of-discretion standard, looking especially hard at three "aggravating factors" in determining whether to uphold a dismissal for delayed service:

(1) the extent to which the plaintiff rather than his attorney is responsible for the delay;

(2) the extent to which the defendant is prejudiced by the delay; and

(3) whether intentional conduct is involved in the delay.

The court re-articulated those factors in Fournier v. Textron, Inc., 776 F.2d 532 (CA5 1985). "Where ... the delay is tactical, and little more than gamesmanship, we are less forgiving". And so they were in Fournier, in which the action was dismissed.

It is better for the plaintiff's lawyer to take note of these cases than of those that sustain excuses and grant time extensions, especially because such a doing by one judge may not be the doing of another. And, short of an "abuse" of discretion, each judge here is usually the final judge.

Relying on Representation by Defendant's Former Lawyer Held Good Excuse

Reliance by the plaintiff on a statement by the defendant's former lawyer that he could accept service in the defendant's behalf was held to be a decent excuse for a short delay occasioned by the lawyer's later denial of such authority: it manifested a reasonable effort to make service. Geller v. Newell, 602 F.Supp. 501 (SD N.Y. 1984). That seems to be a fair holding, but would all judges react so? And since neither a pro nor con reaction need necessarily rise to the "abuse of discretion" level so as to earn appellate intervention, the plaintiff in the position of having to depend on it is not in a good position.

Apply Rule 4 "Strictly" But Not "Harshly"?

Ruley v. Nelson, 106 FRD 514 (D Nev. 1985), said that "Rule 4(j) [now Rule 4(m)] is meant to be strictly construed" and that "[i]t has been held repeatedly that inadvertence of counsel does not qualify" as good cause to earn a Rule 4(m) extension. Ignorance of the time limit was the excuse offered in Ruley. It was rejected and the action dismissed. Shortly before, in Arroyo v. Wheat, 102 FRD 516 (D Nev. 1984), the same court said "[i]t was not intended that [Rule 4(m)] would be enforced harshly; that is why liberal extensions of time are permitted under Rule 6(b)".

One may ask here whether a statement like that in Ruley, to the effect that the rule was "meant to be strictly construed", still applies under subdivision (m) of the revised rule. As noted at the outset of this Commentary, subdivision (m) was intended to be more lenient than its predecessor was. The question is, how much more lenient?

"Good Faith Belief" That Defendants Waived Service Is Good Excuse

Among the grounds that have been found to support a time extension is the plaintiff's "good faith belief" that the defendants had waived objections to service. International Distribution Centers, Inc. v. Walsh Trucking Co., 1984 WL 545 (SD NY 6/22/84, Keenan, J.).

This may not be a sound ground for a plaintiff to rely on today, where the provision for waiver is elaborately prescribed by subdivision (d) of Rule 4 and the two official forms that implement it, Forms 1A and 1B. If there is to be a waiver in the case, it should be either of the formal kind that subdivision (d) contemplates, or at least a writing of some kind. Otherwise, the plaintiff can't rest on any "waiver" laurels unless the defendant has appeared in the action and the waiver consists of some within-the-action conduct, such as answering without including any jurisdictional objection.

Change of Lawyers Held No Excuse

In Coleman v. Greyhound Lines, Inc., 100 FRD 476 (ND Ill. 1984), the plaintiff's change of lawyers was held an unacceptable excuse and a time extension was refused. Noting that the new lawyers still had eight days left in which to make the service, and on an easily servable defendant, the court dismissed the action.

The Government, When Plaintiff, Is Also Subject to Dismissal For Want of Diligence in Making Service

The rules about diligent service apply as well when the government is the plaintiff, and a total absence of effort to effect service can bring about a dismissal even against the United States. See, e.g., U.S. v. General Int'l Marketing Group, 742 F.Supp. 1173 (Ct. Int'l Trade 1990).

Differing Attitudes Continue on What Satisfies as "Good Cause"

On this subject, lawyers on both sides have fertile fields to dig in, as the foregoing compilation--just a sampling--manifests. Cases go in all directions. The bottom line is likely to be the prevalent attitude manifested by circuit opinions. Two decisions that endeavor to collate the cases and the various accepted and rejected reasons for late service (or nonservice) are Gordon v. Hunt, 116 FRD 313 (SD N.Y.), aff'd 835 F.2d 452 (CA2 1987), cert. denied 486 U.S. 1008, 108 S.Ct. 486 (1988), and Quann v. Whitegate-Edgewater, 112 FRD 649 (D Md. 1986).

OTHER POINTS ABOUT THE 120-DAY PERIOD

Dismissal under Rule 4(m) Must Be Without Prejudice

The Seventh Circuit offers an extensive treatment of the application of subdivision (j) of the pre-1993 Rule 4 in Powell v. Starwalt, 866 F.2d 964 (CA7 1989), holding that a dismissal under it must be without prejudice. The court adopts what it calls a "bright-line approach" to the "good cause" matter, which means that a failure to show good cause for letting the 120 days expire without service mandates dismissal, period. Whether so rigid an attitude can be sustained under the more indulgent subdivision (m) of the current Rule 4 is an open question, but the point that the court makes about a dismissal, should that be the result, should still apply: that the dismissal must be without prejudice. And that is so, adds the court, notwithstanding that the statute of limitations may have expired so that a new action by the plaintiff would presumably be barred on that ground.

The mere fact that the plaintiff has failed to show good cause for a time extension, and thus faces a dismissal for nonservice, is not to be equated with the disposition on the merits that "with prejudice" implies, the court says; "speculation about the outcome of a [subsequent] suit does not justify dismissing this one with prejudice".

The court does say, however, that the door is open to a "with prejudice" disposition if the delay entails the disobedience of a court order or if the delay is so long that it would qualify as a failure to prosecute under Rule 41(b).

Court Must Give Notice If Moving Dismissal Sua Sponte

Rule 4(m) is explicit that the court can move the dismissal for nonservice sua sponte, but it is just as explicit that the court must give notice to the plaintiff when it does. "A party can hardly enjoy an opportunity to 'show good' cause ... if that party has not been accorded notice that the matter has been put in issue", wrote the First Circuit in Varela v. Velez, 814 F.2d 821 (1987). But the court also held that the notice need not have been given before the original dismissal if, after dismissal has been granted without notice, the plaintiff then moves for reconsideration. In that situation the prior order of dismissal serves as the notice, so that the plaintiff can now arm herself on the motion to reconsider with whatever she would have put before the court as "good cause" earlier. In Varela, in fact, the plaintiff did offer an excuse for the lateness, furnishing evidence of the defendant's evasion of service. The district court may not have considered that, which resulted in a Court of Appeals vacatur and remand for a hearing.

Move for Extension While 120 Days Alive

We end on this general note, duplicating a point already made several times, but perhaps still not often enough. A plaintiff in need of an enlargement of the 120-day period of Rule 4(m) does well to apply for the enlargement while the period is still alive. The court is by no means precluded from granting the enlargement after the period's expiration, and has of course done so in many cases, but an application beforehand does go some way towards establishing the kind of diligence needed to appeal to a court's discretion.

Subdivision (n)

C4-42. "Rem" Categories of Jurisdiction.

If a court lacks in personam jurisdiction of a person but has property (real or personal) before it and seeks only to affect that person's interest in the property, it can make use of "rem" jurisdiction. The person can be named a defendant, served anywhere, and thereby subjected to the court's jurisdiction to the extent, but only to the extent, of that person's interest in the property, or "res".

The premise of rem jurisdiction in general is that the plaintiff can't get personam jurisdiction of the defendant, although, when rem jurisdiction is available and will accomplish everything the plaintiff is seeking, the plaintiff may purport to invoke it for some special procedural benefit that the statute supplying it may provide even though personam jurisdiction is available in the action. That may sometimes be the situation under 28 U.S.C.A. § 1655, for example, as noted below.

Subdivision (n) governs rem jurisdiction in the federal courts. Paragraph (1) refers to federal sources and is just a reminder that there are such sources. Paragraph (2) refers to state sources, and adopts them for federal use. Service of the summons in either category of jurisdiction may be made by following the same rules that apply in in personam cases, or by following any special instruction about service authorized by the statute or rule relied on for the rem jurisdiction. The added advantage is that no matter where service is made, and even if there is no basis for

personam jurisdiction because of where the defendant has been reached with process--in more familiar terminology, no "longarm" jurisdiction--the more limited "rem" jurisdiction would still be obtained.

We have been using "rem" jurisdiction to describe all categories of it. As brief background, we can note that there are basically three "rem" categories of action, which (acknowledging that there are other possible breakdowns) are:

1. strictly in rem;

2. in rem; and

3. quasi in rem.

The first two seek to affect interests only in a specific and identifiable property; no other will do. The first one binds the whole world, the second only those named as parties and duly notified. The third aims at no specific property at all. It seeks only money and seizes, through an attachment or the like, any property the nondomiciliary defendant may have in the state as a way to satisfy any money judgment the court may render, even if only on the defendant's default. (The quasi in rem category numbered 3 is sometimes used, such as by the Restatement 2d of Conflicts [note preceding § 56], to embrace both categories 2 and 3 above, with the "in rem" description applied to what we have put down as category 1. That has historical basis but the above division serves best for clarity of reference.)

Federal practice makes use of all of these categories to one degree or another, to whatever extent they are still used in this age of expanded personal jurisdiction. (Before turning to their federal use, however, the lawyer should note that rem jurisdiction plays a special role in admiralty actions, for which see the special Supplemental Rules for Certain Admiralty and Maritime Claims appended to the Federal Rules of Civil Procedure.)

A federal statute, 28 U.S.C.A. § 1655, does the major "rem" job in federal practice. The pre-1993 version of Rule 4 made no reference to it, or to any source of federal rem jurisdiction. Subdivision (n) of the revised rule does, in general terms, in paragraph (1).

Section 1655 offers a broad range of jurisdiction in the first and second categories listed above--principally the second because the first (strictly in rem jurisdiction) is relatively rare (and found more in the admiralty sphere than anywhere else today)--and it goes even further than its caption suggests. The caption is "Lien Enforcement" but, as its abundant case law manifests, § 1655 offers rem jurisdiction in a broad range of "in rem" actions, not just "lien" cases. It is less needed today than during the earlier years of its long history for the obvious reason of the expansion of "longarm" personal jurisdiction, heavily exploited in federal practice by what is now subdivision (k) of Rule 4. Quite often today, for example, when it can be shown that a case affects local property, which is the § 1655 jurisdictional predicate, the case is also likely to have local contacts of the kind that support longarm jurisdiction and thus may well be the subject of a state longarm statute giving full personam jurisdiction in the action. And when outright personam jurisdiction is available, on a longarm or any other basis, the need to depend on any category of rem jurisdiction declines, if it doesn't disappear altogether.

But § 1655 remains alive and well, and gainfully employed. It should be used unhesitatingly by any plaintiff who finds some benefit in its provisions. As a perusal of the statute quickly reveals, it has some advantages, such as in method of notice, but also some disadvantages, such as in the delay it entails in finalizing a judgment if personal

notice is not given. The plaintiff's lawyer with a choice of using the rem jurisdiction of § 1655 or a personam basis available through subdivision (k) of Rule 4 should appraise the advantages of each alternative as applied to the particular case and choose accordingly.

Is there any authority for using in a federal court the quasi in rem jurisdiction of category 3? There is, and that's where paragraph (2) of subdivision (n) comes in.

Many states have attachment or like statutes exploiting quasi in rem jurisdiction. Before 1963, if such an action was commenced in a state court, it could be removed to a federal court by the defendant if there was a removal basis as a matter of subject matter jurisdiction, and many such quasi in rem actions found their way into the federal courts through the removal route, which is still permissible. But there was no provision permitting the use of such jurisdiction to commence an original action in a federal court. A 1963 amendment, affecting what was subdivision (e) of the pre-1993 Rule 4, remedied that, allowing quasi in rem jurisdiction as an original federal matter whenever forum state law provided for it.

Paragraph (2) of subdivision (n) carries this forward, borrowing quasi in rem jurisdiction from the forum state, at least when personal jurisdiction is not available.

As to method of service--distinguishing it for a moment from amenability to jurisdiction--subdivision (e)(1) of the current rule borrows not just from forum state law, but also from the law of the state in which service is made. Those service options would be available even in a quasi in rem case, but authorization for the exercise of the quasi in rem jurisdiction itself must be found in the law of the state in which the federal court sits; the law of the place of service, if service should be made outside the forum, has nothing to do with that. The present situation assumes that the property is located in the forum state, and the only logical source of authority for using the property as a jurisdictional base is that state's law.

The mechanics of the attachment (or garnishment or whatever other name the state gives to its quasi in rem process) are also to follow forum state law, again the logical source. The procedure can sometimes be quite involved.

The addition of quasi in rem jurisdiction to the federal arsenal was a substantial achievement in 1963, reflecting the frequent reliance put on this category of jurisdiction over the years, but the gift was to be enjoyed for little more than a decade. In 1977, the U.S. Supreme Court, in a reconsidered application of the due process clause, drastically reduced this category of jurisdiction in all cases, affecting removal and original jurisdiction both. It did so in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683, in 1977 and then followed through in 1980 in Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516.

Quasi in rem jurisdiction, as used before the Shaffer case, could subject the defendant to the adjudication of a claim even in a court having no connection with the claim or with the defendant, on the simple basis that the defendant had property in the state. Nor was it necessary to show that the property had any connection to the claim. These were the factors to which the Shaffer case took exception. Reexamining this category of jurisdiction in light of the "minimum contacts" doctrine applicable to longarm personal jurisdiction, and relying essentially on the fact that with the growth of longarm jurisdiction there is less need to depend on quasi in rem jurisdiction, the Supreme Court struck it down in all but a few instances.

The advisory committee note on subdivision (n) suggests that when the defendant's contacts with the forum are too

slight to support personam jurisdiction, they will ipso facto be too slight to support quasi in rem jurisdiction, but not all courts accept that proposition. Some find in Shaffer the recognition of a gap within the due process clause itself between what is needed for outright personam jurisdiction and what will satisfy for the less demanding quasi in rem jurisdiction. They sustain as just enough for a quasi in rem measure contacts that apparently come up short on the personam scale.

An example of such a case is Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (1978), in which the Second Circuit said that the contacts test is "narrower" for quasi in rem than for personam jurisdiction. Another is Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984). There are still others.

Should a given case find any way to squeeze itself under any of the few quasi in rem possibilities constitutionally surviving under state law today, paragraph (2) of subdivision (n) of Rule 4 stands by to support such a case in the federal court.

In General

C4-43. Raising and Preserving a Jurisdictional Objection.

Since Rule 4 governs personal jurisdiction, it is appropriate to note briefly how the defendant makes and preserves an objection to personal jurisdiction in federal practice.

Rule 12 of the Federal Rules of Civil Procedure governs. The objection may consist of an absence of a jurisdictional basis, of some defect in the summons, or of insufficient service. Rule 12(b) covers all of them under one or the other of its clauses numbered (2), (4), and (5). Whichever it is, if the objection is good it can bring on a dismissal.

Rule 12(b) gives the defendant the option of interposing the objection either in a motion to dismiss or as a defense in the answer. If the defendant wants a prompt adjudication, the Rule 12 dismissal motion should be the procedure. If she wants for any reason to preserve the objection for later adjudication, as perhaps in the tactical hope of winning a favorable outcome on the point when it would clearly be too late for the plaintiff to bring a new action, her step is to include the objection as a defense in the answer.

A defendant making any Rule 12 motion on any ground must see that this objection to personal jurisdiction is included in the motion, or the objection is lost. A special waiver provision, embodied in subdivisions (g) and (h)(1) of Rule 12, so provides. It is designed to discourage the defendant's waste of the court's time on a Rule 12 motion on other grounds while withholding a jurisdictional objection she has all the while. Hence the defendant can safely use the defense-in-the-answer route for an objection to personal jurisdiction only if she makes no Rule 12 motion at all.

If the defendant uses the answer route but then changes her mind and wants a pretrial adjudication of the jurisdictional point after all, the time for a Rule 12(b) motion will likely have expired. In that situation, the defendant can probably raise the point with a summary judgment motion under Rule 56. This is somewhat awkward--summary judgment is technically designed to dispose of a case on its merits--but Rule 12(d) dictates that jurisdictional objections (among others) be disposed of "before trial on application of any party", and the name of

the "application" that brings the matter to judicial attention would seem inconsequential. Although perhaps denominated a "summary judgment" motion in this scenario, its granting will have the impact--and the res judicata effect should the point ever arise--of disposing only of the jurisdictional issue, not the merits.

The plaintiff must of course be wary of a defendant pursuing the defense-in-the-answer alternative. The defendant's reason for wanting to postpone the jurisdictional adjudication should be the plaintiff's reason for accelerating it. If there is anything to the objection, especially if it is of a possibly curable variety (e.g., a defect in the summons or in the mechanics of its service), the plaintiff should try to have the matter disposed of forthwith. His principal tool for doing this is a motion to strike the jurisdictional defense pursuant to Rule 12(f). The motion will of course succeed if the court is convinced that the jurisdictional defense is groundless as a matter of law. But even if it depends on the resolution of a factual issue, the plaintiff can now--as the defendant did above--cite Rule 12(d), which evinces Rule 12's preference for the early adjudication of jurisdictional matters. Under it the court can order a preliminary hearing of the issue of fact. But the same rule, Rule 12(d), also gives the court discretion to defer the issue until the trial if it sees fit.

If the jurisdictional objection does depend on only a factual issue, such as whether the mechanics of service were just so, and there is yet time to serve again before the statute of limitations expires, fresh service, or even a new action, may be the plaintiff's best course. Problems like these were not often met under the pre-1983 Rule 4, which had neither an arbitrary time limit on summons service, as subdivision (m) now has, nor a statement making the plaintiff responsible for summons service, as subdivision (c)(1) now has, nor a general provision prescribing private process servers instead of marshals, as subdivision (c)(2) now has. There was less opportunity and less incentive, therefore, for defendants to raise technical points about service under Rule 4 before its 1983 amendment.

It may happen that the jurisdictional issue will require discovery proceedings. The defendant may contend, however, that discovery, too, requires personal jurisdiction and that not even discovery can proceed until jurisdiction has been sustained. The U.S. Supreme Court has rejected that proposition, holding that the simple fact of the defendant's appearance to raise the jurisdictional objection is a sufficient turn of the jurisdictional wheel to allow for the limited discovery needed for full resolution of the jurisdictional point. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

Separate captions for additional points about raising and preserving a jurisdictional objection are used below to facilitate reference.

Defendant Pleading Service Defect in Answer May Waive It by Subsequent Conduct

Rule 12(b) gives the defendant (D) the option of interposing an objection to defective service either in a motion to dismiss or as a defense in the answer. When D foregoes the motion method and uses the answer, however, D cannot safely assume that the objection will automatically be preserved through all later proceedings. If later conduct by the defendant is found inconsistent with preservation of the jurisdictional objection, the court may hold that the defendant waived it, as was held in Datskow v. Teledyne, Inc., 899 F.2d 1298 (CA2), cert. denied 498 U.S. 854, 111 S.Ct. 149 (1990).

The defendant in Datskow participated in a conference at which discovery and motion practice were scheduled and settlement discussed, but said nothing about the defective service, apparently assuming that it wasn't necessary because the objection had been duly raised as a defense in the answer. In holding the defendant to a waiver, the court noted that proper service could have been made had the defect been mentioned at the conference, because at the time the statute of limitations was still alive. And the court stressed that this was a mere objection to method of

service, not to amenability to jurisdiction (jurisdictional basis):

We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court. But here ... defendant is complaining only about a defect in the form of service....

Objection to "Jurisdiction Over the Person" Doesn't Preserve Objection to "Insufficiency of Service"

It is important in federal practice that a defendant be specific about the nature of the jurisdictional objection the defendant wants to raise. Several objections in Rule 12(b) of the Federal Rules of Civil Procedure go to the court's personal jurisdiction--numbers 2, 4, and 5 on the Rule 12(b) list--but only one of them, number 5, is addressed to "insufficiency of service of process" specifically. It is that objection that the defendant is relying on when there is some defect in service. To preserve the objection, the defendant should be explicit about it. Since Rule 12(b) differentiates the categories, the raising of the objection in the general terms of "personal jurisdiction", even when the defendant takes the objection as a defense in the answer instead of by motion, may not suffice. It didn't suffice, for example, in Roque v. U.S., 857 F.2d 20 (CA1 1988), where the court wrote that

normally we do not think insufficient service of process should be subsumed as having been raised in an answer's assertion of lack of personal jurisdiction.... If the true objection is insufficient service of process, we do not think it is too much to require a litigant to plainly say so. The [defendant] ... should not couch its true objection to the sufficiency of service in the garb of formalistic incantations of lack of personal jurisdiction....

The defendant's doing so in Roque was among the reasons cited by the court (there were others) in granting the plaintiff a time extension for service pursuant to what is now Rule 4(m).

With clause 4 of Rule 12(b) directed to defects in the summons, and clause 5 directed to defects in its service, clause 2 ends up with the mission of covering objections to jurisdictional basis (amenability to jurisdiction), as where the scope of a longarm statute or a forum's contacts with the case are disputed despite the timely service of valid process. Perhaps the defendant's best rule of thumb, in cases of doubt, is to preserve objections under all categories that are arguably applicable, citing them all.

Is Defendant's Request for Time Extension a Waiver of Objection to Service?

Does a motion by the defendant under Rule 6(b) for an extension of time to plead waive an objection to service? Bernard v. Strang Air, Inc., 109 FRD 336 (D Neb. 1985), holds that it does not. To say that it does, noted the court, would be to re-introduce the distinction between general and special appearances, which have long since been abolished in the federal courts.

While a single request for a time extension may not waive an objection to service or any other jurisdictional objection, a progression of such requests may do it. Indeed, one alone may, if it is made under circumstances to suggest an intention to defend on the merits. The Ninth Circuit in Benny v. Pipes, 799 F.2d 489 (1986), cert. denied 484 U.S. 870, 108 S.Ct. 198 (1987), for example, found the question of whether a waiver resulted from three time enlargement motions a "close" one, but held that there was no waiver. The court said that

Generally, a motion to extend time to respond gives no hint that the answer will waive personal jurisdiction defects,

and is probably best viewed as a holding maneuver while counsel consider how to proceed.

The court indicates that the point may turn on the reasons for the extension. In Benny, the first two requests were based on the prior engagements of counsel. The court said it would be "harsh" to call these a jurisdictional waiver. It suggests, however, that the defendants

would have been well advised to include statements in these two motions that they were not waiving any affirmative defenses,

and that's the advice defendants should take from the case. Whether it works in all cases or not, a time enlargement request by a defendant should note clearly whether it intends to preserve a jurisdictional objection. If it does, however, and it appears that the grant of the time extension will be the very thing that puts the plaintiff beyond the applicable statute of limitations, the plaintiff should let the court know that. It may prompt the court to exact a jurisdictional waiver from the defendant as the price of a time enlargement.

Is Rule 4(m) a Dismissal Source Independent of Rule 12?

After setting forth the objection to the sufficiency of service as a distinct dismissal ground in clause (5) of subdivision (b), Rule 12 then goes on to provide, in subdivisions (g) and (h), that the objection is waived by the defendant who raises it neither by a motion to dismiss under Rule 12 nor by way of defense in the answer. It was urged in International Distribution Centers, Inc. v. Walsh Trucking Co., 1984 WL 545 (SD NY 6/22/84, Keenan, J.), that a violation of what is now Rule 4(m) by failing to serve process within the 120 days is a source of dismissal independent of Rule 12, and that the Rule 12 waiver consequences therefore shouldn't apply to Rule 4(m) omissions. The court rejected the contention and held several defendants to a waiver. They had answered with no jurisdictional objection and only after much pretrial activity did they move, pursuant to Rule 4(m), for the dismissal on the ground of nonservice. (The situation was not as unusual as it sounds. A preliminary injunction had been issued early in the case, occasioning activity that had resulted in the service of an answer before formal summons service had been made.)

Since the purpose of the waiver provision of Rule 12 is to remove jurisdictional issues from the case once the defendant has made a response on the merits (which an answer of course does), a defendant's Rule 4(m) objection should be just as much subject to the Rule 12 waiver as any other category of objection addressed by Rule 12. Rule 4(m) is of course concerned with the timeliness of service, but an untimely service is an insufficient one and should as such fall under Rule 12(b)(5).

C4-44. Vacating Defaults.

If the defendant is in default for nonappearance--the category of default relevant to a treatment of Rule 4--and the plaintiff is adamant in holding the defendant to it, the defendant's remedy is to move to vacate the default under Rule 55(c) or Rule 60(b) of the Federal Rules of Civil Procedure. Generally speaking, Rule 55(c) governs if no judgment has yet been entered, Rule 60(b)(1) (principally its "excusable neglect" category) if it has. Under the latter, the motion to vacate should be made within a year after the judgment is taken.

There is a strong policy in federal practice to have every case adjudicated on its merits. An adjunct of this policy is a fairly liberal attitude about vacating defaults. Rule 55(c) permits a default to be set aside for "good cause", but

this is less intimidating than it sounds. The standard applied has sometimes been described as "lenient" and held to depend on "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented". See Meehan v. Snow, 652 F.2d 274, 277 (CA2 1981), noting that the Rule 55(c) standard for vacatur is "less rigorous" than the Rule 60(b) standard. The requirement about demonstrating a defense is premised on the proposition that if the defendant can't make a prima facie showing of a reasonable position on the merits, then a default judgment is as good as any other to close the case out.

The court can impose conditions on the vacatur, and is likely to if the plaintiff is faultless and has been put to trouble and expense because of the default. Rule 60(b), the FRCP's chief provision on vacating judgments, states explicitly that the court can impose "such terms as are just".

It is self-evidently preferable to seek vacatur of the default before a judgment has been entered on it. The weight of a judgment added to the fact of the default makes the onus of lifting it greater. Judicial attitudes, as Meehan shows, are more indulgent of Rule 55(c) than Rule 60(b)(1) applications.

If the default was based on the defendant's not being notified of the action, i.e., a failure of summons service, or if for any other reason the defendant claims a want of personal jurisdiction, and the default has gone to judgment, the motion to vacate should be based on clause (4) of Rule 60(b): that "the judgment is void". But lest the court disagree about whether the defect goes to jurisdiction, the defendant should hedge all bets by including in the alternative the request under clause (1) to open the default. If (4) prevails, the action may of course be dismissed. But if it doesn't, (1) can come into play, the court directing merely that the default be opened and the defendant permitted to defend on the merits.

C4-45. Finding the Statute of Limitations.

Nothing is said about the statute of limitations in Rule 4, and little--never enough, anyway--in committee and legislative studies on amendments of Rule 4. And yet the rule is enmeshed, atomically fused, with the limitations' subject. Indeed, from a practical viewpoint the phenomenon, and perhaps the only one, that gives moment to mistakes made under Rule 4 is the statute of limitations.

Generally speaking, no mistake under Rule 4 carries a serious consequence unless the statute of limitations has expired. If it is still alive, even a plaintiff tossed out of the courthouse on a mountain of Rule 4 defects can climb down, brush himself off, and begin again. Rule 4 defects give rise to a want of personal jurisdiction, and a dismissal on that ground is not a disposition on the merits. Hence a new action can't be met with the defense of res judicata. It is the interim passing of the statute of limitations that will prove the plaintiff's undoing in a new action, the obverse of which is that if the statute of limitations hasn't expired, then the plaintiff may be inconvenienced, and put to some expense, but won't be undone.

When subject matter jurisdiction in the action is based on diversity of citizenship, state law governs the statute of limitations. When jurisdiction is based on the claim's arising under federal law, the statute of limitations is whatever is supplied in the law the claim arises under. If that law does not supply a concomitant statute of limitations, complications arise and resort may have to be made, even in an "arising under" case, to state law.

A statute enacted in 1990, § 1658 of Title 28, purports to supply a uniform four-year statute of limitations to all federal claims not otherwise having one, but it applies so narrowly that it is something of a joke: it governs only claims recognized by Congress in enactments made after December 1, 1990.

A more extensive treatment of the statute of limitations in federal practice appears in the Commentary on 28 U.S.C.A. § 1658, to which the reader is referred for further discussion.

C4-46. Leave Time for Trouble.

Enough has already been said about potential time problems under Rule 4 and the statute of limitations to make the present section anti-climactic. We use the section to house just a few reminders about how much can be spared by bringing an action with plenty of time left on the applicable statute of limitations.

Plaintiffs' lawyers know to diary a potential court action so that they stay on the alert for the arrival of the last permissible day for suit. They know, too, to diary back to give themselves weeks and months of warning. Too often, though, the warnings are not used to start suit with plenty of time to spare, but merely as reassurances on the way to the last day. It is often difficult even to determine what the applicable statute of limitations is in a given federal action. (See the Commentary on 28 U.S.C.A. § 1658.) The lawyer who has made the wrong guess may very well be too late even by suing with what was thought to be much time to spare.

And how much applause does a lawyer merit merely by slipping in just under the wire? This is the kind of race that brings trouble, not applause, especially with the 120-day stated time limit on summons service under subdivision (m) of Rule 4. Dismissal is not the only possible consequence of a passing of the period without service, but it has turned out to be the principal one. It takes a positive exercise of judicial discretion to forgive tardiness or permit new service. It would always be good for a plaintiff in such a situation to know, should judicial discretion under subdivision (m) not be exercised in her favor, that she can sue over because there is still time. Indeed, the very fact that there is still time might influence the court in a case of late or defective service, psychologically if not technically, to retain the action because the statute of limitations is still alive and a new action could be brought anyway.

The committee notes on Rule 4(m), incidentally, state that the fact that the statute of limitations would now bar a new action may even be a reason for excusing the plaintiff's delays in effecting service in the original one. We hope plaintiffs don't plan their procedures on that assumption, because it is unpredictable how the courts will react to the idea. See Commentary C4-41 above. In a sense it seems almost an invitation to laxity, and has perhaps more potential for harming than helping plaintiffs by lulling them into too deep a sense of security.

Subdivision (c)(1)'s making the plaintiff responsible for the process server is another reason for suing with time to spare. If the process server errs, or even cheats, and the defendant makes an issue of it, the plaintiff who has left time for trouble will re-read the affidavit of service with equanimity, not terror. She has put herself into a comfortable position. She need not depend on the process server or on the court's indulgence. If the process server did wrong and the court won't help, the plaintiff can just suffer a dismissal and sue again.

Many of the issues that can eject a case at the threshold involve facts that the plaintiff is unaware of, only becoming aware of them when something afterwards occurs to educate her. Summons service is only one possible issue. The method the process server says he used, for example, the defendant says he didn't. Or the person served was not the defendant, or a proper person to serve in behalf of a corporate or governmental defendant. Or the activities of the defendant, blandly assumed by the plaintiff to support extraterritorial longarm jurisdiction under Rule 4(k), do not suffice for it. In each instance, a dismissal can result. In the last mentioned, not even new service will help because the problem is with respect to jurisdictional basis, not mechanics of service.

The list, in Commentary C4-41 above, of illustrative excuses tendered as purportedly "good cause" for an enlargement of time for service by desperate plaintiffs who didn't leave enough time at the outset can further illustrate the kinds of unanticipated problems that creep up out of nowhere and destroy meritorious claims at the threshold. And the cited list is just a taste. There are scores of cases on the books offering further examples. These problems, should they arise, will almost always arise during the initial stages of the action. If the plaintiff has sued with time to spare, there will yet be time to cure them all, even if the cure entails a new action, or even a new action in another forum.

It is always a good idea for the plaintiff's attorney to know at the outset what other forums might be available, and what their statutes of limitations are, if there is any chance at all of an incurable jurisdictional dismissal of the present action, such as for a want of longarm contacts or, indeed, for a want of federal subject matter jurisdiction.

The list of problems with a dismissal potential can be extended, but the point has been made. Suing with six or eight months to go, instead of a week or two, is the best hedge against unforeseen trouble. Jurisdictional dismissals don't bar a new action, as long as the statute of limitations is still alive. The lawyer who makes certain to Leave Time for Trouble will assure that it will be.

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

Note to Subdivision (c). This rule does not affect U.S.C., Title 28, § 503 [see 566], as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them in so far as they may imply service by a marshal only:

U.S.C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25 (Restraining violations; procedure)

U.S.C., Title 28:

§ 45 [former] (Practice and procedure in certain cases under the interstate commerce laws)

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

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

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

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists,* 7 F.(2d) 481 (D.C.Ky.1925) and *Singleton v. Order of Railway Conductors of America,* 9 F.Supp. 417 (D.C.Ill.1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case,* 93 F.(2d) 56 (App.D.C.1937).

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

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

For the [former] Equity Rule on service, see [former] Equity Rule 13, Manner of Serving Subpoena.

Note to Subdivision (e). The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U.S.C., Title 8, § 405 (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with State law); U.S.C., Title 28, § 118 [now 1655] (Absent defendants in suits to enforce liens); U.S.C., Title 35, § 72a [now 146, 291] (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries);

U.S.C., Title 38, § 445 [now 784] (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the district may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 [now title 13, § 336] of the Code of the District of Columbia (Publication against non-resident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

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

U.S.C., Title 28, §§ 113 [now 1392] (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), [former] 115 (Suits of a local nature), 116 [now 1392] (Property in different districts in same state), [former] 838 (Executions run in all districts of state); U.S.C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner--"upon any agent of the company found in such state"); U.S.C., Title 49, § 321(c) [now 10330(b)] (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

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

Note to Subdivision (g). With the second sentence compare [former] Equity Rule 15, (Process, by Whom Served).

Note to Subdivision (h). This rule substantially continues U.S.C., Title 28, [former] § 767 (Amendment of process).

1963 Amendment

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

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

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy v. Siler,* 205 F.2d 498, 501-2 (3d Cir.) (concurring opinion), cert. denied, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the effective service in those cases occurred not

when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see *Holbrook v. Cafiero,* 18 F.R.D. 218 (D.Md.1955); *Pasternack v. Dalo,* 17 F.R.D. 420 (W.D.Pa.1955); *Super Prods. Corp. v. Parkin,* 20 F.R.D. 377 (S.D.N.Y.1957), or by reading paragraph (7) as not limited by subdivision (f). See *Giffin v. Ensign,* 234 F.2d 307 (3d Cir. 1956); 2 Moore's *Federal Practice,* ¶4.19 (2d ed. 1948); 1 Barron & Holtzoff, *Federal Practice & Procedure* § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also *Olberding v. Illinois Central R.R.,* 201 F.2d 582 (6th Cir.), rev'd on other grounds, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); *Feinsinger v. Bard,* 195 F.2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill.Ann.Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba,* 243 F.2d 342 (2d Cir. 1957); *Kappus v. Western Hills Oil, Inc.,* 24 F.R.D. 123 (E.D.Wis.1959); *Star v. Rogalny,* 162 F.Supp. 181 (E.D.Ill.1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, supra.* But *cf. Sappia v. Lauro Lines,* 130 F.Supp. 810 (S.D.N.Y.1955).

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

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

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

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

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick v. Devon Syndicate, Ltd.,* 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark v. Wells,* 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, *Attachment and Garnishment in the Federal Courts,* 59 Mich.L.Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co. v. Read,* 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); *Davis v. Ensign-Bickford Co.,* 139 F.2d 624 (8th Cir. 1944); 7 Moore's *Federal Practice* ¶64.05 (2d ed. 1954); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1423 (Wright ed. 1958); but cf. Note, 13 So.Calif.L.Rev. 361 (1940). The amendment will now

permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made upon them.

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

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

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

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

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R. v. Erie Avenue Warehouse Co.,* 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir.1962); *Dery v. Wyer,* 265 F.2d 804 (2d Cir.1959); *United Artists Corp. v. Masterpiece Productions, Inc.,* 221 F.2d 213 (2d Cir.1955); *Lesnik v. Public Industrials Corp.,* 144 F.2d 968 (2d Cir.1944); *Vaughn v. Terminal Transp. Co.,* 162 F.Supp. 647 (E.D.Tenn.1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, supra, § 4.01[13] (Supp.1960); 1 Barron & Holtzoff, supra, § 184; Note, 51 Nw.U.L.Rev. 354 (1956). But cf. Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* 18 F.R.D. 105, 106 (1956).

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

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

Subdivision (i). The continual increase of civil litigation having international elements makes it advisable to consolidate,

amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 Yale L.J. 515 (1953); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory,* Proc.A.B.A., Sec.Int'l & Comp.L. 34 (1959); Smit, *International Aspects of Federal Civil Procedure,* 61 Colum.L.Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me.Rev.Stat., ch. 22, § 70 (Supp.1961); Minn.Stat.Ann. § 303.13 (1947); N.Y.Veh. & Tfc.Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman v. Superior Court,* 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App.1958); *Sperry v. Fliegers,* 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct.1949); *Ewing v. Thompson,* 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing v. Bush,* 260 S.W.2d 900 (Tex.Ct.Civ.App.1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill.Ann.Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959).

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

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

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

Subdivision (i)(1). Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures,* supra.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign courts, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See *In re Letters Rogatory out of First Civil Court of City of Mexico,* 261 Fed. 652

(S.D.N.Y.1919); Jones, supra, at 543; Comment, 44 Colum.L.Rev. 72 (1944); Note 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

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

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

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

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§ 146, 293; 38 U.S.C. § 784(a); 46 U.S.C. § 1292.

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

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

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

1966 Amendment

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

1980 Amendment

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

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

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

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

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

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

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

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

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

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

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

orders, motions, notices, pleadings, and other documents is governed by Rule 5.

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

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

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

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

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons. Subdivision (c) eliminates the requirement for service by the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, is now permitted to designate any person who is 18 years of age and not a party to serve its summons.

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

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

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service

could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F.2d 161 (8th Cir.1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

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

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

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

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

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

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

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

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

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

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

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay be declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

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

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

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

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

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

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

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

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

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

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

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

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. E.g., Martens v. Winder, 341 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 937 (1965). This authority, however, was found to exist by

implication. E.g., SEC v. VTR, Inc., 39 F.R.D. 19 (S.D.N.Y.1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

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

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

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

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

Two minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subdivision (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

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

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit

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

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

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

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

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

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

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

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

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Paragraph (1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of

territorial jurisdiction by all district courts with respect to specified federal actions. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

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

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir.1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n. 3 (3rd Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill.L.Rev. 1 (1988).

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

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

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

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

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

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D.Mich.1987). A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts & Eyeglasses, 876 F.2d 596 (7th Cir.1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

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

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

2000 Amendment

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

individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

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

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

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

GAP Report

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

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

2007 Amendment

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

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

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

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

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

The former provision describing service on interpleader claimants [former (k)(1)(C)] is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

LEGISLATIVE STATEMENT

1983 Amendment

128 Congressional Record H 9848, Dec. 15, 1982. Mr. EDWARDS of California. Mr. Speaker, in July Mr. McClory and I brought before the House a bill to delay the effective date of proposed changes in rule 4 of the Federal Rules of Civil Procedure dealing with service of process. The Congress enacted that legislation and delayed the effective date so that we could cure certain problems in the proposed amendments to rule 4.

Since that time, Mr. McClory and I introduced a bill, H.R. 7154, that cures those problems. It was drafted in consultation with representatives of the Department of Justice, the Judicial Conference of the United States, and others.

The Department of Justice and the Judicial Conference have endorsed the bill and have urged its prompt enactment. Indeed, the Department of Justice has indicated that the changes occasioned by the bill will facilitate its collection of debts owed to the Government.

I have a letter from the Office of Legislative Affairs of the Department of Justice supporting the bill that I will submit for the Record. Also, I am submitting for the Record a section-by-section analysis of the bill.

H.R. 7154 makes much needed changes in rule 4 of the Federal Rules of Civil Procedure and is supported by all interested parties. I urge my colleagues to support it.

U.S. DEPARTMENT OF JUSTICE,

OFFICE OF LEGISLATIVE AFFAIRS,

Washington, D.C., December 10, 1982.

Hon. Peter W. Rodino, Jr.

Chairman, Committee on the Judiciary House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is to proffer the views of the Department of Justice on H.R. 7154, the proposed Federal Rules of Civil Procedure Amendments Act of 1982. While the agenda is extremely tight and we appreciate that fact, we do reiterate that this Department strongly endorses the enactment of H.R. 7154. We would greatly appreciate your watching for any possible way to enact this legislation expeditiously.

H.R. 7154 would amend Rule 4 of the Federal Rules of Civil Procedure to relieve effectively the United States Marshals Service of the duty of routinely serving summonses and complaints for private parties in civil actions and would thus achieve a goal this Department has long sought. Experience has shown that the Marshals Service's increasing workload and limited budget require such major relief from the burdens imposed by its role as process-server in all civil actions.

The bill would also amend Rule 4 to permit certain classes of defendants to be served by first class mail with a notice and acknowledgment of receipt form enclosed. We have previously expressed a preference for the service-by-mail provisions of the proposed amendments to Rule 4 which the Supreme Court transmitted to Congress on April 28, 1982.

The amendments proposed by the Supreme Court would permit service by registered or certified mail, return receipt requested. We had regarded the Supreme Court proposal as the more efficient because it would not require an affirmative act of signing and mailing on the part of a defendant. Moreover, the Supreme Court proposal would permit the entry of a default judgment if the record contained a returned receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant and subsequent service and notice by first class mail. However, critics of that system of mail service have argued that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused," the latter providing the sole basis for a default judgment.

As you know, in light of these criticisms the Congress enacted Public Law 97-227 (H.R. 6663) postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983, so as to facilitate further review of the problem. This Department opposed the delay in the effective date, primarily because the Supreme Court's proposed amendments also contained urgently needed provisions designed to relieve the United States Marshals of the burden of serving summonses and complaints in private civil actions. In our view, these necessary relief provisions are readily separable from the issues of service by certified mail and the propriety of default judgment after service by certified mail which the Congress felt warranted additional review.

During the floor consideration of H.R. 6663 Congressman Edwards and other proponents of the delayed effective date pledged to expedite the review of the proposed amendments to Rule 4, given the need to provide prompt relief for the Marshals Service in the service of process area. In this spirit Judiciary Committee staff consulted with representatives of this Department, the Judicial Conference, and others who had voiced concern about the proposed amendments.

H.R. 7154 is the product of those consultations and accommodated the concerns of the Department in a very workable and acceptable manner.

Accordingly, we are satisfied that the provisions of H.R. 7154 merit the support of all three branches of the Federal Government and everyone else who has a stake in the fair and efficient service of process in civil actions. We urge prompt consideration of H.R. 7154 by the Committee.[1]

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,

Assistant Attorney General

[1] In addition to amending Rule 4, we have previously recommended: (a) amendments to 28 U.S.C. § 569(b) redefining the Marshals traditional role by eliminating the statutory requirement that they serve subpoenas, as well as summonses and complaints, and; (b) amendments to 28 U.S.C. § 1921 changing the manner and level in which marshal fees are charged for serving private civil process. These legislative changes are embodied in Section 10 of S. 2567 and the Department's proposed fiscal year 1983 Appropriations Authorization bill. If, in the Committee's judgment, efforts to incorporate these suggested amendments in H.R. 7154 would in any way impede consideration of the bill during the few remaining legislative days in the 97th Congress, we would urge that they be separately considered early in the 98th Congress.

H.R. 7154--Federal Rules of Civil Procedure Amendments Act of 1982

BACKGROUND

The Federal Rules of Civil Procedure set forth the procedures to be followed in civil actions and proceedings in United States district courts. These rules are usually amended by a process established by 28 U.S.C. 2072, often referred to as the "Rules Enabling Act". The Rules Enabling Act provides that the Supreme Court can propose new rules of "practice and procedure" and amendments to existing rules by transmitting them to Congress after the start of a regular session but not later than May 1. The rules and amendments so proposed take effect 90 days after transmittal unless legislation to the contrary is enacted.[1]

On April 28, 1982, the Supreme Court transmitted to Congress several proposed amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure (which govern criminal cases and proceedings in Federal courts), and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code (which govern habeas corpus proceedings). These amendments were to have taken effect on August 1, 1982.

The amendments to Rule 4 of the Federal Rules of Civil Procedure were intended primarily to relieve United States marshals of the burden of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). The Committee received numerous complaints that the changes not only failed to achieve that goal, but that in the process the changes saddled litigators with flawed mail service, deprived litigants of the use of effective local procedures for service, and created a time limit for service replete with

ambiguities that could only be resolved by costly litigation. See House Report No. 97-662, at 2-4 (1982).

In order to consider these criticisms, Congress enacted Public Law 97-227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983.[2] Accordingly, in order to help shape the policy behind, and the form of, the proposed amendments, Congress must enact legislation before October 1, 1983.[3]

With that deadline and purpose in mind, consultations were held with representatives of the Judicial Conference, the Department of Justice, and others who had voiced concern about the proposed amendments. H.R. 7154 is the product of those consultations. The bill seeks to effectuate the policy of relieving the Marshals Service of the duty of routinely serving summonses and complaints. It provides a system of service by mail modeled upon a system found to be effective in California, and finally, it makes appropriate stylistic, grammatical, and other changes in Rule 4.

NEED FOR THE LEGISLATION

1. CURRENT RULE 4

Rule 4 of the Federal Rules of Civil Procedure relates to the issuance and service of process. Subsection (c) authorizes service of process by personnel of the Marshals Service, by a person specially appointed by the Court, or "by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made." Subsection (d) describes how a summons and complaint must be served and designates those persons who must be served in cases involving specified categories of defendants. Mail service is not directly authorized. Subsection (d)(7), however, authorizes service under the law of the state in which the district court sits upon defendants described in subsections (d)(1) (certain individuals) and (d)(3) (organizations). Thus, if state law authorizes service by mail of a summons and complaint upon an individual or organization described in subsections (d)(1) or (3), then subsection (d)(7) authorizes service by mail for United States district courts in that state.[4]

2. REDUCING THE ROLE OF MARSHALS

The Supreme Court's proposed modifications of Rule 4 were designed to alleviate the burden on the Marshals Service of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure), 16 (Advisory Committee Note). While the Committee received no complaints about the goal of reducing the role of the Marshals Service, the Court's proposals simply failed to achieve that goal. See House Report No. 97-662, at 2-3 (1982).

The Court's proposed Rule 4(c)(2)(B) required the Marshals Service to serve summonses and complaints "pursuant to any statutory provision expressly providing for service by a United States Marshal or his deputy."[5] One such statutory provision is 28 U.S.C. 569(b), which compels marshals to "execute *all* lawful writs, process and orders issued under authority of the United States, *including those of the courts* * * *." (emphasis added). Thus, any party could have invoked 28 U.S.C. 569(b) to utilize a marshal for service of a summons and complaint, thereby thwarting the intent of the new subsection to limit the use of marshals. The Justice Department acknowledges that the proposed subsection did not accomplish its objectives.[6]

Had 28 U.S.C. 569(b) been inconsistent with proposed Rule 4(c)(2)(B), the latter would have nullified the former under 28 U.S.C. 2072, which provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Since proposed Rule 4(c)(2)(B) specifically referred to statutes such as 28 U.S.C. 569(b), however, the new subsection did not conflict with 28 U.S.C. 569(b) and did not, therefore, supersede it.

H.R. 7154 cures this problem and achieves the desired reduction in the role of the Marshals Service by authorizing marshals to serve summonses and complaints "on behalf of the United States". By so doing, H.R. 7154 eliminates the loophole in the Court's proposed language and still provides for service by marshals on behalf of the Government.[7]

3. MAIL SERVICE

The Supreme Court's proposed subsection (d)(7) and (8) authorized, as an alternative to personal service, mail service of summonses and complaints on individuals and organizations described in subsection (d)(1) and (3), but only through registered or certified mail, restricted delivery. Critics of that system of mail service argued that registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them. This was so, they argued, because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused", the latter apparently providing the sole basis for a default judgment.[8]

H.R. 7154 provides for a system of service by mail similar to the system now used in California. See Cal.Civ.Pro. § 415.30 (West 1973). Service would be by ordinary mail with a notice and acknowledgment of receipt form enclosed. If the defendant returns the acknowledgment form to the sender within 20 days of mailing, the sender files the return and service is complete. If the acknowledgment is not returned within 20 days of mailing, then service must be effected through some other means provided for in the Rules.

This system of mail service avoids the notice problems created by the registered and certified mail procedures proposed by the Supreme Court. If the proper person receives the notice and returns the acknowledgment, service is complete. If the proper person does not receive the mailed form, or if the proper person receives the notice but fails to return the acknowledgment form, another method of service authorized by law is required.[9] In either instance, however, the defendant will receive actual notice of the claim. In order to encourage defendants to return the acknowledgment form, the court can order a defendant who does not return it to pay the costs of service unless the defendant can show good cause for the failure to return it.

4. THE LOCAL OPTION

The Court's proposed amendments to Rule 4 deleted the provision in current subsection (d)(7) that authorizes service of a summons and complaint upon individuals and organizations "in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." The Committee received a variety of complaints about the deletion of this provision. Those in favor of preserving the local option saw no reason to forego systems of service that had been successful in achieving effective notice.[10]

H.R. 7154 carries forward the policy of the current rule and permits a party to serve a summons and complaint upon individuals and organizations described in Rule 4(d)(1) and (3) in accordance with the law of the state in which the district court sits. Thus, the bill authorizes four methods of serving a summons and complaint on such defendants: (1) service by a nonparty adult (Rule 4(c)(2)(A)); (2) service by personnel of the Marshals Service, if the party qualifies, such as because the party is proceeding in forma pauperis (Rule 4(c)(2)(B)); (3) service in any manner authorized by the law of the state in which the district court is held (Rule 4(c)(2)(C)(i)); or (4) service by regular mail with a notice and acknowledgment of receipt form enclosed (Rule 4(c)(2)(C)(ii)).[11]

5. TIME LIMITS

Rule 4 does not currently provide a time limit within which service must be completed. Primarily because United States marshals currently effect service of process, no time restriction has been deemed necessary, Appendix II, at 18 (Advisory Committee Note). Along with the proposed changes to subdivisions (c) and (d) to reduce the role of the Marshals Service, however, came new subdivision (j), requiring that service of a summons and complaint be made within 120 days of the filing of the complaint. If service were not accomplished within that time, proposed subdivision (j) required that the action "be dismissed as to that defendant without prejudice upon motion or upon the court's own initiative". Service by mail was deemed made for purposes of subdivision (j) "as of the date on which the process was accepted, refused, or returned as unclaimed".[12]

H.R. 7154 adopts a policy of limiting the time to effect service. It provides that if a summons and complaint have not been served within 120 days of the filing of the complaint and the plaintiff fails to show "good cause" for not completing service within that time, then the court must dismiss the action as to the unserved defendant. H.R. 7154 ensures that a plaintiff will be notified of an attempt to dismiss the action. If dismissal for failure to serve is raised by the court upon its own motion, the legislation requires that the court provide notice to the plaintiff. If dismissal is sought by someone else, Rule 5(a) of the Federal Rules of Civil Procedure requires that the motion be served upon the plaintiff.

Like proposed subsection (j), H.R. 7154 provides that a dismissal for failure to serve within 120 days shall be "without prejudice". Proposed subsection (j) was criticized by some for ambiguity because, it was argued, neither the text of subsection (j) nor the Advisory Committee Note indicated whether a dismissal without prejudice would toll a statute of limitation. *See* House Report 97-662, at 3-4 (1982). The problem would arise when a plaintiff files the complaint within the applicable statute of limitation period but does not effect service within 120 days. If the statute of limitation period expires during that period, and if the plaintiff's action is dismissed "without prejudice", can the plaintiff refile the complaint and maintain the action? The answer depends upon how the statute of limitation is tolled.[13]

If the law provides that the statute of limitation is tolled by filing and service of the complaint, then a dismissal under H.R. 7154 for failure to serve within the 120 days would, by the terms of the law controlling the tolling bar the plaintiff from later maintaining the cause of action.[14] If the law provides that the statute of limitation is tolled by filing alone, then the status of the plaintiff's cause of action turns upon the plaintiff's diligence. If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve within 120 days, and the plaintiff will be barred from later maintaining the cause of action because the statute of limitation has run. A dismissal without prejudice does not confer upon the plaintiff any rights that the plaintiff does otherwise possess and leaves a plaintiff whose action has been dismissed in the same position as if the action had never been filed.[15] If, on the other hand, the plaintiff has made reasonable efforts to effect service, then the plaintiff can move under Rule 6(b) to enlarge the time within which to serve or can oppose dismissal for failure to serve. A court would undoubtedly permit such a plaintiff additional time within which to effect service. Thus, a diligent plaintiff can preserve the cause of action. This result is consistent with the policy behind the time limit for service and with statutes of limitation, both of which are designed to encourage prompt movement of civil actions in the federal courts.

6. CONFORMING AND CLARIFYING SUBSECTIONS (D)(4) AND (5)

Current subsections (d)(4) and (5) prescribe which persons must be served in cases where an action is brought against the United States or an officer or agency of the United States. Under subsection (d)(4), where the United States is the named defendant, service must be made as follows: (1) personal service upon the United States attorney, an assistant United States attorney, or a designated clerical employee of the United States attorney in the district in which the action is brought; (2) registered or certified mail service to the Attorney General of the United States in Washington, D.C.; and (3) registered or certified mail service to the appropriate officer or agency if the action attacks an order of that officer or agency but does not

name the officer or agency as a defendant. Under subsection (d)(5), where an officer or agency of the United States is named as a defendant, service must be made as in subsection (d)(4), except that personal service upon the officer or agency involved is required.[16]

The time limit for effecting service in H.R. 7154 would present significant difficulty to a plaintiff who has to arrange for personal service upon an officer or agency that may be thousands of miles away. There is little reason to require different types of service when the officer or agency is named as a party, and H.R. 7154 therefore conforms the manner of service under subsection (d)(5) to the manner of service under subsection (d)(4).

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 provides that the short title of the bill is the "Federal Rules of Civil Procedure Amendments Act of 1982".

SECTION 2

Section 2 of the bill consists of 7 numbered paragraphs, each amending a different part of Rule 4 of the Federal Rules of Civil Procedure.

Paragraph (1) deletes the requirement in present Rule 4(a) that a summons be delivered for service to the marshal or other person authorized to serve it. As amended by the legislation, Rule 4(a) provides that the summons be delivered to "the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and complaint". This change effectuates the policy proposed by the Supreme Court. See Appendix II, at -- (Advisory Committee Note).

Paragraph (2) amends current Rule 4(c), which deals with the service of process. New Rule 4(c)(1) requires that all process, other than a subpoena or a summons and complaint, be served by the Marshals Service or by a person especially appointed for that purpose. Thus, the Marshals Service or persons specially appointed will continue to serve all process other than subpoenas and summonses and complaints, a policy identical to that proposed by the Supreme Court. See Appendix II, at 8 (Report of the Judicial Conference Committee on Rules of Practice and Procedure). The service of subpoenas is governed by Rule 45,[17] and the service of summonses and complaints is governed by new Rule 4(c)(2).

New Rule 4(c)(2)(A) sets forth the general rule that summonses and complaints shall be served by someone who is at least 18 years old and not a party to the action or proceeding. This is consistent with the Court's proposal. Appendix II, at 16 (Advisory Committee Note). Subparagraphs (B) and (C) of new Rule 4(c)(2) set forth exceptions to this general rule.

Subparagraph (B) sets forth 3 exceptions to the general rule. First, subparagraph (B)(i) requires the Marshals Service (or someone specially appointed by the court) to serve summonses and complaints on behalf of a party proceeding in forma pauperis or a seaman authorized to proceed under 28 U.S.C. 1916. This is identical to the Supreme Court's proposal. *See* Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note). Second, subparagraph (B)(ii) requires the Marshals Service (or someone specially appointed by the court) to serve a summons and complaint when the court orders the marshals to do so in order properly to effect service in that particular action.[18] This, except for nonsubstantive changes in phrasing, is identical to the Supreme Court's proposal. See Appendix II, at 3 (text of proposed rule), 16 (Advisory Committee Note).

Subparagraph (C) of new Rule 4(c)(2) provides 2 exceptions to the general rule of service by a nonparty adult. These exceptions apply only when the summons and complaint is to be served upon persons described in Rule 4(d)(1) (certain individuals) or Rule 4(d)(3) (organizations).[19] First, subparagraph (C)(i) permits service of a summons and complaint in a manner authorized by the law of the state in which the court sits. This restates the option to follow local law currently found in Rule 4(d)(7) and would authorize service by mail if the state law so allowed. The method of mail service in that instance would, of course, be the method permitted by state law.

Second, subparagraph (C)(ii) permits service of a summons and complaint by regular mail. The sender must send to the defendant, by first-class mail, postage prepaid, a copy of the summons and complaint, together with 2 copies of a notice and acknowledgment of receipt of summons and complaint form and a postage prepaid return envelope addressed to the sender. If a copy of the notice and acknowledgment form is not received by the sender within 20 days after the date of mailing, then service must be made under Rule 4(c)(2)(A) or (B) (i.e., by a nonparty adult or, if the person qualifies,[20] by personnel of the Marshals Service or a person specially appointed by the court) in the manner prescribed by Rule 4(d)(1) or (3) (i.e., personal or substituted service).

New Rule 4(c)(2)(D) permits a court to penalize a person who avoids service by mail. It authorizes the court to order a person who does not return the notice and acknowledgment form within 20 days after mailing to pay the costs of service, unless that person can show good cause for failing to return the form. The purpose of this provision is to encourage the prompt return of the form so that the action can move forward without unnecessary delay. Fairness requires that a person who causes another additional and unnecessary expense in effecting service ought to reimburse the party who was forced to bear the additional expense.

Subparagraph (E) of Rule 4(c)(2) requires that the notice and acknowledgment form described in new Rule 4(c)(2)(C)(ii) be executed under oath or affirmation. This provision tracks the language of 28 U.S.C. 1746, which permits the use of unsworn declarations under penalty of perjury whenever an oath or affirmation is required. Statements made under penalty of perjury are subject to 18 U.S.C. 1621(2), which provides felony penalties for someone who "willfully subscribes as true any material matter which he does not believe to be true". The requirement that the form be executed under oath or affirmation is intended to encourage truthful submissions to the court, as the information contained in the form is important to the parties.[21]

New Rule 4(c)(3) authorizes the court freely to make special appointments to serve summonses and complaints under Rule 4(c)(2)(B) and all other process under Rule 4(c)(1). This carries forward the policy of present Rule 4(c).

Paragraph (3) of section 2 of the bill makes a non-substantive change in the caption of Rule 4(d) in order to reflect more accurately the provisions of Rule 4(d). Paragraph (3) also deletes a provision on service of a summons and complaint pursuant to state law. This provision is redundant in view of new Rule 4(c)(2)(C)(i).

Paragraph (4) of section 2 of the bill conforms Rule 4(d)(5) to present Rule 4(d)(4). Rule 4(d)(5) is amended to provide that service upon a named defendant agency or officer of the United States shall be made by "sending" a copy of the summons and complaint "by registered or certified mail" to the defendant.[22] Rule 4(d)(5) currently provides for service by "delivering" the copies to the defendant, but 28 U.S.C. 1391(e) authorizes delivery upon a defendant agency or officer outside of the district in which the action is brought by means of certified mail. Hence, the change is not a marked departure from current practice.

Paragraph (5) of section 2 of the bill amends the caption of Rule 4(e) in order to describe subdivision (e) more accurately.

Paragraph (6) of section 2 of the bill amends Rule 4(g), which deals with return of service. Present rule 4(g) is not changed except to provide that, if service is made pursuant to the new system of mail service (Rule 4(c)(2)(C)(ii)), the plaintiff or the plaintiff's attorney must file the court the signed acknowledgment form returned by the person served.

Paragraph (7) of section 2 of the bill adds new subsection (j) to provide a time limitation for the service of a summons and complaint. New Rule 4(j) retains the Supreme Court's requirement that a summons and complaint be served within 120 days of the filing of the complaint. See Appendix II, at 18 (Advisory Committee Note).[23] The plaintiff must be notified of an effort or intention to dismiss the action. This notification is mandated by subsection (j) if the dismissal is being raised on the court's own initiative and will be provided pursuant to Rule 5 (which requires service of motions upon the adverse party) if the dismissal is sought by someone else.[24] The plaintiff may move under Rule 6(b) to enlarge the time period. See Appendix II, at Id. (Advisory Committee Note). If service is not made within the time period or enlarged time period, however, and if the plaintiff fails to show "good cause" for not completing service, then the court must dismiss the action as to the unserved defendant. The dismissal is "without prejudice". The term "without prejudice" means that the dismissal does not constitute an adjudication of the merits of the complaint. A dismissal "without prejudice" leaves a plaintiff whose action has been dismissed in the position in which that person would have been if the action had never been filed.

SECTION 3

Section 3 of the bill amends the Appendix of Forms at the end of the Federal Rules of Civil Procedure by adding a new form 18A, "Notice and Acknowledgment for Service by Mail". This new form is required by new Rule 4(c)(2)(C)(ii), which requires that the notice and acknowledgment form used with service by regular mail conform substantially to Form 18A.

Form 18A as set forth in section 3 of the bill is modeled upon a form used in California.[25] It contains 2 parts. The first part is a notice to the person being served that tells that person that the enclosed summons and complaint is being served pursuant to Rule 4(c)(2)(C)(ii); advises that person to sign and date the acknowledgment form and indicate the authority to receive service if the person served is not the party to the action (e.g., the person served is an officer of the organization being served); and warns that failure to return the form to the sender within 20 days may result in the court ordering the party being served to pay the expenses involved in effecting service. The notice also warns that if the complaint is not responded to within 20 days, a default judgment can be entered against the party being served. The notice is dated under penalty of perjury by the plaintiff or the plaintiff's attorney.[26]

The second part of the form contains the acknowledgment of receipt of the summons and complaint. The person served must declare on this part of the form, under penalty of perjury, the date and place of service and the person's authority to receive service.

SECTION 4

Section 4 of the bill provides that the changes in Rule 4 made by H.R. 7154 will take effect 45 days after enactment, thereby giving the bench and bar, as well as other interested persons and organizations (such as the Marshals Service), an opportunity to prepare to implement the changes made by the legislation. The delayed effective date means that service of process issued before the effective date will be made in accordance with current Rule 4. Accordingly, all process in the hands of the Marshals Service prior to the effective date will be served by the Marshals Service under the present rule.

SECTION 5

Section 5 of the bill provides that the amendments to Rule 4 proposed by the Supreme Court (whose effective date was postponed by Public Law 97-227) shall not take effect. This is necessary because under Public Law 97-227 the proposed amendments will take effect on October 1, 1983.

For background information about how the Judicial Conference committees operate, see Wright, "Procedural Reform: Its Limitation and Its Future," 1 Ga.L.Rev. 563, 565-66 (1967) (civil rules); statement of United States District Judge Roszel C. Thomsen, Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess. at 25 (1974) (criminal rules); statement of United States Circuit Judge J. Edward Lumbard, id. at 203 (criminal rules); J. Weinstein, Reform of Federal Court Rulemaking Procedure (1977); Weinstein, "Reform of Federal Rulemaking Procedures," 76 Colum.L.Rev. 905 (1976).

The interpretation of Rule 4(d)(8) to require a refusal of delivery in order to have a basis for a default judgment, while undoubtedly the interpretation intended and the interpretation that reaches the fairest result, may not be the only possible interpretation. Since a default judgment can be entered for defendant's failure to respond to the complaint once defendant has been served and the time to answer the complaint has run, it can be argued that a default judgment can be obtained where the mail was unclaimed because proposed subsection (j), which authorized dismissal of a complaint not served within 120 days, provided that mail service would be deemed made "on the date on which the process was accepted, refused, or *returned as unclaimed* " (emphasis added).

In the federal question action, the courts of appeals have generally held that Rule 3 governs, so that the filing of the complaint tolls a statute of limitation. *United States v. Wahl,* 538 F.2d 285 (6th Cir. 1978); *Windbrooke Dev. Co. v. Environmental Enterprises Inc. of Fla.,* 524 F.2d 461 (5th Cir. 1975); *Metropolitan Paving Co. v. International Union of Operating Engineers,* 439 F.2d 300 (10th Cir. 1971); *Moore Co. v. Sid Richardson Carbon & Gasoline Co.,* 347 F.2d 921 (8th Cir.), cert. denied, 383 U.S. 925, reh. denied, 384 U.S. 914 (1965); *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959). The continued validity of this line of cases, however, must be questioned in light of the *Walker* case, even though the Court in that case expressly reserved judgment about federal question actions, *see Walker v. Armco Steel Corp.,* 446 U.S. 741, 751 n.11 (1980).

TREATIES AND CONVENTIONS

Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial

or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I--JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either--

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an

addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with--

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by--

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that--

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled--

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled--

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II--EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III--GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with--

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following--

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of--

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905 [99 BFSP 990], and on 1st March 1954 [286 UNTS 265], this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following--

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

[Signatures omitted.]

Service of Documents Convention

ANNEX TO THE CONVENTION

Forms *

* These forms may be obtained from the Offices of United States Marshals.

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Identity and address of the applicant	Address of receiving authority

The undersigned applicant has the honour to transmit--in duplicate--the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e., (identity and address) .....

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention*.

(*b*) in accordance with the following particular method (sub-paragraph (*b*) of the first paragraph of article 5)*:

.....

(*c*) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the documents--and of the annexes*--with a certificate as provided on the reverse side.
List of documents

.....
.....
.....
.....
.....
.....
.....
Done at .....,
the .....
.....
.....
Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served *
-- the (date). -- at (place, street, number). . -- in one of the following methods authorised by article 5--

(*a*) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention*.

(*b*) in accordance with the following particular method *: .....

(*c*) by delivery to the addressee, who accepted it voluntarily*.

The documents referred to in the request have been delivered to:
--(identity and description of person)

--relationship to the addressee (family, business or other)

2) that the document has not been served, by reason of the following facts*: .....

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement *.

Annexes

Documents returned: .....

.....

.....

.....

.....Done at ……., the .....

In appropriate cases, documents establishing the service:

.....

.....

..... Signature and/or stamp.

*Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

_____

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the 15th of November 1965.

(article 5, fourth paragraph)

Name and address of the requesting authority:.....

.....

.....

Particulars of the parties*:

.....

.....
.....

JUDICIAL DOCUMENT**

Nature and purpose of the document:
.....

.....
.....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute: .....

Date and place for entering appearance**:
.....

.....

Court which has given judgment**:
.....

.....

Date of judgment**: .....

Time limits stated in the document**:
.....

.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:
.....

.....
.....

Time limits stated in the document**:
.....

.....
.....

* If appropriate, identity and address of the person interested in the transmission of the document.

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. Done at The Hague

November 15, 1965; entered into force for the United States February 10, 1969. 20 UST 361; TIAS 6638; 658 UNTS 163.

Notes and Annotations to the Convention

Litigants wishing to serve a person in one of the Convention countries should request copies in duplicate of the three forms prescribed by the Convention: the "Request", the "Certificate" and the "Summary." These forms may be obtained from the offices of the United States Marshals. Upon completion of these forms, the litigants must then transmit them, together with the documents to be served--all in duplicate--to the local process server.

The local process server thereupon mails all these documents to the "Central Authority" abroad. After service has been effected, one copy of the documents served and an executed "Certificate" all be returned to the local process server, who will transmit these documents to the litigant who initiated the request.

---- Annotations

"The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters", 2 Cornell Int'l L.J. 125 (1969).

Julen v. Larson, 25 Cal.App.3d 325, 101 Cal. 796 (1972).

Shoei Kako Co., Ltd. v. Superior Court, 33 Cal.App.3d 808, 109 Cal. 402 (1973).

Notes of Decisions (2134)

Footnotes

1

The drafting of the rules and amendments is actually done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Civil Procedure, the initial draft is prepared by the Advisory Committee on Civil Rules. The Advisory Committee's draft is then reviewed by the Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft approved by that committee is forwarded to the Judicial Conference. If the Judicial Conference approves the draft, it forwards the draft to the Supreme Court. The Judicial Conference's role in the rule-making process is defined by 28 U.S.C. 331.

2

All of the other amendments, including all of the proposed amendments to the Federal Rules of Criminal Procedure and the Rules and Forms Governing Proceedings in the United States District Courts under sections 2254 and 2255 of Title 28, United States Code, took effect on August 1, 1982, as scheduled.

3

The President has urged Congress to act promptly. See President's Statement on Signing H.R. 6663 into Law, 18 Weekly Comp. of Pres. Doc. 982 (August 2, 1982).

4

Where service of a summons is to be made upon a party who is neither an inhabitant of, nor found within, the state where the district court sits, subsection (e) authorizes service under a state statute or rule of court that provides for service upon such a party.

This would authorize mail service if the state statute or rule of court provided for service by mail.

5

The Court's proposal authorized service by the Marshals Service in other situations. This authority, however, was not seen as thwarting the underlying policy of limiting the use of marshals. *See* Appendix II, at 16, 17 (Advisory Committee Note).

6

Appendix I, at 2 (letter of Assistant Attorney General Robert A. McConnell).

7

The provisions of H.R. 7154 conflict with 28 U.S.C. 569(b) because the latter is a broader command to marshals to serve all federal court process. As a later statutory enactment, however, H.R. 7154 supersedes 28 U.S.C. 569(b), thereby achieving the goal of reducing the role of marshals.

8

Proposed Rule 4(d)(8) provided that "Service ... shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant." This provision reflects a desire to preclude default judgments on unclaimed mail. See Appendix II, at 7 (Report of the Committee on Rules of Practice and Procedure).

9

See p. 15 infra.

10

Proponents of the California system of mail service, in particular, saw no reason to supplant California's proven method of mail service with a certified mail service that they believed likely to result in default judgments without actual notice to defendants. See House Report No. 97-662, at 3 (1982).

11

The parties may, of course, stipulate to service, as is frequently done now.

12

While return of the letter as unclaimed was deemed service for the purpose of determining whether the plaintiff's action could be dismissed, return of the letter as unclaimed was not service for the purpose of entry of a default judgment against the defendant. See note 8 supra.

13

The law governing the tolling of a statute of limitation depends upon the type of civil action involved. In a diversity action, state law governs tolling. *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). In *Walker,* plaintiff had filed his complaint and thereby commenced the action under Rule 3 of the Federal Rules of Civil Procedure within the statutory period. He did not, however, serve the summons and complaint until after the statutory period had run. The Court held that state law (which required both filing and service within the statutory period) governed, barring plaintiff's action.

14

The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitation has run.

15

See p. 19 infra.

16

See p. 17 infra.

17

Rule 45(c) provides that "A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age."

18

Some litigators have voiced concern that there may be situations in which personal service by someone other than a member of the Marshals Service may present a risk of injury to the person attempting to make the service. For example, a hostile defendant may have a history of injuring persons attempting to serve process. Federal judges undoubtedly will consider the risk of harm to private persons who would be making personal service when deciding whether to order the Marshals Service to make service under Rule

4(c)(2)(B)(iii).

19

The methods of service authorized by Rule 4(c)(2)(C) may be invoked by any person seeking to effect service. Thus, a nonparty adult who receives the summons and complaint for service under Rule 4(c)(1) may serve them personally or by mail in the manner authorized by Rule 4(c)(2)(C)(ii). Similarly, the Marshals Service may utilize the mail service authorized by Rule 4(c)(2)(C)(ii) when serving a summons and complaint under Rule 4(c)(2)(B)(i)(iii). When serving a summons and complaint under Rule 4(c)(2)(B)(ii), however, the Marshals Service must serve in the manner set forth in the court's order. If no particular manner of service is specified, then the Marshals Service may utilize Rule 4(c)(2)(C)(ii). It would not seem to be appropriate, however, for the Marshals Service to utilize Rule 4(c)(2)(C)(ii) in a situation where a previous attempt to serve by mail failed. Thus, it would not seem to be appropriate for the Marshals Service to attempt service by regular mail when serving a summons and complaint on behalf of a plaintiff who is proceeding in forma pauperis if that plaintiff previously attempted unsuccessfully to serve the defendant by mail.

20

To obtain service by personnel of the Marshals Service or someone specially appointed by the court, a plaintiff who has unsuccessfully attempted mail service under Rule 4(c)(2)(C)(ii) must meet the conditions of Rule 4(c)(2)(B)--for example, the plaintiff must be proceeding *in forma pauperis.*

21

For example, the sender must state the date of mailing on the form. If the form is not returned to the sender within 20 days of that date, then the plaintiff must serve the defendant in another manner and the defendant may be liable for the costs of such service. Thus, a defendant would suffer the consequences of a misstatement about the date of mailing.

22

See p. 12 supra.

23

The 120 day period begins to run upon the filing of each complaint. Thus, where a defendant files a cross-claim against the plaintiff, the 120 day period begins to run upon the filing of the cross-complaint, not upon the filing of the plaintiff's complaint initiating the action.

24

The person who may move to dismiss can be the putative defendant (i.e., the person named as defendant in the complaint filed with the court) or, in multi-party actions, another party to the action. (If the putative defendant moves to dismiss and the failure to effect service is due to that person's evasion of service, a court should not dismiss because the plaintiff has "good cause" for not completing service.)

25

See Cal.Civ.Pro. § 415.30 (West 1973).

26

See p. 16 supra.

**

Delete if inappropriate.

Fed. Rules Civ. Proc. Rule 4, 28 U.S.C.A., FRCP Rule 4
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 4.1

Rule 4.1. Serving Other Process

Currentness

(a) In General. Process--other than a summons under Rule 4 or a subpoena under Rule 45--must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

CREDIT(S)

(Adopted April 22, 1993, effective December 1, 1993; amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1993 Adoption

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

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

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. *Chagas v. United States,* 369 F.2d 643 (5th Cir.1966). The same is true for service of an order to show cause. *Waffenschmidt v. Mackay,* 763 F.2d 711 (5th Cir.1985).

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

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

2007 Amendment

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

Notes of Decisions (4)

Fed. Rules Civ. Proc. Rule 4.1, 28 U.S.C.A., FRCP Rule 4.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5

Rule 5. Serving and Filing Pleadings and Other Papers

Currentness

(a) Service: When Required.

(1) ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

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

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

(A) handing it to the person;

(B) leaving it:

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

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

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

(D) leaving it with the court clerk if the person has no known address;

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

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

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

(c) Serving Numerous Defendants.

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

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

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

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

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

(d) Filing.

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

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

(A) to the clerk; or

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

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

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

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

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 23, 1996, effective December 1, 1996; April 17, 2000, effective December 1, 2000; April 23, 2001, effective December 1, 2001; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivisions (a) and (b). Compare 2 Minn.Stat. (1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164 and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§ 244 to 249.

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

1963 Amendment

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, *Federal Practice & Procedure* 760-61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22-A and the Advisory Committee's Note thereto.

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

1970 Amendment

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

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

1980 Amendment

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

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

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

Subdivision (e). The words "*pleading and other* " are stricken as unnecessary. Pleadings are papers within the meaning of the rule. The revision also accommodates the development of the use of facsimile transmission for filing.

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

1993 Amendments

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

1996 Amendments

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be

authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

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

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

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

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

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

2000 Amendment

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

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. *Local Rules Project* at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to

direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed." Rule 30(f)(1) has been amended to conform to this change in Rule 5(d).

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

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

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

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

GAP Report

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

2001 Amendments

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3)--as well as rules that invoke those rules--must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is

obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service--such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Changes Made After Publication and Comments

Rule 5(b)(2)(D) was changed to require that consent be "in writing."

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: "As with other modes of service, however, actual notice that the transmission was

not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency." The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this possibility. The Committee Note submitted above includes a "no negative implications" paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means "if the party making service learns that the attempted service did not reach the person to be served." It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) requires that the party making service learn of the failure within three calendar days. The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent "be express, and cannot be implied from conduct." This addition reflects a more general concern stimulated by a reported ruling that an e-mail address on a firm's letterhead implied consent to e-mail service. (2) The paragraph discussing service through the court's facilities is expanded by describing alternative methods, including an "electronic link." (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the

quicker will come the improvements that will make electronic service ever more attractive. Consistency with the Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

2006 Amendment

Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under amended Rule 5(e), a local rule that requires electronic filing must include reasonable exceptions, but Rule 5(e) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 5(e).

2007 Amendment

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

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

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

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

Notes of Decisions (177)

Fed. Rules Civ. Proc. Rule 5, 28 U.S.C.A., FRCP Rule 5
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5.1

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

Currentness

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

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

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

CREDIT(S)

(Adopted April 12, 2006, effective December 1, 2006; amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2006 Adoption

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

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

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

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-period [So in original. Probably should read "60-day period".] on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action -- including a constitutional challenge -- at any time, even before service of process.

2007 Amendment

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (1)

Fed. Rules Civ. Proc. Rule 5.1, 28 U.S.C.A., FRCP Rule 5.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 5.2

Rule 5.2. Privacy Protection For Filings Made With the Court

Currentness

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

CREDIT(S)

(Adopted April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2007 Adoption

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability ... of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement--such as driver's license numbers and alien registration numbers--in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled

to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

Notes of Decisions (2)

Fed. Rules Civ. Proc. Rule 5.2, 28 U.S.C.A., FRCP Rule 5.2
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 6

Rule 6. Computing and Extending Time; Time for Motion Papers

Currentness

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) Motions, Notices of Hearing, and Affidavits.

(1) ***In General.*** A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 1, 1971, effective July 1, 1971; April 28, 1983, effective August 1, 1983; April 29, 1985, effective August 1, 1985; March 2, 1987, effective August 1, 1987; April 29, 1999, effective December 1, 1999; April 23, 2001, effective December 1, 2001; April 25, 2005, effective December 1, 2005; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivisions (a) and (b). These are amplifications along lines common in state practices, of [former] Equity Rule 80 (Computation of Time--Sundays and Holidays) and of the provisions for enlargement of time found in [former] Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer--Default--Decree Pro Confesso). See also Rule XIII, Rules and Forms in Criminal Cases, 1934, 292 U.S. 661, 666. Compare Ala.Code Ann. (Michie, 1928) § 13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

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

Note to Subdivision (d). Compare 2 Minn.Stat. (Mason, 1927) § 9246; N.Y.R.C.P. (1937) Rules 60 and 64.

1946 Amendment

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

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

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

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

With regard to Rule 25(a) for substitution, it was held in *Anderson v. Brady,* Ky.1941, 1 F.R.D. 589, 4 Fed.Rules Service 25a.1, Case 1, and in *Anderson v. Yungkau,* C.C.A.6, 1946, 153 F.2d 685, certiorari granted 66 S.Ct. 1025, 328 U.S. 829, 90 L.Ed. 1606, that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in *Leishman v. Associated Wholesale Electric Co.,* 1943, 63 S.Ct. 543, 318 U.S. 203, 87 L.Ed. 714, that Rule 6(b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See *Coca-Cola v. Busch,* E.D.Pa.1943, 7 Fed.Rules Service, 59b.2, Case 4. Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered "forthwith" on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc. v. Coe,* App.D.C.1943, 136 F.2d 771, 78 U.S.App.D.C. 19; *Jusino v. Morales & Tio,* C.C.A.1, 1944, 139 F.2d 946; *Coca-Cola Co. v. Busch,* E.D.Pa.1943, 7 Fed.Rules Service 59b.2, Case 4; *Peterson v. Chicago Great Western Ry. Co.,* D.Neb.1943, 3 F.R.D. 346, 7 Fed.Rules Service 59b.2, Case 1; *Leishman v. Associated Wholesale Electric Co.,* 1943, 63 S.Ct. 543, 318 U.S. 203, 87 L.Ed. 714.

As to Rule 60(b) for relief from a judgment, it was held in *Schram v. O'Connor,* Mich.1941, 5 Fed.Rules Serv. 6b.31, Case 1, 2 F.R.D. 192, s.c. 5 Fed.Rules Serv. 6b.31, Case 2, 2 F.R.D. 192, that the six-months time limit in original rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in *Wallace v. United States,* C.C.A.2, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573; *Reed v. South Atlantic Steamship Co. of Del.,* Del.1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1.

As to Rule 73(g), fixing the time for docketing an appeal, it was held in *Ainsworth v. Gill Glass & Fixture Co.,* C.C.A.3, 1939, 104 F.2d 83, that under Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n v. Snyder,* C.C.A.6, 1940, 109 F.2d 469 and in *Burke v. Canfield,* 1940, 111 F.2d 526, 72 App.D.C. 127.

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

In this connection reference is made to the established rule that if a motion for new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. *Leishman v. Associated Wholesale Electric Co.,* 1943, 63 S.Ct. 543, 318 U.S. 203, 87 L.Ed. 714. By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one year.

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

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

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

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

Subdivision (c). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill v. Hawes,* 1944, 64 S.Ct. 334, 320 U.S. 520, 88 L.Ed. 283; *Boaz v. Mutual Life Ins. Co. of New York,* C.C.A.8, 1944, 146 F.2d 321; *Bucy v. Nevada Construction Co.,* C.C.A.9, 1942, 125 F.2d 213.

1963 Amendment

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

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

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

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (b). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is

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

1966 Amendment

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

1967 Amendment

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

1971 Amendment

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

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

1983 Amendment

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

1985 Amendment

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

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

be obviated by applying to the court to shorten the time. See Rule 6(b).

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1999 Amendment

The reference to Rule 74(a) is stricken from the catalogue of time periods that cannot be extended by the district court. The change reflects the 1997 abrogation of Rule 74(a).

2001 Amendments

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including--with the consent of the person served--service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Changes Made After Publication and Comments

Proposed Rule 6(e) is the same as the "alternative proposal" that was published in August 1999.

2005 Amendments

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added--Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act

unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

2007 Amendment

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

2009 Amendments

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 60(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day--and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days--including intermediate Saturdays, Sundays, and legal holidays--are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method--two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period--the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996)

(collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 28 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction--that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday--no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods--*i.e.*, periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday--no earlier than Tuesday, April 22.

[Subdivision (b)(2), (c)] The times set in the former rule at 1 or 5 days have been revised to 7 or 14 days. See the Note to Rule 6.

Notes of Decisions (495)

Fed. Rules Civ. Proc. Rule 6, 28 U.S.C.A., FRCP Rule 6
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294057.1

Federal Rules of Civil Procedure Rule 7

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

Currentness

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) ***In General.*** A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 28, 1983, effective August 1, 1983; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

1946 Amendment

Note. This amendment eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a

reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, *Scope of Reply where Defendant Has Pleaded Counterclaim,* 1939, 1 Fed.Rules Serv. 672; *Fort Chartres and Ivy Landing Drainage and Levee District No. Five v. Thompson,* Ill.1945, 8 Fed.Rules Serv. 13.32, Case 1.

1963 Amendment

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

1983 Amendment

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

2007 Amendment

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

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

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

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

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

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

Notes of Decisions (163)

Fed. Rules Civ. Proc. Rule 7, 28 U.S.C.A., FRCP Rule 7
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 7.1

Rule 7.1. Disclosure Statement

Currentness

(a) Who Must File; Contents. A nongovernmental corporate party must file two copies of a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

CREDIT(S)

(Adopted April 29, 2002, effective December 1, 2002; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2002 Adoption

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. Developing experience with local disclosure practices and advances in electronic technology may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1.

Changes Made After Publication and Comment. The provisions that would require disclosure of additional information that may be required by the Judicial Conference have been deleted.

2007 Amendment

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

Fed. Rules Civ. Proc. Rule 7.1, 28 U.S.C.A., FRCP Rule 7.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 8

Rule 8. General Rules of Pleading

Currentness

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) ***In General.*** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) ***Denials--Responding to the Substance.*** A denial must fairly respond to the substance of the allegation.

(3) ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading--including the jurisdictional grounds--may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) ***Effect of Failing to Deny.*** An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;

- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense.*** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

2. This rule is, in part, [former] Equity Rule 30 (Answer--Contents--Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn. Practice Book (1934) §§ 107, 108, and 122; Conn.Gen.Stat. (1930) §§ 5508 to 5514. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 17-20.

Note to Subdivision (c). This follows substantially *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) § 242, with "surprise" omitted in this rule.

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

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

Note to Subdivision (f). A provision of like import is of frequent occurrence in the codes. Smith-Hurd Ill.Stats. ch. 110, § 157(3); 2 Minn.Stat. (Mason, 1927) § 9266; N.Y.C.P.A. (1937) § 275; 2 N.D.Comp.Laws Ann. (1913) § 7458.

1966 Amendment

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

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

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

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

2010 Amendments

Subdivision (c)(1). "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or--in most instances--in another court with jurisdiction over the creditor's claim.

Notes of Decisions (3133)

Fed. Rules Civ. Proc. Rule 8, 28 U.S.C.A., FRCP Rule 8
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 9

Rule 9. Pleading Special Matters

Currentness

(a) Capacity or Authority to Sue; Legal Existence.

(1) ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; April 11, 1997, effective December 1, 1997; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). Compare [former] Equity Rule 25 (Bill of Complaint--Contents) requiring disability to be stated; Utah Rev.Stat.Ann. (1933) § 104-13-15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn.Stat. (Mason, 1927) § 9271; N.Y.R.C.P. (1937) Rule 93; 2 N.D.Comp.Laws Ann. (1913) § 7981 et seq.

Note to Subdivision (b). See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22.

Note to Subdivision (c). The codes generally have this or a similar provision. See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 14; 2 Minn.Stat. (Mason, 1927) § 9273; N.Y.R.C.P. (1937) Rule 92; 2 N.D.Comp.Laws Ann. (1913) § 7461; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 288.

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

1966 Amendment

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

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

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

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

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

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

1968 Amendment

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

1970 Amendment

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

1987 Amendment

The amendment is technical. No substantive change is intended.

1997 Amendment

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and non-admiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal

as to the non-admiralty claim. Disposition of the non-admiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and non-admiralty claims may be interdependent. An illustration is provided by Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292 (2d Cir.1990). Claims for losses of ocean shipments were made against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty claims; instead, it refers to admiralty cases." 899 F.2d at 1297. The advantages of permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does--or does not--dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.

GAP Report on Rule 9(h). No changes have been made in the published proposal.

2006 Amendment

Rule 9(h) is amended to conform to the changed title of the Supplemental Rules.

2007 Amendment

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

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

Notes of Decisions (3681)

Fed. Rules Civ. Proc. Rule 9, 28 U.S.C.A., FRCP Rule 9
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 10

Rule 10. Form of Pleadings

Currentness

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

2007 Amendment

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (240)

Fed. Rules Civ. Proc. Rule 10, 28 U.S.C.A., FRCP Rule 10
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is

responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

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

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

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

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

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

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

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

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

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

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal,* C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

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

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

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

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

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

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

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

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

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

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

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

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing

sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

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

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

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

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

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.,* New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

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

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

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

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

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a

notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

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

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

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

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

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

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second,* § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in

similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

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

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

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

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See *Willy v. Coastal Corp.,* 503 U.S. 131 (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.,* 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

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

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

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

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

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

2007 Amendment

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

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

FEDERAL RULES DECISIONS COMMENTARIES

Collision course in federal civil discovery. Carl Tobias, 145 F.R.D. 139 (1993).

Notes of Decisions (2921)

Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., FRCP Rule 11
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in two separate documents. Notes of Decisions for subdivisions I to VII are contained in this document. For Notes of Decisions for subdivisions VIII to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 12.>

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint,

counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

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

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

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

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

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

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

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

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). 1. Compare [former] Equity Rules 12 (Issue of Subpoena--Time for Answer) and 31 (Reply--When Required--When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§ 9107, 9158; N.Y.C. P.A. (1937) § 263; N.Y.R.C.P. (1937) Rules 109-111.

2. U.S.C., Title 28, § 763 (now § 547) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. In so far as any statutes not excepted in rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, [former] § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

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

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

2. For provisions authorizing defenses to be made in the answer or reply see *English Rules Under the Judicature Act*, (The Annual Practice, 1937) O. 25, r.r. 1-4; 1 Miss.Code Ann. (1930) §§ 378, 379. Compare Equity Rule 29 (Defenses--How Presented); U.S.C.A., Title 28, [former] § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, [former] § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc., (Deering, 1937) § 433; 4 Nev.Comp.Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) § 431; 4 Nev.Comp.Laws (Hillyer, 1929) § 8598.

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

Note to Subdivision (c). Compare [former] Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare [former] Equity Rules 20 (Further and Particular Statement in Pleading May be Required) and 21 (Scandal and Impertinence); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§ 9166, 9167; N.Y.C.P.A. (1937) § 247; N.Y.C.P.A. (1937) Rules 103, 115,

116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§ 89-1033, 89-1034.

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

Note to Subdivision (h). Compare Calif.Code Civ.Proc. (Deering, 1937) § 434; 2 Minn.Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI(e). This rule continues U.S.C.A., Title 28, former § 80 [now 1359, 1447, 1919] (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C.A., Title 28, § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

1946 Amendment

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

Subdivision (b). The addition of defense (7), "failure to join an indispensable party", cures an omission in the rules which are silent as to the mode of raising such failure. See Commentary, *Manner of Raising Objection of Non-Joinder of Indispensable Party,* 1940, 2 Fed.Rules Serv. 658, and, 1942, 5 Fed.Rules Serv. 820. In one case, *United States v. Metropolitan Life Ins. Co.*, E.D.Pa.1941, 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States*, C.C.A.2, 1942, 129 F.2d 594, certiorari denied 63 S.Ct. 258, 317 U.S. 686, 87 L.Ed. 549; *Boro Hall Corp. v. General Motors Corp.,* C.C.A.2, 1942, 124 F.2d 822, certiorari denied 63 S.Ct. 436, 317 U.S. 695, 87 L.Ed. 556. See, also, *Kithcart v. Metropolitan Life Ins. Co.,* C.C.A.8, 1945, 150 F.2d 997.

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

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

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

Under group (1) are: *Boro Hall Corp. v. General Motors Corp.*, C.C.A.2, 1942, 124 F.2d 822, certiorari denied 1943, 63 S.Ct. 436, 317 U.S. 695, 87 L.Ed. 556; *Gallup v. Caldwell,* C.C.A.3, 1941, 120 F.2d 90; *Central Mexico Light & Power Co. v. Munch,* C.C.A.2, 1940, 116 F.2d 85; *National Labor Relations Board v. Montgomery Ward & Co.*, 1944, 144 F.2d 528, 79 U.S.App.D.C. 200, certiorari denied 1944, 65 S.Ct. 134, 323 U.S. 774, 89 L.Ed. 619; *Urquhart v. American-La France Foamite Corp.*, 1944, 144 F.2d 542, 79 U.S.App.D.C. 219; *Samara v. United States*, C.C.A.2, 1942, 129 F.2d 594; *Cohen v. American Window Glass Co.*, C.C.A.2, 1942, 126 F.2d 111; *Sperry Products Inc. v. Association of American Railroads,* C.C.A.2, 1942, 132 F.2d 408; *Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co.*, C.C.A.2, 1946, 157 F.2d 417; *Weeks v. Bareco Oil Co.,* C.C.A.7, 1941, 125 F.2d 84; *Carroll v. Morrison Hotel Corp.*, C.C.A.7, 1945, 149 F.2d 404; *Victory v. Manning,* C.C.A.3, 1942, 128 F.2d 415; *Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen's Association v. Southern Pacific Co.*, C.C.A.5, 1942, 131 F.2d 605; *Lucking v. Delano,* C.C.A.6, 1942, 129 F.2d 283; *San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal,* Cal.1944, 58 F.Supp. 466; *Benson v. Export Equipment Corp.,* 1945, 164 P.2d 380, 49 N.M. 356, construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co. v. Gould Pumps, Inc.*, W.D.N.Y.1946, 9 Fed.Rules Serv. 12b.33, Case 2, 5 F.R.D. 132. Cf. *Kohler v. Jacobs,* C.C.A.5, 1943, 138 F.2d 440; *Cohen v. United States*, C.C.A.8, 1942, 129 F.2d 733.

Under group (2) are: *Sparks v. England,* C.C.A.8, 1940, 113 F.2d 579; *Continental Collieries, Inc. v. Shober,* C.C.A.3, 1942, 130 F.2d 631; *Downey v. Palmer,* C.C.A.2, 1940, 114 F.2d 116; *DeLoach v. Crowley's Inc.*, C.C.A.5, 1942, 128 F.2d 378; *Leimer v. State Mutual Life Assurance Co. of Worcester, Mass.,* C.C.A.8, 1940, 108 F.2d 302; *Rossiter v. Vogel,* C.C.A.2, 1943, 134 F.2d 908, compare s.c., C.C.A.2, 1945, 148 F.2d 292; *Karl Kiefer Machine Co. v. United States Bottlers Machinery Co.*, C.C.A.7, 1940, 113 F.2d 356; *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.*, C.C.A.7, 1941, 123 F.2d 518; *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.*, C.C.A.8, 1942, 131 F.2d 419; *Publicity Bldg. Realty Corp. v. Hannegan*, C.C.A.8, 1943, 139 F.2d 583; *Dioguardi v. Durning,* C.C.A.2, 1944, 139 F.2d 774; *Package Closure Corp. v. Sealright Co., Inc.,* C.C.A.2, 1944, 141 F.2d 972; *Tahir Erk v. Glenn L. Martin Co.,* C.C.A.4, 1941, 116 F.2d 865; *Bell v. Preferred Life Assurance Society of Montgomery, Ala.*, 1943, 64 S.Ct. 5, 320 U.S. 238, 88 L.Ed. 15.

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

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

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

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

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's *Federal Practice,* 1938, Cum.Supplement, § 12.07, under "Page 657"; also, Holtzoff, *New Federal Procedure and the Courts,* 1940, 35-41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish,* E.D.Pa.1944, 8 Fed.Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling v. American Steamship Co.*, W.D.N.Y.1945, 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"--eliminated by the proposed amendment--have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co.*, W.D.Mo.1942, 3 F.R.D. 159, 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming v. Mason & Dixon Lines, Inc.*, E.D.Tenn.1941, 42 F.Supp. 230; *Kellogg Co. v. National Biscuit Co.,* D.N.J.1941, 38 F.Supp. 643; *Brown v. H. L. Green Co.,* S.D.N.Y.1943, 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen v. Standard Accident Ins. Co.,* W.D.Mo.1945, 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles v. Ohse,* D.Neb.1945, 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages v. Cohen,* E.D.N.Y.1945, 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles v. Lawrence,* D.Mass.1945, 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co. v. Hoyt,* N.D.Ohio 1945, 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles v. Jack,* D.Minn.1945, 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken, *Poole v. White,* N.D.W.Va.1941, 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles v. Gabel,* W.D.Mo.1946, 9 Fed.Rules Serv. 12e.244, Case 10. ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc.,* D.Conn.1939, 31 F.Supp. 296; *Eastman Kodak Co. v. McAuley,* S.D.N.Y.1941, 4 Fed.Rules Serv., 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp. v. Renken,* E.D.S.C.1940, 34 F.Supp. 678; *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.,* S.D.N.Y.1944, 3 F.R.D. 440; *United States v. Turner Milk Co.*, N.D.Ill.1941, 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger v. Stephan Oderwald, Inc.,* S.D.N.Y.1940, 31 F.Supp. 626; *Teplitsky v. Pennsylvania R. Co.,* N.D.Ill.1941, 38 F.Supp. 535; *Callagher v. Carroll,* E.D.N.Y.1939, 27 F.Supp. 568; *United States v. Palmer,* S.D.N.Y.1939, 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.,* S.D.N.Y.1944, 58 F.Supp. 338; Commentary, *Modes of Attacking Insufficient Defenses in the Answer,* 901, 1939, 1 Fed.Rules Serv. 669, 1940, 2 Fed.Rules Serv. 640.

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

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

Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

1963 Amendment

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

1966 Amendment

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

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

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keef v. Derounian,* 6 F.R.D. 11 (N.D.Ill.1946); *Elbinger v. Precision Metal Workers Corp.,* 18 F.R.D. 467 (E.D.Wis.1956); see also *Rensing v. Turner Aviation Corp.,* 166 F.Supp. 790 (N.D.Ill.1958); *P. Beiersdorf & Co. v. Duke Laboratories, Inc.,* 10 F.R.D. 282 (S.D.N.Y.1950); *Neset v. Christensen,* 92 F.Supp. 78 (E.D.N.Y.1950). Opposing waiver, see *Phillips v. Baker,* 121 F.2d 752 (9th Cir.1941); *Crum v. Graham,* 32 F.R.D. 173 (D.Mont.1963) (regretfully following the Phillips case); see also *Birnbaum v. Birrell,* 9 F.R.D. 72 (S.D.N.Y.1948); *Johnson v. Joseph Schlitz Brewing Co.,* 33 F.Supp. 176 (E.D.Tenn.1940); cf. *Carter v. American Bus Lines, Inc.,* 22 F.R.D. 323 (D.Neb.1958).

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

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

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

2000 Amendment

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

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an

action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report

No changes are recommended for Rule 12 as published.

2007 Amendment

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

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

2009 Amendments

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Notes of Decisions (4100)

Fed. Rules Civ. Proc. Rule 12, 28 U.S.C.A., FRCP Rule 12
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in two separate documents. Notes of Decisions for subdivisions VIII to end are contained in this document. For text of section, historical notes, references, and Notes of Decisions for subdivisions I to VII, see first document for 28 USCA Federal Rules of Civil Procedure Rule 12.>

Notes of Decisions (5987)

Fed. Rules Civ. Proc. Rule 12, 28 U.S.C.A., FRCP Rule 12
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 13

Rule 13. Counterclaim and Crossclaim

Currentness

(a) Compulsory Counterclaim.

(1) ***In General.*** A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) ***Exceptions.*** The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim--or to claim a credit--against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations in Federal Procedure* (1936), 45 Yale L.J. 393, 410 et seq.

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

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co. v. American Surety Co.*, 260 U.S. 360, 43 S.Ct. 149, 67 L.Ed. 306 (1922); *Marconi Wireless Telegraph Co. v. National Electric Signalling Co.*, 206 Fed. 295 (E.D.N.Y., 1913); Hopkins, *Federal Equity Rules* (8th ed., 1933), p. 213; Simkins, *Federal Practice* (1934), p. 663.

8. For allowance of credits against the United States see U.S.C., Title 26, §§ 1672-1673 [sec. 7442] (Suits for refunds of internal revenue taxes--limitations); U.S.C., Title 28, § 774 (now § 2406) (Suits by United States against individuals; credits), [former] § 775 (Suits under postal laws; credits); U.S.C., Title 31, § 227 [now 3728] (Offsets against judgments and claims against United States).

1946 Amendment

Note. Subdivision (a). The use of the word "filing" was inadvertent. The word "serving" conforms with subdivision (e) and with usage generally throughout the rules.

The removal of the phrase "not the subject of a pending action" and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America v. Saxe,* App.D.C.1943, 77 U.S.App.D.C. 144, 134 F.2d 16, 33-34, cert. den., 1943, 319 U.S. 745, 63 S.Ct. 1033. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

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

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

1963 Amendment

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

1966 Amendment

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

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

2009 Amendments

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered--as they should be--according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). *See 6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430 (1990).* Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Notes of Decisions (1255)

Fed. Rules Civ. Proc. Rule 13, 28 U.S.C.A., FRCP Rule 13
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 14

Rule 14. Third-Party Practice

Currentness

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

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

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

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

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

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

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

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

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

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

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

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable--either to the plaintiff or to the third-party plaintiff--for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the federal admiralty courts, and in some American state jurisdictions. See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16A, r.r. 1-

13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); 12 P.S.Pa. § 141; Wis.Stat. (1935) §§ 260.19, 260.20; N.Y.C.P.A. (1937) §§ 193(2), 211(a). Compare La.Code Pract. (Dart, 1932) §§ 378-388. For the practice in Texas as developed by judicial decision, see *Lottman v. Cuilla*, Tex.1926, 288 S.W. 123, 126. For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); *Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936)*, 45 Yale L.J. 393, 417 et seq.

Third-party impleader under the conformity act has been applied in actions at law in the Federal courts. *Lowry and Co., Inc. v. National City Bank of New York,* N.Y.1928, 28 F.2d 895; *Yellow Cab Co. of Philadelphia v. Rodgers,* C.C.A.3, 1932, 61 F.2d 729.

1946 Amendment

Note. The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink v. Holland Township,* D.N.J.1940, 31 F.Supp. 229, noted, 1940, 88 U.Pa.L.Rev. 751; *Connelly v. Bender,* E.D.Mich.1941, 36 F.Supp. 368; *Whitmire v. Partin (Milton),* E.D.Tenn.1941, 2 F.R.D. 83, 5 Fed.Rules Serv. 14a.513, Case 2; *Crim v. Lumbermen's Mutual Casualty Co.,* D.D.C.1939, 26 F.Supp. 715; *Carbola Chemical Co., Inc. v. Trundle,* S.D.N.Y.1943, 3 F.R.D. 502, 7 Fed.Rules Serv. 14a.224, Case 1; *Roadway Express, Inc. v. Automobile Ins. Co. of Hartford, Conn., (Providence Washington Ins. Co.)* N.D.Ohio 1945, 8 Fed.Rules Serv. 14a.513, Case 3. In *Delano v. Ives,* E.D.Pa.1941, 40 F.Supp. 672, the court said: ". . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink v. Holland Township, supra; Malkin v. Arundel Corp.,* D.Md.1941, 36 F.Supp. 948; also Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure,* 1941, 4 Fed.Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.,* Ga.1943, 52 F.Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie v. Prudential Ins. Co. of America, (Lorrac Real Estate Corp.),* E.D.N.Y.1941, 39 F.Supp. 305; *Johnson v. G. J. Sherrard Co., (New England Telephone & Telegraph Co.),* D.Mass.1941, 5 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 164; *Thompson v. Cranston,* W.D.N.Y.1942, 6 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 270, affirmed CCA2d, 1942, 132 F.2d 631, certiorari denied 1945, 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698; *Friend v. Middle Atlantic Transportation Co.,* C.C.A.2, 1946, 153 F.2d 778, certiorari denied 1946, 66 S.Ct. 1370, 328 U.S. 865, 90 L.Ed. 1635; *Herrington v. Jones,* E.D.La.1941, 5 Fed.Rules Serv. 14a.511, Case 2, 2 F.R.D. 108; *Banks v. Employers' Liability Assurance Corp., (Central Surety & Ins. Corp.)* W.D.Mo.1943, 7 Fed.Rules Serv. 14a.11, Case 2; *Saunders v. Baltimore & Ohio R. Co.,* S.D.W.Va.1945, 9 Fed.Rules Serv. 14a.62, Case 2; *Hull v. United States Rubber Co. (Johnson Larsen and Co.),* E.D.Mich.1945, 9 Fed.Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for Use of Trust Co. of Chicago v. Maryland Casualty Co.,* C.C.A.7, 1942, 132 F.2d 850, 853. Contra: *Sklar v. Hayes (Singer),* E.D.Pa.1941, 4 Fed.Rules Serv. 14a.511, Case 2, 1 F.R.D. 594. Discussion of the problem will be found in Commentary, *Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant,* 1942, 5 Fed.Rules Serv. 811; Commentary, *Federal Jurisdiction in Third-Party Practice,* 1943, 6 Fed.Rules Serv. 766; Holtzoff, *Some Problems Under Federal Third-Party Practice,* 1941, 3 La.L.Rev. 408, 419-420; 1 Moore's *Federal Practice,* 1938, Cum.Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted

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

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

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

1963 Amendment

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

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

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

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

1966 Amendment

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2000 Amendment

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

GAP Report

Rule B(1)(a) was modified by moving "in an in personam action" out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons "to the plaintiff for service on the defendant." A parallel change is made in Rule C(3)(b).

2006 Amendment

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).

2007 Amendment

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

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

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

2009 Amendments

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (1026)

Fed. Rules Civ. Proc. Rule 14, 28 U.S.C.A., FRCP Rule 14
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 15

Rule 15. Amended and Supplemental Pleadings

Currentness

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied

consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; amended by Pub.L. 102-198, § 11, December 9, 1991, 105 Stat.

1626; amended April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 493; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, *Code Pleading* (1928), pp. 498, 509.

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

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) § 9513; Smith-Hurd Ill.Stats. ch. 110, § 170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) for a provision for "relation back".

Note to Subdivision (d). This is an adaptation of former Equity Rule 34 (Supplemental Pleading).

1963 Amendment

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

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is

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

1966 Amendment

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

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *" *Cohn v. Federal Security Adm.,* 199 F.Supp. 884, 885 (W.D.N.Y.1961); see also *Cunningham v. United States,* 199 F.Supp. 541 (W.D.Mo.1958); *Hall v. Department of HEW,* 199 F.Supp. 833 (S.D.Tex.1960); *Sandridge v. Folsom, Secretary of HEW,* 200 F.Supp. 25 (M.D.Tenn.1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 Geo.L.J. 19, 42-43 (1964); see also *Simmons v. United States Dept. HEW,* 328 F.2d 86 (3d Cir. 1964).]

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

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

Much the same question arises in other types of actions against the government (see *Byse,* supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, *Federal Practice & Procedure* § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 *Moore's Federal Practice,* par. 15.15 (Cum.Supp.1962); Annot., *Change in Party After Statute of Limitations Has Run,* 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is

asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

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

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

Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra,* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous*

Fortune: The Case for Amending Rule 15(c) Again, 61 S.Cal.L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 86 Mich.L.Rev. 1507 (1987).

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

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

1993 Amendments

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

2007 Amendment

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

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

2009 Amendments

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).[1]

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Notes of Decisions (5372)

Footnotes

1 If the proposed amendment to Rule 15(a)(3) ... changing the time period is approved by the Judicial Conference, the following additional sentence will be added to the Committee Note: "Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading."

Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A., FRCP Rule 15
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

Currentness

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require

that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G)identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

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

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see *A Proposal for Minimizing Calendar Delay in Jury Cases* (Dec. 1936--published by the New York Law Society); *Pre-Trial Procedure and Administration,* Third Annual Report of the Judicial Council of the State of New York (1937), pages 207-243; *Report of the Commission on the Administration of Justice in New York State* (1934), pp. (288) to (290). See also *Pre-Trial Procedure in the Wayne Circuit Court,* Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63 to 75; and Sunderland, *The Theory and Practice of Pre-trial Procedure* (Dec. 1937) 36 Mich.L.Rev. 215-226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the "summons for directions", *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J.S.A. 2:27-135, 2:27-136, 2:27-160; N.J. Supreme Court Rules, 2 N.J.Misc.Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J.Misc.Rep. (1933) 955).

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

1983 Amendment

Introduction

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

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, *Pretrial Procedures More Effectively Handled,* 65 F.R.D. 475 (1974). This is especially likely to be true when

pretrial proceedings occur long before trial. At the other end of the spectrum, the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

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

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

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, *Case Management and Court Management in United States District Courts* 17, Federal Judicial Center (1977). Thus, the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

Discussion

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

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

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

A scheduling conference may be requested either by the judge, a magistrate when authorized by district court rule, or a party

within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term "judge" in subdivision (b) reflects the Advisory Committee's judgment that it is preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636(c). While personal supervision by the trial judge is preferred, the rule, in recognition of the impracticality or difficulty of complying with such a requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order, the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)-(3). As indicated in Rule 16(b)(4)-(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the same time, at least when a scheduling conference is held.

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

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

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

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

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

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited to the individual case than a standard order, without taking the time that would be required by a formal conference.

Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves

> to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

Report of the National Commission for the Review of Antitrust Laws and Procedures 28 (1979).

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

Subdivision (c); Subjects to be Discussed at Pretrial Conferences. This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, *Case Management and Court Management in United States District Courts,* 39 Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

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

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

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

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

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's *Federal Practice* ¶ 16.17; 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences

mandatory because they would be a waste of time in many cases. See Flanders, *Case Management and Court Management in the United States District Courts,* 39 Federal Judicial Center (1977). Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

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

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in *Green, Marks & Olson, Settling Large Case Litigation: An Alternative Approach,* 11 Loyola of L.A.L.Rev. 493 (1978).

Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts,* 4 Just.Sys.J. 135 (1976). Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular techniques have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the *Manual for Complex Litigation*.

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

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

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

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

Subdivision (e); Pretrial Orders. Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1521-30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

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

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

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

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

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, *cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65-67, 80-84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reenforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

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

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

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

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

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

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

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

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

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

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651-58; Section 104(b)(2), Pub.L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

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

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

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

2006 Amendment

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

2007 Amendment

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

only.

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Notes of Decisions (854)

Fed. Rules Civ. Proc. Rule 16, 28 U.S.C.A., FRCP Rule 16
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294044.1

Federal Rules of Civil Procedure Rule 17

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

Currentness

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(3) ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 25, 1988, effective August 1, 1988; amended by Pub.L. 100-690, Title VII, § 7049, November 18, 1988, 102 Stat. 4401 (although amendment by Pub.L. 100-690 could not be executed due to prior amendment by Court order which made the same change effective August 1, 1988); April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from [former] Equity Rule 37 (Parties Generally--Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A., (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89-501, 89-502, 89-503; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 8. See, also Equity Rule 41 (Suit to Execute Trusts of Will--Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b [see now 40 U.S.C.A. § 3133(b)] (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing"); and U.S.C., Title 25, § 201 (Penalties under laws relating to Indians--how recovered). Compare U.S.C., Title 26, Int.Rev.Code [1939], § 3745(c) [former § 1645(c)] (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). For capacity see generally Clark and Moore, *New Federal Civil Procedure*--II. Pleadings and Parties, 44 Yale L.J. 1291, 1312-1317 (1935) and specifically *Coppedge v. Clinton,* 72 F.2d 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co. v. Automobile Club of America,* 225 U.S. 489, 32 S.Ct. 711, 56 L.Ed. 1177, Ann.Cas.1914A, 699 (1912) (corporation); *Puerto Rico v. Russell & Co.,* 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933) (unincorporated assn.); *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League v. United States,* 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933). See note to Rule 23, clause (1).

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

1946 Amendment

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

1948 Amendment

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

1966 Amendment

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

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

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed--in both maritime and nonmaritime cases. See *Levinson v. Deupree,* 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs,* 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well,

having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice--in short, to codify in broad terms the salutary principle of *Levinson v. Deupree,* 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs,* 325 F.2d 613 (D.C.Cir. 1963).

1987 Amendment

The amendments are technical. No substantive change is intended.

1988 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendment

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

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Notes of Decisions (1107)

Fed. Rules Civ. Proc. Rule 17, 28 U.S.C.A., FRCP Rule 17
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 18

Rule 18. Joinder of Claims

Currentness

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill.Rev.Stat. (1937) ch. 110, § 168; N.J.S.A. 2:27-37, as modified by N.J.Sup.Ct.Rules, Rule 21, 2 N.J.Misc. 1208 (1924); N.Y.C.P.A. (1937) § 258 as amended by Laws of 1935, ch. 339.

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

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

Note to Subdivision (b). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in [former] Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (*Braun v. American Laundry Mach. Co.*, 56 F.2d 197 (S.D.N.Y. 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act,* 46 Harv.L.Rev. 404, 444 (1933).

1966 Amendment

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

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

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules,* 36 Minn.L.Rev. 580, 605-06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 109; see also id. at 198 n. 60.4; cf. 3 Moore's *Federal Practice,* supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, § 533.1; Wright, supra, 36 Minn.L.Rev. at 604-11; *Developments in the Law--Multiparty Litigation in the Federal Courts,* 71 Harv. 874, 970-71 (1958); Commentary, *Relation Between Joinder of Parties and Joinder of Claims,* 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the *Christianson* case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the *Christianson* decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See *Noland Co., Inc. v. Graver Tank & Mfg. Co.,* 301 F.2d 43,

49-51 (4th Cir.1962); but cf. *C. W. Humphrey Co. v. Security Alum. Co.,* 31 F.R.D. 41 (E.D.Mich.1962). This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

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

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

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

Notes of Decisions (192)

Fed. Rules Civ. Proc. Rule 18, 28 U.S.C.A., FRCP Rule 18
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 19

Rule 19. Required Joinder of Parties

Currentness

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be

dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

Note to Subdivision (c). For the substance of this rule see the fourth subdivision of [former] Equity Rule 25 (Bill of Complaint--Contents).

1966 Amendment

General Considerations

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

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

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

Textual defects.--(1) The expression "persons * * * who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). See *United States v. Washington Inst. of Tech., Inc.,* 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester v. City of Newark,* 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, *Compulsory Joinder of Parties in Civil Actions,* 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between the parties already joined. See *Samuel Goldwyn, Inc. v. United Artists Corp.,* 113 F.2d 703, 707 (3d Cir. 1940); *McArthur v. Rosenbaum Co. of Pittsburgh,* 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote v. Texas Pac. Coal & Oil Co.,* 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, supra, 55 Mich.L.Rev. at 332-34.

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

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of *Shields v. Barrow,* 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis.Doc.1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann.Rep., Legis.Doc.1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, *Indispensable Parties in the Federal Courts,* 65 Harv.L.Rev. 1050 (1952); *Developments in the Law--Multiparty Litigation in the Federal Courts,* 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen.Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, § 1001 (effective Sept. 1, 1963).

The Amended Rule

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

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests--"joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's *Federal Practice* 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

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

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

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

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers,* 203 F.2d 72 (D.C.Cir.1953); *Miller & Lux, Inc. v. Nickel,* 141 F.Supp. 41 (N.D.Calif.1956). On the use of "protective provisions," see *Roos v. Texas Co.,* supra; *Atwood v. Rhode Island Hosp. Trust Co.,* 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf v. Fidelity Gas Co.,* 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co. v. Labor Board,* 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second

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

The third factor--whether an "adequate" judgment can be rendered in the absence of a given person--calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese v. General Steel Castings Corp.,* 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald v. Haynes,* 241 F.2d 417, 420 (3d Cir. 1957); *Fouke v. Schenewerk,* 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield v. Marks,* 190 F.2d 178 (5th Cir. 1951).

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

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson v. Kirkland,* 290 F.2d 440, 446-47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy v. Pedreiro,* 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87-748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

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

Notes of Decisions (2299)

Fed. Rules Civ. Proc. Rule 19, 28 U.S.C.A., FRCP Rule 19
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 20

Rule 20. Permissive Joinder of Parties

Currentness

(a) Persons Who May Join or Be Joined.

(1) ***Plaintiffs.*** Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) ***Defendants.*** Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders--including an order for separate trials--to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

Note to Subdivision (b). This is derived from *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r.r. 1 and 5.

1966 Amendment

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

Notes of Decisions (576)

Fed. Rules Civ. Proc. Rule 20, 28 U.S.C.A., FRCP Rule 20
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 21

Rule 21. Misjoinder and Nonjoinder of Parties

Currentness

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

2007 Amendment

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

Notes of Decisions (439)

Fed. Rules Civ. Proc. Rule 21, 28 U.S.C.A., FRCP Rule 21
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 22

Rule 22. Interpleader

Currentness

(a) Grounds.

(1) ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements--and does not limit--the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to--and does not supersede or limit--the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of

interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.,* 22 F.Supp. 326 (D.C.Md.1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

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

This rule substantially continues such statutory provisions as U.S.C., Title 38, § 445 [now 784] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chaffee, *The Federal Interpleader Act of 1936: I and II* (1936), 45 Yale L.J. 963, 1161.

1948 Amendment

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

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendment

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

Notes of Decisions (334)

Fed. Rules Civ. Proc. Rule 22, 28 U.S.C.A., FRCP Rule 22
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 23.>

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the

interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

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

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

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

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

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the

action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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

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

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

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

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

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

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

Clause (3). See *Everglades Drainage League v. Napoleon Broward Drainage Dist*., 253 Fed. 246 (D.C.Fla., 1918); *Gramling v. Maxwell*, 52 F.2d 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford v. Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits,* 30 Mich.L.Rev. 878 (1932).

Note to Subdivision (b). This is [former] Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

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

Supplementary Note

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

As a result of the decision in *Erie R. Co. v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory

Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

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

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

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

Some other cases dealing with [former] Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v. Tompkins* are *Dimpfel v. Ohio & Miss. R.R.*, 1884, 3 S.Ct. 573, 110 U.S. 209, 28 L.Ed. 121; *Illinois Central R. Co. v. Adams*, 1901, 21 S.Ct. 251, 180 U.S. 28, 34, 45L.Ed. 410; *Venner v. Great Northern Ry.,* 1908, 28 S.Ct. 328, 209 U.S. 24, 30, 52 L.Ed. 666; *Jacobson v. General Motors Corp.*, S.D.N.Y.1938, 22 F.Supp. 255, 257. These cases generally treat *Hawes v. Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

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

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

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

In *Piccard v. Sperry Corporation,* S.D.N.Y.1941, 36 F.Supp. 1006, 1009-10, affirmed without opinion, C.C.A.2d 1941, 120 F.2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v. Tompkins.* In

New York v. Guaranty Trust Co. of New York, C.C.A.2, 1944, 143 F.2d 503, rev'd on other grounds, 1945, 65 S.Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural," citing the *Piccard* and other cases.

Some other federal decisions since 1938 touch the question.

In *Gallup v. Caldwell,* C.C.A.3, 1941, 120 F.2d 90, 95 arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

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

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

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

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

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

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

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

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v. Merrill,* supra, it has been held that even though the statute is procedural in nature--a matter not definitely decided--the Legislature evinced no intent that the provisions should apply to actions pending when it became effective. *Shielcrawt v. Moffett,* supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v. Atkinson,* Sup.Ct.1944, 182 Misc. 675, 49 N.Y.S.2d 703 (constitutional); *Citron v. Mangel Stores Corp.,* Sup.Ct.1944, 50 N.Y.S.2d 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of § 61-b of the New York General Corporation Law,* 1945, 54 Yale L.J. 352.

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

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

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

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

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

1966 Amendment

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur,* 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts,* 71 Harv. L.Rev. 874, 931 (1958);

Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veterans' Coop. H. Assn.,* 13 F.R.D. 11 (D.D.C.1952); *Shipley v. Pittsburgh & L.E.R. Co.,* 70 F.Supp. 870 (W.D.Pa.1947); *Deckert v. Independence Shares Corp.,* 27 F.Supp. 763 (E.D.Pa.1939), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert,* 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v. Reed,* 180 F.2d 991 (6th Cir.1950); *Wilson v. City of Paducah,* 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co. v. Monticello State Bank,* 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.,* 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); *United States v. American Optical Co.,* 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers' & C. Assn. v. Philad Co.,* 34 F.Supp. 264 (D.Del.1940); 41 F.Supp. 701 (D.Del.1940), aff'd mem., 129 F.2d 1020 (3d Cir.1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers Sec. Corp.,* 17 F.R.D. 245 (E.D.Pa.1954), aff'd 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.,* 81 F.Supp. 957 (D.Del.1949); *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner,* 145 F.2d 316, 320 (3d Cir.1944), cert. denied, 325 U.S. 867 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis,* [1901] A.C. 1; *Sheffield Waterworks v. Yeomans,* L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden,* 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's *Federal Practice,* pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir.1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. *P. W. Husserl, Inc. v. Newman,* 25 F.R.D. 264 (S.D.N.Y.1960); *Athas v. Day,* 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen v. Black,* 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but cf. *Wagner v. Kemper,* 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

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

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

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L.Rev. 433, 458-59

(1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.,* 183 F.2d 558, 560 (3d Cir.1950); *Zachman v. Erwin,* 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc. v. Warren-Connelly Co., Inc.,* 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

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

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921); *Waybright v. Columbian Mut. Life Ins. Co.,* 30 F.Supp. 885 (W.D.Tenn.1939); cf. *Smith v. Swormstedt,* 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.,* 17 F.R.D. 245 (E.D.Pa.1954), aff'd, 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.,* 81 F.Supp. 957 (D.Del.1949); *Zahn v. Transamerica Corp.,* 162 F.2d 36 (3d Cir.1947); *Speed v. Transamerica Corp.,* 100 F.Supp. 461 (D.Del.1951); *Sobel v. Whittier Corp.,* 95 F.Supp. 643 (E.D.Mich.1951), app. dism., 195 F.2d 361 (6th Cir.1952); *Goldberg v. Whittier Corp.,* 111 F.Supp. 382 (E.D.Mich.1953); *Dann v. Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir.1961); *Edgerton v. Armour & Co.,* 94 F.Supp. 549 (S.D.Calif.1950); *Ames v. Mengel Co.,* 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v. Chicago T. & T. Co.,* 128 F.2d

245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank,* 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.,* 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham,* 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v. Bennett & Armour,* 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco v. Market Street Ry.,* 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v. Paramount Pictures, Inc.,* 66 F.Supp. 323, 341-46 (S.D.N.Y.1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

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

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

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.,* 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y.,* 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Britannica,* 199 F.2d 295 (7th Cir. 1952); *Sturgeon v. Great Lakes Steel Corp.,* 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States,* 111 F.Supp. 80 (D.N.J.1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. *Weeks v. Bareco Oil Co.,* 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busch, Inc.,* 194 F.2d 737 (7th Cir. 1952); *Hess v. Anderson, Clayton & Co.,* 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.,* 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Dravo Corp.,* 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought.

Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

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

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

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

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

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

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for

themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); *York v. Guaranty Trust Co.,* 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); *Pentland v. Dravo Corp.,* 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.,* 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.,* 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp.,* 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver v. Cudahy Packing Co.,* 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law,* supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v. Hercules Powder Co.,* 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram v. San Joaquin Cotton Oil Co.,* 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

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

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.,* 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks v. Bareco Oil Co.,* 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.,* 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice

to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee,* 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); cf. *Dickinson v. Burnham,* 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elderd,* 209 F.2d 247, 249 (2d Cir. 1954); *Gart v. Cole,* 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle v. Smith,* 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.,* 201 F.Supp. 934 (D.Mass.1962); *Hormel v. United States,* 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

1987 Amendment

The amendments are technical. No substantive change is intended.

1998 Amendments

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1291(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion

and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probably benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

2003 Amendments

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is

appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice--including an opportunity to request exclusion--must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority--already established in part by Rule 23(d)(2)--to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by

subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be--and at times was--read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action--such as filing claims--to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions,* 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation--that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the

instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in

actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron,* 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to

the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties--for example, nonsettling defendants--may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

2007 Amendment

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

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

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

2009 Amendments

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (386)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in two separate documents. Notes of Decisions for subdivisions III to end are contained in this document. For text of section, historical notes, references, and Notes of Decisions for subdivisions I and II, see first document for 28 USCA Federal Rules of Civil Procedure Rule 23.>

Notes of Decisions (9954)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 23.1

Rule 23.1. Derivative Actions

Currentness

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

CREDIT(S)

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(Adopted February 28, 1966, effective July 1, 1966; amended March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1966 Addition

A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's *Federal Practice,* par. 23.08 (2d ed. 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

Notes of Decisions (868)

Fed. Rules Civ. Proc. Rule 23.1, 28 U.S.C.A., FRCP Rule 23.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 23.2

Rule 23.2. Actions Relating to Unincorporated Associations

Currentness

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

CREDIT(S)

(Adopted February 28, 1966, effective July 1, 1966; amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1966 Addition

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, *Pleading and Procedure: State and Federal* 718 (1962); 3 Moore's *Federal Practice,* par. 23.08 (2d ed. 1963); Story, J. in *West v. Randall,* 29 Fed.Cas. 718, 722-23, No. 17,424 (C.C.D.R.I.1820); and, for examples, *Gibbs v. Buck,* 307 U.S. 66 (1939); *Tunstall v. Brotherhood of Locomotive F. & E.,* 148 F.2d 403 (4th Cir. 1945); *Oskoian v. Canuel,* 269 F.2d 311 (1st Cir. 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

2007 Amendment

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

Notes of Decisions (148)

Fed. Rules Civ. Proc. Rule 23.2, 28 U.S.C.A., FRCP Rule 23.2

Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

Currentness

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U.S.C., Title 28 former sections:

45a [now 2323] (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

48 [now 2322] (Suits to be against United States; intervention by United States)

401 [now 2403] (Intervention by United States; constitutionality of Federal statute)

U.S.C., Title 40:

276a-2(b) [now 3162(a)(2)] (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of [former] Equity Rule 37 (Parties Generally--Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, *Federal Intervention: I The Right to Intervene and Reorganization* (1936), 45 Yale L.J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen.Code Ann. (Page, 1926) § 11263; Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1

Colo.Stat.Ann. (1935) Code Civ.Proc. § 22; La.Code Pract. (Dart, 1932) Arts. 389-394; Utah Rev.Stat.Ann. (1933) § 104-3-24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J.A. (1925) §§ 181, 182, 183(2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.,* (1912) 2 Ch. 497 (receivership); *Wilson v. Church,* 9 Ch.D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler,* 142 L.T.Jo. 94 (Ch.1916), *Vavasseur v. Krupp,* 9 Ch.D. 351 (1878) (persons out of the jurisdiction).

1946 Amendment

Note. Subdivision (a). The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency--such as the Secretary of the Treasury--but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (b). The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see *Matter of Bender Body Co.,* Ref. Ohio 1941, 47 F.Supp. 224, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission v. United States Realty & Improvement Co.,* 1940, 310 U.S. 434, 60 S.Ct. 1044, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission v. Long Island Lighting Co.,* C.C.A.2d 1945, 148 F.2d 252, judgment vacated as moot and case remanded with direction to dismiss complaint, 1945, 325 U.S. 833, 65 S.Ct. 1085. For discussion see Commentary, *Nature of Permissive Intervention Under Rule 24b,* 1940, 3 Fed.Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts,* 1940, 50 Yale L.J. 65.

Regarding the construction of subdivision (b)(2), see *Allen Calculators, Inc. v. National Cash Register Co.,* 1944, 64 S.Ct. 905, 322 U.S. 137, 88 L.Ed. 1188.

1948 Amendment

The amendment effective Oct. 20, 1949, substituted the reference to "Title 28, U.S.C.A. § 2403" at the end of subdivision (c) for the reference to "the Act of August 24, 1937, c. 754, § 1."

1963 Amendment

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

1966 Amendment

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision.

Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action." 4 Moore's *Federal Practice,* par. 24.09[3], at 55 (2d ed. 1962), and see, e.g., *Formulabs, Inc. v. Hartley Pen Co.,* 275 F.2d 52 (9th Cir.1960). This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, *Pleading and Procedure: State and Federal* 749-50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this created difficulties with intervention in class actions. If the "bound" language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See *Hansberry v. Lee,* 311 U.S. 32 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be "bound" by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961); cf. *Sutphen Estates, Inc. v. United States,* 342 U.S. 19 (1951). This reasoning might be linguistically justified by original Rule 24(a)(2); but it could lead to poor results. Compare the discussion in *International M. & I. Corp. v. Von Clemm,* 301 F.2d 857 (2d Cir.1962); *Atlantic Refining Co. v. Standard Oil Co.,* 304 F.2d 387 (D.C.Cir.1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Crop. v. Von Clemm,* and *Atlantic Refining Co. v. Standard Oil Co.,* both supra; *Wolpe v. Poretsky,* 144 F.2d 505 (D.C.Cir.1944), cert. denied, 323 U.S. 777 (1944); cf. *Ford Motor Co. v. Bisanz Bros.,* 249 F.2d 22 (8th Cir.1957); and

generally, Annot., 84 A.L.R.2d 1412 (1961).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

2006 Amendment

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. § 2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn into question.

2007 Amendment

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

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

Notes of Decisions (2311)

Fed. Rules Civ. Proc. Rule 24, 28 U.S.C.A., FRCP Rule 24
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 25

Rule 25. Substitution of Parties

Currentness

(a) Death.

(1) ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; April 17, 1961, effective July 19, 1961; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). 1. The first paragraph of this rule is based upon [former] Equity Rule 45 (Death of Party--Revivor) and U.S.C., Title 28, former § 778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81(b). Paragraph two states the content of U.S.C., Title 28, former § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 17, r.r. 1-10.

2. This rule modifies U.S.C., Title 28, [former] §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.), in so far as they differ from it.

Note to Subdivisions (b) and (c). These are a combination and adaptation of N.Y.C.P.A. (1937) § 83 and Calif.Code Civ.Proc. (1937) § 385; see also 4 Nev.Comp.Laws (Hillyer, 1929) § 8561.

Note to Subdivision (d). With the first and last sentences compare U.S.C.A., Title 28, former § 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare *Ex parte La Prade,* 1933, 53 S.Ct. 682, 289 U.S. 444, 77 L.Ed. 1311.

1948 Amendment

The amendment effective October 19, 1949, inserted the words, "the Canal Zone, a territory, an insular possession," in the first sentence of subdivision (d), and, in the same sentence, after the phrase "or other governmental agency," deleted the words, "or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), formerly section 780 of this title."

1961 Amendment

Subdivision (d)(1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 Moore's *Federal Practice* ¶25.01[7] (2d ed. 1950); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee,* 7 Vand.L.Rev. 521, 529 (1954); *Developments in the Law*--*Remedies Against the United States and Its Officials,* 70 Harv.L.Rev. 827, 931-34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder v. Buck,* 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, "makes a trap for unsuspecting litigants which seems unworthy of a great government." *Vibra Brush Corp. v. Schaffer,* 256 F.2d 681, 684 (2d Cir.1958). Although courts have on occasion found means of undercutting the rule, e.g. *Acheson v. Furusho,* 212 F.2d 284 (9th Cir.1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought),

it has operated harshly in many instances, e.g. *Snyder v. Buck,* supra; *Poindexter v. Folsom,* 242 F.2d 516 (3d Cir.1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term "public officer" is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, cf. *Philadelphia Co. v. Stimson,* 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, cf. *Ex parte Young,* 209 U.S. 123 (1908); *Ex parte La Prade,* 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. Cf. *Land v. Dollar,* 330 U.S. 731 (1947); *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr v. Matteo,* 360 U.S. 564 (1959); *Howard v. Lyons,* 360 U.S. 593 (1959); *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir.1949), cert. denied, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi v. Granger,* 16 F.R.D. 517 (W.D.Pa.1955), 28 U.S.C. § 2006, 4 Moore, supra, ¶25.05, p. 531; but see 28 U.S.C. § 1346(a)(1), authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit will remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade,* supra; *Allen v. Regents of the University System,* 304 U.S. 439 (1938); *McGrath v. National Assn. of Mfgrs.,* 344 U.S. 804 (1952); *Danenberg v. Cohen,* 213 F.2d 944 (7th Cir.1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and

helping to eliminate concern with the problem of substitution. If for any reason it seems desirable to add the individual's name, this may be done upon motion or on the court's initiative; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the officer or title rather than the officeholder, see *Annot.,* 102 A.L.R. 943, 948-52; *Comment,* 50 Mich.L.Rev. 443, 450 (1952); cf. 26 U.S.C. § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, supra, ¶25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

1963 Amendment

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, e.g., *Anderson v. Yungkau,* 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); *Iovino v. Waterson,* 274 F.2d 41 (1959), cert. denied, *Carlin v. Sovino,* 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); *Perry v. Allen,* 239 F.2d 107 (5th Cir.1956); *Starnes v. Pennsylvania R.R.,* 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir.1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed.2d 612 (1962); *Zdanok v. Glidden Co.,* 28 F.R.D. 346 (S.D.N.Y.1961). See also 4 Moore's *Federal Practice* ¶25.01[9] (Supp.1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 621, at 420-21 (Wright ed.1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by means of a suggestion of death upon the record, i.e. service of a statement of the fact of the death. Cf. Ill.Ann.Stat., c. 110, § 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("the court may order") it may be denied by the court in the exercise of a sound discretion if made long after the death--as can occur if the suggestion of death is not made or is delayed--and circumstances have arisen rendering it unfair to allow substitution. Cf. *Anderson v. Yungkau,* supra, 329 U.S. at 485, 486, 67 S.Ct. at 430, 431, 91 L.Ed. 436, where it was noted under the present rule that settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

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

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

Notes of Decisions (429)

Fed. Rules Civ. Proc. Rule 25, 28 U.S.C.A., FRCP Rule 25
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294046.1

Federal Rules of Civil Procedure T. V, Refs & Annos

Currentness

ADVISORY COMMITTEE'S EXPLANATORY STATEMENT CONCERNING 1970 AMENDMENTS TO DISCOVERY RULES

This statement is intended to serve as a general introduction to the amendments of Rules 26-37, concerning discovery, as well as related amendments of other rules. A separate note of customary scope is appended to amendments proposed for each rule. This statement provides a framework for the consideration of individual rule changes.

Changes in the Discovery Rules

The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These amendments make substantial changes in the discovery rules. Those summarized here are among the more important changes.

Scope of Discovery. New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of "trial preparation" materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a)).

Mechanics of Discovery. A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule 26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2) Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon

or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below) finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be examined in the privacy of his person was recently stressed by the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The court emphasized the trial judge's responsibility to assure that the medical examination was justified, particularly as to its scope.

Rearrangement of Rules. A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement and the details are set out in a table at the end of this statement.

Optional Procedures. In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the deposition of a corporation or other organization (Rule 30(b)(6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

Other Changes. This summary of changes is by no means exhaustive. Various changes have been made in order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule.

A Field Survey of Discovery Practice

Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment. Since discovery is in large measure extra-judicial, however, even these disputes may be enlightened by a study of discovery "in the field." And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases.

The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report to the Committee entitled "Field Survey of Federal Pretrial Discovery" (hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

Rearrangement of the Discovery Rules

The present discovery rules are structured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out following this statement.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrificed. Revision of treatises and other reference works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No.	New Rule No.
26(a)	30(a), 31(a)
26(c)	30(c)
26(d)	32(a)
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

Fed. Rules Civ. Proc. T. V, Refs & Annos, 28 U.S.C.A., FRCP T. V, Refs & Annos
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

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

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

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

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

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

(ii) a forfeiture action in rem arising from a federal statute;

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

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

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

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

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

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703,

or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

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

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

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

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal

Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) ***Trial Preparation: Materials*****.**

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts*****.**

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

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

(A) forbidding the disclosure or discovery;

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

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

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

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

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

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

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

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

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

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

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

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

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

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

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

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

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on

a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

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

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

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

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

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

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643

(Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606(8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61 to 67; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse,* with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn.Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the

taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo.Rev.Stat.Ann.1939, § 1917; 2 Burns' Ind.Stat.Ann.1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.,* D.Conn.1939, 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.,* supra; *Mahler v. Pennsylvania R. Co.,* supra; *Bloomer v. Sirian Lamp Co.,* D.Del.1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rosseau v. Langley,* N.Y.1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co. v. Socony-Vacuum Co.,* E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino v. Jones Store Co.,* W.D.Mo.1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.,* E.D.N.Y.1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. *See Maryland for use of Montvila v. Pan-American Bus Lines, Inc.,* D.Md.1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. "Italia," Societa Anonima Di Navigazione,* E.D.N.Y.1940, 31 F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America,* S.D.N.Y.1939, 29 F.Supp. 504; *Colpak v. Hetterick,* E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.,* E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York,* S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman,* D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.,* supra; *Stevenson v. Melady,* S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.,* supra; *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York,* S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.,* E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.,* D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.,* supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.,* D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.,* E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500,* N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer,* C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse,* for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.,* 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty,* 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle,* 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules,* 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning,* 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender,* 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage,* 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits,* 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g., Connecticut Mutual Life Ins. Co. v. Shields,* 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g., Lauer v. Tankrederi,* 39 F.R.D. 334 (E.D.Pa.1966).

As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g., Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-products. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder,* 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.,* 216 F.2d 501 (7th Cir. 1954); *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham,* 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR,* 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.,* 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker,* 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I. & Pac. RR,* 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett v. L. R. Ryan, Inc.,* 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.,* 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.,* 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Alltmont v. United States,* 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman*

applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell,* 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.,* 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States,* 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder,* 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g., Safeway Stores, Inc. v. Reynolds,* 176 F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.,* 19 F.R.D. 144 (W.D.Pa.1956); with *e.g., New York Central R.R. v. Carr,* 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.,* 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith v. Central Linen Service Co.,* 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.,* 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery,* 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States v. Nysco Laboratories, Inc.,* 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America,* 7 F.R.D. 425 (N.D.Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land,* 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts,* 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy--and often fruitless--cross-examination during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.,* 41 F.R.D. 234 (W.D.Tex.1966); *United*

States v. 23.76 Acres, 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.,* 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g., United States v. Certain Parcels of Land,* 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres,* 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio,* 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure,* 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay,* 372 F.2d 174, 176-177 (5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g., United States v. 23.76 Acres of Land,* 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert

be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. E.g., *Lewis v. United Air Lines Transp. Corp.,* 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.,* 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.,* 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g., Covey Oil Co. v. Continental Oil Co.,* 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.,* 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery,* 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice.

Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g., E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.,* 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g., Kaeppler v. James H. Matthews & Co.,* 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.,* 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, *Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment,* 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim,* 46 Corn.L.Q. 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure,* 11 Fed.B.J. 289, 296-297 (1951); *Developments in the Law-Discovery,* 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules,* 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of

New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.,* E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g., Chenault v. Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.,* 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course

make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery,* Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules,* 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando,* 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.,* 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson,* 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.,* 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute,* 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g., Apco Oil Co. v. Certified Transp., Inc.,* 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a

deterrent." *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 *U.Pitt.L.Rev. 703, 721-23 (1989).*

The rule is based upon the experience of district courts that have required disclosure of some of this information through

local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement *[sic]* or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases

involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a

party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.,* a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at

trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date

approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within

120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.,* bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.,* government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.,* actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform

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

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

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques,* 175 F.R.D. 62, 98 (1997).

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

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

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

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

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

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

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

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

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

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

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

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference

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

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

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

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

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

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

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

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

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

GAP Report

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

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

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice*, *supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

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

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined

according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

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

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

GAP Report

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

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

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

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference

requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

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

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

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

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

GAP Report

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

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating,

retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the

likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during

a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the

application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have

actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called "clawback agreements"-- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

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

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

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

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

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

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

words are deleted to reflect the actual meaning of the present rule.

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

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

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendments

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development,

foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by

Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Notes of Decisions (1382)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions IV to end are contained in this document. For text of section, historical notes, references, and Notes of Decisions for subdivisions I to III, see first document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

Notes of Decisions (4551)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 27

Rule 27. Depositions to Perpetuate Testimony

Currentness

(a) Before an Action Is Filed.

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

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

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

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

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

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

(2) ***Notice and Service.*** At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) ***In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A)the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 1, 1971, effective July 1, 1971; March 2, 1987, effective August 1, 1987; April 25, 2005, effective December 1, 2005; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California,* 1934, 54 S.Ct. 735, 292 U.S. 341, 78 L.Ed. 1298; *Todd Engineering Dry Dock and Repair Co. v. United States,* C.C.A.5, 1929, 32 F.2d 734; *Hall v. Stout,* 4 Del.Ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§ 666 to 670; Calif.Code Civ.Proc. (Deering, 1937) 2083-2089; Smith-Hurd Ill.Stats. c. 51, §§ 39 to 46; Iowa Code (1935) §§ 11400 to 11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, §§ 46 to 63; N.Y.C.P.A. (1937) § 295; Ohio Gen.Code Ann. (Throckmorton, 1936) §§ 12216 to 12222; Va.Code Ann. (Michie, 1936) § 6235; Wis.Stat. (1935) §§ 326.27 to 326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b). This follows the practice approved in *Richter v. Union Trust Co.,* 1885, 5 S.Ct. 1162, 115 U.S. 55, 29 L.Ed. 345, by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c). This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, [former] § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.

1946 Amendment

Note. Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

1948 Amendment

The amendment effective October 1949, substituted the words “United States district court” in subdivision (a)(1) and (4) for “district court of the United States.”

1971 Amendment

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

1987 Amendment

The amendments are technical. No substantive change is intended.

2005 Amendment

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions.

2007 Amendment

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

2009 Amendments

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Notes of Decisions (100)

Fed. Rules Civ. Proc. Rule 27, 28 U.S.C.A., FRCP Rule 27
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 28

Rule 28. Persons Before Whom Depositions May Be Taken

Currentness

(a) Within the United States.

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

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

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

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

(b) In a Foreign Country.

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

(A) under an applicable treaty or convention;

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

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

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

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

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

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

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

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

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

In effect this rule is substantially the same as U.S.C., Title 28, [former] § 639 (Depositions *de bene esse*; when and where taken; notice). U.S.C., Title 28, [former] § 642 (Depositions, acknowledgments, and affidavits taken by notaries public) does not conflict with subdivision (a).

1946 Amendments

Note. The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co. v. Columbian Button & Fastener Co.,* C.C.N.D.N.Y.1898, 85 Fed. 54; *Mathieson Alkali Works v. Arnold, Hoffman & Co.,* C.C.A.1, 1929, 31 F.2d 1.

1963 Amendments

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally *Symposium, Letters Rogatory* (Grossman ed. 1956); Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory,* Proc.A.B.A., Sec.Int'l & Comp.L. 37 (1959); Heilpern, *Procuring Evidence Abroad,* 14 Tul.L.Rev. 29 (1939); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 Yale L.J. 515, 526-29 (1953); Smit, *International Aspects of Federal Civil Procedure,* 61 Colum.L.Rev. 1031, 1056-58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., *United States v. Matles,* 154 F.Supp. 574 (E.D.N.Y.1957); *The Edmund Fanning,* 89 F.Supp. 282 (E.D.N.Y.1950); *Branyan v. Koninklijke Luchtvaart Maatschappij,* 13 F.R.D. 425 (S.D.N.Y.1953). See also *Ali Akber Kiachif v. Philco International Corp.,* 10 F.R.D. 277 (S.D.N.Y.1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States v. Paraffin Wax,* 2255 Bags, 23 F.R.D. 289 (E.D.N.Y.1959). In many noncommon-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See *Jones, supra,* at 530-32; *Doyle, supra,* at 39-41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See *The Mandu,* 11 F.Supp. 845 (E.D.N.Y.1935). But *cf. Nelson v. United States,* 17 Fed.Cas. 1340 (No. 10,116) (C.C.D.Pa.1816); *Winthrop v. Union Ins. Co.,* 30 Fed.Cas. 376 (No. 17901) (C.C.D.Pa.1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of

the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, *cf. Uebersee Finanz-Korporation, A.G. v. Brownell,* 121 F.Supp. 420 (D.D.C.1954); *Danisch v. Guardian Life Ins. Co.,* 19 F.R.D. 235 (S.D.N.Y.1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 *Moore's Federal Practice* ¶¶28.05-28.08 (2d ed. 1950).

1980 Amendments

The amendments are clarifying.

1987 Amendments

The amendment is technical. No substantive change is intended.

1993 Amendments

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see *Société Nationale Industrielle Aérospatiale v. United States District Court,* 482 U.S. 522 (1987).

The term "letter of request" has been substituted in the rule for the term "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

2007 Amendment

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

Notes of Decisions (37)

Fed. Rules Civ. Proc. Rule 28, 28 U.S.C.A., FRCP Rule 28

Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 29

Rule 29. Stipulations About Discovery Procedure

Currentness

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified--in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified--but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

CREDIT(S)

(Amended March 30, 1970, effective July 1, 1970; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1970 Amendment

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

1993 Amendments

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special

motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

2007 Amendment

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

Notes of Decisions (7)

Fed. Rules Civ. Proc. Rule 29, 28 U.S.C.A., FRCP Rule 29
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 30

Rule 30. Depositions by Oral Examination

Currentness

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) ***Method of Recording.***

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) ***By Remote Means.*** The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) ***Officer's Duties.***

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v)the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

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

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

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

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

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

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

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

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

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

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

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

(e) Review by the Witness; Changes.

(1) ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 30, 1970, effective July 1, 1970; March 1, 1971, effective July 1, 1971; November 20, 1972, effective July 1, 1975; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This is in accordance with common practice. See U.S.C., Title 28, [former] § 639 (Depositions *de bene esse*; when and where taken; notice), the relevant provisions of which are incorporated in this rule; West's Ann.Code Civ.Proc. § 2031; and statutes cited in respect to notice in the Note to Rule 26(a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d). These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

Note to Subdivisions (c) and (e). These follow the general plan of [former] Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U.S.C., Title 28, [former] §§ 640 (Depositions *de bene esse*; mode of taking), and [former] 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also [former] Equity Rule 50 (Stenographer--Appointment--Fees.)

Note to Subdivision (f). Compare [former] Equity Rule 55 (Depositions Deemed Published When Filed.)

Note to Subdivision (g). This is similar to 2 Minn.Stat. (Mason, 1927) § 9833, but is more extensive.

1963 Amendments

This amendment corresponds to the change in Rule 4(d)(4). See Advisory Committee's Note to that amendment.

1970 Amendments

Subdivision (a). This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present

procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. *Cf.* Ill.S.Ct.R. 19-1 S-H Ill.Ann.Stat. § 101.19-1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, *Federal Practice and Procedure* 455-456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admiralty and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions *de bene esse* may continue to be taken as to admiralty and maritime claims within the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's Note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43-44 (1966).

The changes in Rule 30(a) and the new Rule 30(b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions *de bene esse*. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. *Cf. S.S. Hai Chang,* 1966 A.M.C. 2239 (S.D.N.Y.1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are to be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the *de bene esse* provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(e). See also S.D.N.Y. Civ.R. 5(a). Some parts of the *de bene esse* provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

Subdivision (b). Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating

to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

Subdivision (b)(1). If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

Subdivision (b)(2). This subdivision is discussed in the note to subdivision (a), to which it relates.

Subdivision (b)(3). This provision is derived from existing Rule 30(a), with a minor change of language.

Subdivision (b)(4). In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means--*e.g.*, by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

Subdivision (b)(5). A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, *Federal Practice and Procedure* § 644.1 n. 83.2, § 792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. *Cf.* N.Y.C.P.L.R. § 3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

Subdivision (b)(6). A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation--for example, in a personal injury case--can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the

taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L.Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney v. Woodward & Lothrop, Inc.,* 330 F.2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., *United States v. Gahagan Dredging Corp.,* 24 F.R.D. 328, 329 (S.D.N.Y.1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

Subdivision (c). A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

Subdivision (d). The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

Subdivision (e). The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

Subdivision (f)(1). A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. *Cf.* N.Y.C.P.L.R. § 3116(c).

1971 Amendments

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a non-party organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a non-party organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not

represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

1972 Amendments

Subdivision (c). Existing Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.

1980 Amendments

Subdivision (b)(4). It has been proposed that electronic recording of depositions be authorized as a matter of course, subject to the right of a party to seek an order that a deposition be recorded by stenographic means. The Committee is not satisfied that a case has been made for a reversal of present practice. The amendment is made to encourage parties to agree to the use of electronic recording of depositions so that conflicting claims with respect to the potential of electronic recording for reducing costs of depositions can be appraised in the light of greater experience. The provision that the parties may stipulate that depositions may be recorded by other than stenographic means seems implicit in Rule 29. The amendment makes it explicit. The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath. See Rules 28(a) and 29.

Subdivision (b)(7). Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties. The amendment authorizes that method by order of the court. The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions are propounded.

Subdivision (f)(1). For the reasons set out in the Note following the amendment of Rule 5(d), the court may wish to permit the parties to retain depositions unless they are to be used in the action. The amendment of the first paragraph permits the court to so order.

The amendment of the second paragraph is clarifying. The purpose of the paragraph is to permit a person who produces materials at a deposition to offer copies for marking and annexation to the deposition. Such copies are a “substitute” for the originals, which are not to be marked and which can thereafter be used or even disposed of by the person who produces them. In the light of that purpose, the former language of the paragraph had been justly termed “opaque.” Wright & Miller, *Federal Practice and Procedure: Civil* § 2114.

1987 Amendments

The amendments are technical. No substantive change is intended.

1993 Amendments

Subdivision (a). Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and fourth sentences are relocated.

Paragraph (2) collects all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

Subdivision (b). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Subdivision (c). Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.,* objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (*e.g.,* as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to

modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

Subdivision (e). Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f). Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

2000 Amendment

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

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or

otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition--and courts asked to order an extension--might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time--even after the submission of the report required by Rule 26(a)(2)--for full exploration of the theories upon which the witness relies.

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

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

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

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

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

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

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there

is no ambiguity.

GAP Report

The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d) regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree--or the court order--that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

2007 Amendment

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

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Notes of Decisions (1022)

Fed. Rules Civ. Proc. Rule 30, 28 U.S.C.A., FRCP Rule 30
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 31

Rule 31. Depositions by Written Questions

Currentness

(a) When a Deposition May Be Taken.

(1) ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

(1) ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed.

(2) ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

CREDIT(S)

(Amended March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule

26(a).

1970 Amendment

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

Subdivision (a). A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

Subdivision (d). Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

Subdivision (a). The first paragraph of subdivision (a) is divided into two subparagraphs, with provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

2007 Amendment

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

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Notes of Decisions (40)

Fed. Rules Civ. Proc. Rule 31, 28 U.S.C.A., FRCP Rule 31
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 32

Rule 32. Using Depositions in Court Proceedings

Currentness

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

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

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

(A) before the deposition begins; or

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

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

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

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

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

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

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

CREDIT(S)

(Amended March 30, 1970, effective July 1, 1970; November 20, 1972, effective July 1, 1975; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is in accordance with common practice. In most of the states listed in the note to rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26.

1970 Amendment

As part of the rearrangement of the discovery rules, existing subdivisions (d), (e), and (f) of Rule 26 are transferred to Rule 32 as new subdivisions (a), (b), and (c). The provisions of Rule 32 are retained as subdivision (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial byproduct of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear. Note present Rule 26(e), transferred to Rule 32(b); see 2A Barron & Holtzoff, *Federal Practice and Procedure* 164-166 (Wright ed. 1961).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

A change is made in the standard under which a party offering part of a deposition in evidence may be required to introduce additional parts of the deposition. The new standard is contained in a proposal made by the Advisory Committee on Rules of Evidence. See Rule 1-07 and accompanying Note, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates* 21-22 (March, 1969).

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

1972 Amendment

Subdivision (c). The concept of "making a person one's own witness" appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party-witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

1980 Amendment

Subdivision (a)(1). Rule 801(d) of the Federal Rules of Evidence permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. And Rule 801(d)(2) makes the statement of an agent or servant admissible against the principal under the circumstances described in the Rule. The language of the present subdivision is, therefore, too narrow.

Subdivision (a)(4). The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it. See Wright & Miller, *Federal Practice and Procedure: Civil* § 2150. The final sentence is added to reflect the fact that the Federal Rules of Evidence permit a broader use of depositions previously taken under certain circumstances. For example, Rule 804(b)(1) of the Federal Rules of Evidence provides that if a witness is unavailable, as that term is defined by the rule, his deposition in any earlier proceeding can be used against a party to the prior proceeding who had an opportunity and similar motive to develop the testimony of the witness.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Subdivision (c). This new subdivision, inserted at the location of a subdivision previously abrogated, is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b). Under this rule

a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use nonstenographic deposition testimony as substantive evidence is required to provide other parties with a transcript in advance of trial.

2007 Amendment

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

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

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

2009 Amendments

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

Notes of Decisions (258)

Fed. Rules Civ. Proc. Rule 32, 28 U.S.C.A., FRCP Rule 32
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 33

Rule 33. Interrogatories to Parties

Currentness

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) ***Responding Party.*** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and

fully in writing under oath.

(4) ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule restates the substance of [former] Equity Rule 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness), with modifications to conform to these rules.

1946 Amendment

Note. The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33

as those stated in Rule 26(a). *United States v. American Solvents & Chemical Corp. of California,* D.Del.1939, 30 F.Supp. 107; *Sheldon v. Great Lakes Transit Corp.,* W.D.N.Y.1942, 2 F.R.D. 272, 5 Fed.Rules Serv. 33.11, Case 3; *Musher Foundation, Inc., v. Alba Trading Co.,* S.D.N.Y.1941, 42 F.Supp. 281; 2 *Moore's Federal Practice,* 1938, 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See *Hoffman v. Wilson Line, Inc.*, E.D.Pa.1946, 9 Fed.Rules Serv. 33.514, Case 2; *Brewster v. Technicolor, Inc.,* N.Y.1941, 2 F.R.D. 186, 5 Fed.Rules Serv. 33.319, Case 3; *Kingsway Press, Inc. v. Farrell Publishing Corp.*, S.D.N.Y.1939, 30 F.Supp. 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer v. Hershey Creamery Co.,* D.N.J.1939, 2 Fed.Rules Serv. 33.31, Case 2, 1 F.R.D. 14; *Tudor v. Leslie,* D.Mass.1940, 1 F.R.D. 448, 4 Fed.Rules Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox v. Alter,* W.D.Pa.1942, 2 F.R.D. 337, 6 Fed.Rules Serv. 33.352, Case 1; *Byers Theaters, Inc. v. Murphy*, W.D.Va.1940, 3 Fed.Rules Serv. 33.31, Case 3, 1 F.R.D. 286; *Coca-Cola Co. v. Dixi-Cola Laboratories, Inc.,* D.Md.1939, 30 F.Supp. 275. See also comment on these restrictions in Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure,* 1942, 41 Mich.L.Rev. 205, 216-217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc. v. Brauer,* W.D.Mo.1940, 1 F.R.D. 292, 3 Fed.Rules Serv. 33.31, Case 2, the court said: "Rule 33 * * * has been interpreted * * * as being just as broad in its implications as in the case of depositions * * * It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain." To the same effect, see *Canuso v. City of Niagara Falls,* W.D.N.Y.1945, 8 Fed.Rules Serv. 33.352, Case 1; *Hoffman v. Wilson Line, Inc.,* supra.

By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, e.g., *Bailey v. New England Mutual Life Ins. Co.,* S.D.Cal.1940, 1 F.R.D. 494, 4 Fed.Rules Serv. 33.46, Case 1.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. *Howard v. State Marine Corp.*, S.D.N.Y.1940, 4 Fed.Rules Serv. 33.62, Case 1, 1 F.R.D. 499; *Stevens v. Minder Construction Co.*, S.D.N.Y.1943, 3 F.R.D. 498, 7 Fed.Rules Serv. 30b.31, Case 2. But objections have been sustained to interrogatories served after the oral deposition of a

party had been taken. *McNally v. Simons,* S.D.N.Y.1940, 3 Fed.Rules Serv. 33.61, Case 1, 1 F.R.D. 254; *Currier v. Currier*, S.D.N.Y.1942, 3 F.R.D. 21, 6 Fed.Rules Serv. 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30(b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

1970 Amendment

Subdivision (a). The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speck, *The Use of Discovery in United States District Courts,* 60 Yale L.J. 1132, 1144, 1151 (1951); Note, 36 Minn.L.Rev. 364, 379 (1952).

The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories--15 days for answers and 10 days for objections--are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speck, *supra*, 60 Yale L.J. 1132, 1144. The time pressures tend to encourage objections as a means of gaining time to answer.

The time for objections is even shorter than for answers, and the party runs the risk that if he fails to object in time he may have waived his objections. *E.g., Cleminshaw v. Beech Aircraft Corp.,* 21 F.R.D. 300 (D.Del.1957); See 4 *Moore's Federal Practice,* ¶33.27 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* 372-373 (Wright ed. 1961). It often seems easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposes no sanction of expenses on a party whose objections are clearly unjustified.

Rule 33 assures that the objections will lead directly to court, through its requirement that they be served with a notice of hearing. Although this procedure does not preclude an out-of-court resolution of the dispute, the procedure tends to discourage informal negotiations. If answers are served and they are thought inadequate, the interrogating party may move under Rule 37(a) for an order compelling adequate answers. There is no assurance that the hearing on objections and that on inadequate answers will be heard together.

The amendment improves the procedure of Rule 33 in the following respects:

(1) The time allowed for response is increased to 30 days and this time period applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement--that defendant have time to obtain counsel before a response must be made--is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons

and complaint upon him.

Some would urge that the plaintiff nevertheless not be permitted to serve interrogatories with the complaint. They fear that a routine practice might be invited, whereby form interrogatories would accompany most complaints. More fundamentally, they feel that, since very general complaints are permitted in present-day pleading, it is fair that the defendant have a right to take the lead in serving interrogatories. (These views apply also to Rule 36.) The amendment of Rule 33 rejects these views, in favor of allowing both parties to go forward with discovery, each free to obtain the information he needs respecting the case.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. *E.g., Pressley v. Bochlke,* 33 F.R.D. 316 (W.D.N.C. 1963). If the discovering party asserts that an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation, and the court may by local rule require it.

The proposed changes are similar in approach to those adopted by California in 1961. See Calif.Code Civ.Proc. § 2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories. Rhode Island takes a similar approach. See R. 33, *R.I.R. Civ.Proc. Official Draft,* p. 74 (Boston Law Book Co.).

A change is made in subdivision (a) which is not related to the sequence of procedures. The restriction to "adverse" parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings--even though the parties may have conflicting interests. E.g., *Mozeika v. Kaufman Construction Co.,* 25 F.R.D. 233 (E.D.Pa.1960) (plaintiff and third-party defendant); *Biddle v. Hutchinson,* 24 F.R.D. 256 (M.D.Pa.1959) (codefendants). The resulting distinctions have often been highly technical. In *Schlagenhauf v. Holder,* 379 U.S. 104 (1964), the Supreme Court rejected a contention that examination under Rule 35 could be had only against an "opposing" party, as not in keeping "with the aims of a liberal, nontechnical application of the Federal Rules." 379 U.S. at 116. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in subdivision (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

Subdivision (b). There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions. Compare, e.g., *Payer, Hewitt & Co. v. Bellanca Corp.,* 26 F.R.D. 219 (D.Del.1960) (opinions bad); *Zinsky v. New York Central R.R.,* 36 F.R.D. 680 (N.D.Ohio 1964) (factual opinion or contention good, but legal theory bad); *United States v. Carter Products, Inc.,* 28 F.R.D. 373 (S.D.N.Y.1961) (factual contentions and legal theories bad) with *Taylor v. Sound Steamship Lines, Inc.,* 100 F.Supp. 388 (D.Conn.1951) (opinions good); *Bynum v. United States,* 36 F.R.D. 14 (E.D.La.1964) (contentions as to facts constituting negligence good). For lists of the many conflicting authorities, see 4 *Moore's Federal Practice* ¶33.17 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 768 (Wright ed. 1961).

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention

that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967); Moore, *supra*; Field & McKusick, *Maine Civil Practice* § 26.18 (1959). On the other hand, under the new language interrogatories may not extend to issues of "pure law," *i.e.,* legal issues unrelated to the facts of the case. *Cf. United States v. Maryland & Va. Milk Producers Assn., Inc.,* 22 F.R.D. 300 (D.D.C.1958).

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, *The Revival of Bills of Particulars under the Federal Rules,* 71 Harv.L.Rev. 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See, *e.g., McElroy v. United Air Lines, Inc.,* 21 F.R.D. 100 (W.D.Mo.1967); *Pressley v. Boehlke,* 33 F.R.D. 316, 317 (W.D.N.C.1963). Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, *e.g., Zielinski v. Philadelphia Piers, Inc.,* 139 F.Supp. 408 (E.D.Pa.1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance. The rule does not affect the power of a court to permit withdrawal or amendment of answers to interrogatories.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination. See 4 *Moore's Federal Practice* ¶33.29[1] (2d ed. 1966).

Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the subdivision is thus simplified without any change of substance.

Subdivision (c). This is a new subdivision, adapted from Calif.Code Civ.Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research of the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefittee," Louisell, *Modern California Discovery,* 124-125 (1963), and alleviates a problem which in the past has troubled Federal courts. See Speck, *The Use of Discovery in United States District Courts,* 60 Yale L.J. 1132, 1142-1144 (1951). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

1980 Amendment

Subdivision (c). The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available, justifying the response by the option provided by this subdivision. Such practices are an abuse of the option. A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner than permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.

1993 Amendments

Purpose of Revision. The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. For ease of reference, subdivision (a) is divided into two subdivisions and the remaining subdivisions renumbered.

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not

objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g), authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

Subdivisions (c) and (d). The provisions of former subdivisions (b) and (c) are renumbered.

2006 Amendment

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

2007 Amendment

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

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

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

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

Notes of Decisions (1185)

Fed. Rules Civ. Proc. Rule 33, 28 U.S.C.A., FRCP Rule 33
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Currentness

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

In England orders are made for the inspection of documents, *English Rules Under the Judicature Act (The Annual Practice,* 1937) O. 31, r.r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932) Appendix, p. 267, setting out the statutes.

Compare [former] Equity Rule 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness) (fifth paragraph).

1946 Amendment

Note. The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co. v. Socony-Vacuum Oil Co.,* E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2, "* * * Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. *See Brown v. United States,* 1928, 48 S.Ct. 288, 276 U.S. 134, 143, 72 L.Ed. 500 ("The subpoena * * * specifies * * * with reasonable particularity the subjects to which the documents called for related."); *Consolidated Rendering Co. v. Vermont,* 1908, 28 S.Ct. 178, 207 U.S. 541, 543-544, 52 L.Ed. 327 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

1970 Amendment

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a). Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, i.e., something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34--it will conform to it in most cases--it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. *Cf.* Mich.Gen.Ct.R. 310.1(1) (1963) (testing authorized).

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Subdivision (b). The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the

preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

1980 Amendment

Subdivision (b). The Committee is advised that, "It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." *Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association* (1977) 22. The sentence added by this subdivision follows the recommendation of the *Report.*

1987 Amendment

The amendment is technical. No substantive change is intended.

1991 Amendment

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.

1993 Amendments

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties' meeting. See Rule 81(c), providing that these rules govern procedures after removal.

2006 Amendment

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically

stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers -- either as documents or as electronically stored information -- information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must -- like documents and land sought to be examined -- be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or

must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

2007 Amendment

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

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

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

Notes of Decisions (1390)

Fed. Rules Civ. Proc. Rule 34, 28 U.S.C.A., FRCP Rule 34
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 35

Rule 35. Physical and Mental Examinations

Currentness

(a) Order for an Examination.

(1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) ***Motion and Notice; Contents of the Order.*** The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request--and

is entitled to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.

(5) ***Failure to Deliver a Report.*** The court on motion may order--on just terms--that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

CREDIT(S)

(Amended March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; amended by Pub.L. 100-690, Title VII, § 7047(b), November 18, 1988, 102 Stat. 4401; amended April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz.Rev. Code Ann. (Struckmeyer, 1928) § 4468; Mich. Court Rules Ann. (Searl, 1933) Rule 41, § 2; 2 N.J.Comp.Stat. (1910); N.Y.C.P.A. (1937) § 306; 1 S.D.Comp.Laws (1929) § 2716A; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1230-1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491-F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa,* 20 Ia.L.Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon v. Manhattan Railway Co.,* 1894, 37 N.E. 113, 142 N.Y. 298, and *McGovern v. Hope,* 1899, 42 A. 830, 63 N.J.L. 76. In *Union Pacific Ry. Co. v. Botsford,* 1891, 11 S.Ct. 1000, 141 U.S. 250, 35 L.Ed. 734, it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson,* 1900, 20 S.Ct. 617, 177 U.S. 172, 44 L.Ed. 721 where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, c. 651, U.S.C., Title 28, § 2072, formerly §§ 723b (Rules in actions at law; Supreme Court authorized to make) and 723c (Union of equity and action at law rules; power of Supreme Court).

1970 Amendment

Subdivision (a). Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to "produce" the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach v. Beach,* 114 F.2d 479 (D.C. Cir. 1940). Provisions similar to the amendment have been adopted in at least 10 States: Calif. Code Civ.Proc. § 2032; Ida.R.Civ.P. 35; Ill. S-H Ann. c. 110A, § 215; Md.R.P. 420; Mich.Gen.Ct.R. 311; Minn.R.Civ.P. 35; Mo.Vern.Ann.R.Civ.p. 60.01; N.Dak.R.Civ.P. 35; N.Y.C.P.L. § 3121; Wyo.R.Civ.P. 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be "in controversy" and "good cause" must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf v. Holder,* 379 U.S. 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1). This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La.Stat.Ann., Civ.Proc. art 1495 (1960); Utah R.Civ.P. 35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3). This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 *Moore's Federal Practice* ¶35.06, n. 1 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b), but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher v. De Haven,* 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)--such as Rules 34 or 26(b)(3) or (4)--discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, *e.g., Galloway v. National Dairy Products Corp.,* 24 F.R.D. 362 (E.D.Pa.1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. *E.g., Leszynski v. Russ,* 29 F.R.D. 10, 12 (D.Md.1961) and cases cited. The question was recently given full consideration in *Buffington v. Wood,* 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

The requirement that the examiner be *suitably* licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2234 (1986 Supp.). The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications.

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

2007 Amendment

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

Notes of Decisions (327)

Fed. Rules Civ. Proc. Rule 35, 28 U.S.C.A., FRCP Rule 35
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 36

Rule 36. Requests for Admission

Currentness

(a) Scope and Procedure.

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

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

(B) the genuineness of any described documents.

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

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

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

(5) ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the

request presents a genuine issue for trial.

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

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Compare similar rules: [Former] Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 32; Ill.Rev.Stat. (1937) ch. 110, § 182 and Rule 18 (Ill.Rev.Stat. (1937) ch. 110, § 259.18); 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 69; Mich. Court Rules Ann. (Searl, 1933) Rule 42; N.J. Comp.Stat. (2 Cum.Supp. 1911-1924); N.Y.C.P.A. (1937) §§ 322, 323; Wis.Stat. (1935) § 327.22.

1946 Amendment

Note. The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth v. Kaufman,* C.C.A.2, 1940, 114 F.2d 40, it was held that the word "therein", now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Notes to

Rules 13(a) and 33 herein. The substitution [in said subdivision] of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (1) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, *Methods of Objecting to Notice to Admit,* 1942, 5 Fed.Rules Serv. 835; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.,* S.D.Cal.1944, 57 F.Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

1970 Amendment

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, *The Request for Admissions in Federal Civil Procedure,* 71 Yale L.J. 371 (1962).

Subdivision (a). As revised, the subdivision provides that a request may be made to admit any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. As to "opinion," compare, *e.g., Jackson Buff Corp. v. Marcelle,* 20 F.R.D. 139 (E.D.N.Y.1957); *California v. The S. S. Jules Fribourg,* 19 F.R.D. 432 (N.D.Calif.1955), with *e.g., Photon, Inc. v. Harris Intertype, Inc.,* 28 F.R.D. 327 (D.Mass.1961); *Hise v. Lockwood Grader Corp.,* 153 F.Supp. 276 (D.Nebr.1957). As to "mixed law and fact" the majority of courts sustain objections, *e.g., Minnesota Mining and Mfg. Co. v. Norton Co.,* 36 F.R.D. 1 (N.D.Ohio 1964), but *McSparran v. Hanigan,* 225 F.Supp. 628 (E.D.Pa.1963) is to the contrary.

Not only is it difficult as a practical matter to separate "fact" from "opinion," see 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); cf. 2A Barron & Holtzoff, *Federal Practice and Procedure* 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan, supra*, plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F.Supp. at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as "in dispute." Compare, *e.g., Syracuse Broadcasting Corp. v. Newhouse,* 271 F.2d 910, 917 (2d Cir. 1959); *Driver v. Gindy Mfg. Corp.,* 24 F.R.D. 473 (E.D.Pa.1959); with, *e.g., McGonigle v. Baxter,* 27 F.R.D. 504 (E.D.Pa.1961); *United States v. Ehbauer,* 13 F.R.D. 462 (W.D.Mo.1952). The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests. See, *e.g., Syracuse Broadcasting Corp. v. Newhouse, supra.*

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. *E.g., Jackson Buff Corp. v. Marcelle,* 20 F.R.D. 139 (E.D.N.Y.1957); *Sladek v. General Motors Corp.,* 16 F.R.D. 104 (S.D.Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. *E.g., Hise v. Lockwood Grader Corp.,* 153 F.Supp. 276 (D.Nebr. 1957); *E. H. Tate Co. v. Jiffy Enterprises, Inc.,* 16 F.R.D. 571 (E.D.Pa.1954); Finman, *supra*, 71 Yale L.J. 371, 404-409; 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* 509 (Wright ed. 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules sets forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule--for example, a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g., Southern Ry. Co. v. Crosby,* 201 F.2d 878 (4th Cir. 1953); *United States v. Laney,* 96 F.Supp. 482 (E.D.S.C.1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g., Woods v. Stewart,* 171 F.2d 544 (5th Cir. 1948); *SEC v. Kaye, Real & Co.,* 122 F.Supp. 639 (S.D.N.Y.1954); *Sieb's Hatcheries, Inc. v. Lindley,* 13 F.R.D. 113 (W.D.Ark.1952). The rule as revised conforms to the latter practice.

Subdivision (b). The rule does not how indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. *E.g., Ark-Tenn Distributing Corp. v. Breidt,* 209 F.2d 359 (3d Cir. 1954); *United States v. Lemons,* 125 F.Supp. 686 (W.D.Ark.1954); 4 *Moore's Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g., Alamo v. Del Rosario,* 98 F.2d 328 (D.C.Cir.1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark-Tenn* and *Lemons, supra*, reasoned in this way, although the results reached may be supported on different grounds. In *McSparran v. Hanigan,* 225 F.Supp. 628, 636-637 (E.D.Pa.1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* § 8.07 (1963); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field v. McKusick, *Maine Civil Practice* § 36.4 (1959); Finman, *supra*, 71 Yale L.J. 371, 418-426; Comment, 56 Nw.U.L.Rev. 679, 682-683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the

action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686 (2d Cir. 1966).

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

2007 Amendment

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

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

Notes of Decisions (608)

Fed. Rules Civ. Proc. Rule 36, 28 U.S.C.A., FRCP Rule 36
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 37

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

Currentness

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

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

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

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

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

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

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

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

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

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

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

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

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

(iii) striking pleadings in whole or in part;

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

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

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

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

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

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

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

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

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; amended by Pub.L. 96-481, Title II, § 205(a), October 21, 1980, 94 Stat. 2330, effective October 1, 1981; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas,* 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott,* 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711."

1970 Amendment

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth v. Paramount Pictures Corp.,* 8 F.R.D. 31 (W.D.Pa.1948); *Campbell v. Johnson,* 101 F.Supp. 705, 707 (S.D.N.Y.1951). In *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson v. Michigan Mutual Liability Co.,* 275 F.2d 537 (5th Cir. 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489-490 (1958).

Subdivision (a). Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1). This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held

that the court where the action is pending has "inherent power" to compel a party deponent to answer. *Lincoln Laboratories, Inc. v. Savage Laboratories, Inc.,* 27 F.R.D. 476 (D.Del.1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2). This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3). This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g., Cone Mills Corp. v. Joseph Bancroft & Sons Co.,* 33 F.R.D. 318 (D.Del.1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4). This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial justification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust--as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b). This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, "Contempt" and "Other Consequences," respectively, are confusing. One of the

consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to reflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery--*e.g.,* Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale v. Rogers,* 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g., United Sheeplined Clothing Co. v. Arctic Fur Cap Corp.,* 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.,* 22 F.R.D. 302 (S.D.N.Y.1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c). Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party give inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp. v. National Theatres Corp.,* 15 F.R.D. 339 (E.D.N.Y.1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co. v. Stern, Morgenthau & Co.,* 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp. v. Hudson Lumber Co.,* 127 F.Supp. 489, 497-498 (S.D.N.Y.1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure,* 71 Yale L.J. 371, 426-430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d). The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. E.g., *Gill v. Stolow,* 240 F.2d 669 (2d Cir.1957); *Saltzman v. Birrell,* 156 F.Supp. 538 (S.D.N.Y.1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554-557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfullness. E.g., *Milewski v. Schneider Transportation Co.,* 238 F.2d 397 (6th Cir.1956); *Dictograph Products, Inc. v. Kentworth Corp.,* 7 F.R.D. 543 (W.D.Ky.1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn v. Pa. R.R.,* 96 F.Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc. v. United Packinghouse Workers,* 26 F.R.D. 139 (D.Kans.1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale v. Rogers,* 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins v. Wayland,* 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois v. El Paso Natural Gas Co.,* 20 F.R.D. 358 (S.D.N.Y.1957); *Loosley v. Stone,* 15 F.R.D. 373 (S.D.Ill.1954), with *Scarlatos v. Kulukundis,* 21 F.R.D. 185 (S.D.N.Y.1957); *Ross v. True Temper Corp.,* 11 F.R.D. 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra*, 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, *Federal Practice and Procedure* 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, *Federal Practice and Procedure* 306-307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell v. General Motors Corp.,* 13 F.R.D. 331 (S.D.N.Y.1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. Cf. *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Subdivision (e). The change in the caption conforms to the language of 28 U.S.C. § 1783, as amended in 1964.

Subdivision (f). Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rep.No. 1535, 89th Cong., 2d Sess., 2-3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

1980 Amendment

Subdivision (b)(2). New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

Subdivision (e). Subdivision (e) is stricken. Title 28, U.S.C. § 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

Subdivision (g). New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. § 2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.,* the inadvertent omission from a Rule

26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

2000 Amendment

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

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

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

GAP Report

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

phrasing change is recommended for the Committee Note.

2006 Amendment

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" -- the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

2007 Amendment

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2013 Amendment

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

Changes Made After Publication and Comment

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial" were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

Notes of Decisions (2635)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294047.1

Federal Rules of Civil Procedure Rule 38

Rule 38. Right to a Jury Trial; Demand

Currentness

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution--or as provided by a federal statute--is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand--which may be included in a pleading--no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may--within 14 days after being served with the demand or within a shorter time ordered by the court--serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, § 723c [sec. 2072]), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, § 188; 6 Tenn.Code Ann. (Williams, 1934) § 8734; compare Wyo.Rev.Stat.Ann. (1931) § 89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) § 5624; Hawaii Rev.Laws (1935) § 4101; 2 Mass.Gen.Laws (Ter.Ed.1932) ch. 231, § 60; 3 Mich.Comp.Laws (1929) § 14263; Mich. Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud. Act (1927) § 57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 3802; Calif. Code Civ.Proc. (Deering, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev.Comp.Laws (Hillyer, 1929) § 8782; N.M. Stat.Ann. (Courtright, 1929) § 105-814; N.Y.C.P.A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); R.I. Pub. Laws (1929), ch. 1327, amending R.I. Gen.Laws (1923) ch. 337, § 6; Utah Rev.Stat.Ann. (1933) § 104-23-6; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 316; England (4 days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) § 12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup.Ct.Rules (1925) O. 36, r.r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r.r. 2 and 5. See James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L.J. 1022.

Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U.S.C., Title 28, § 770 (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U.S.C., Title 28, [former] § 773 (Trial of issues of fact; by court).

1966 Amendments

See Note to Rule 9(h), supra.

1987 Amendments

The amendments are technical. No substantive change is intended.

1993 Amendments

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

2007 Amendment

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

2009 Amendments

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (885)

Fed. Rules Civ. Proc. Rule 38, 28 U.S.C.A., FRCP Rule 38
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 39

Rule 39. Trial by Jury or by the Court

Currentness

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The provisions for express waiver of jury trial found in U.S.C., Title 28, [former] § 773 (Trial of issues of fact; by court) are incorporated in this rule. See Rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, [former] § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. *See Liberty Oil Co. v. Condon Nat. Bank,* 260 U.S. 235, 43 S.Ct. 118, 67 L.Ed. 232 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif. Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat.Ann. (1935) Code Civ.Proc., ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev.Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat.Ann. (Harlow, 1931) § 351 [12 Okl.St.Ann. § 557]; Utah Rev.Stat.Ann. (1933) § 104-23-5; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28 [former] § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co. v. Savannah River Lumber Co.,* C.C.A.4, 1922, 280 F. 358; *Fed. Res. Bk. of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n,* C.C.A.9, 1925, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778 (1926); *Watt v. Starke,* 1879, 101 U.S. 247, 25 L.Ed. 826.

2007 Amendment

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

Notes of Decisions (431)

Fed. Rules Civ. Proc. Rule 39, 28 U.S.C.A., FRCP Rule 39
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 40

Rule 40. Scheduling Cases for Trial

Currentness

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

U.S.C., Title 28, [former] § 769 (Notice of case for trial) is modified. See former Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also [former] Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, § 47 (now §§ 1253, 2101, 2325) (Injunctions as to orders of Interstate Commerce Commission); § 380 (now §§ 1253, 2101, 2284) (Injunctions; alleged unconstitutionality of state statutes); § 380a (now §§ 1253, 2101, 2284) (Same; Constitutionality of federal statute); [former] § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, [former] § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

2007 Amendment

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

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

Notes of Decisions (3)

Fed. Rules Civ. Proc. Rule 40, 28 U.S.C.A., FRCP Rule 40
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 41

Rule 41. Dismissal of Actions

Currentness

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) c. 110, § 176, and *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 [see 1329] (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 [now 3730] (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

1946 Amendment

Note. Subdivision (a). The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 *Moore's Federal Practice,* 1938, 3037-3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

Subdivision (b). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young v. United States,* C.C.A.9, 1940, 111 F.2d 823; *Gary Theatre Co. v. Columbia Pictures Corporation,* C.C.A.7, 1941, 120 F.2d 891; *Bach v. Friden Calculating Machine Co., Inc.,* C.C.A.6, 1945, 148 F.2d 407. Cf. *Mateas v. Fred Harvey, a Corporation,* C.C.A.9, 1945, 146 F.2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp. v. Mason,* C.C.A.3, 1940, 115 F.2d 548; *Schad v. Twentieth Century-Fox Film Corp.,* C.C.A.3, 1943, 136 F.2d 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 *Moore's Federal Practice,* 1938, Cum.Supplement § 41.03, under "Page 3045"; Commentary, *The Motion to Dismiss in Non-Jury Cases,* 1946, 9 Fed.Rules Serv., Comm.Pg. 41b.14.

1963 Amendment

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien v. Westinghouse Electric Corp.,* 293 F.2d 1, 5-10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 *Moore's Federal Practice* ¶59.08[5] (2d ed. 1954); *cf. Cone v. West Virginia*

Pulp & Paper Co., 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello v. United States,* 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow v. Hinde,* 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); *Restatement of Judgments* § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

1966 Amendment

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

1968 Amendment

The amendment corrects an inadvertent error in the reference to amended Rule 23.

1987 Amendment

The amendment is technical. No substantive change is intended.

1991 Amendment

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

2007 Amendment

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

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended

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

Notes of Decisions (1951)

Fed. Rules Civ. Proc. Rule 41, 28 U.S.C.A., FRCP Rule 41
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 42

Rule 42. Consolidation; Separate Trials

Currentness

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Subdivision (a) is based upon U.S.C., Title 28, [former] § 734 (Orders to save costs; consolidation of causes of like nature) but in so far as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) § 1081; Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.M.Stat.Ann. (Courtright, 1929) § 105-828; N.Y.C.P.A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV, (1919) Art. 26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.Y.C.P.A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of Equity Rule 29 (Defenses--How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

1966 Amendment

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, *Routine Bifurcation of Negligence Trials,* 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g., United Air Lines, Inc. v. Wiener,* 286 F.2d 302 (9th Cir.1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

2007 Amendment

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

Notes of Decisions (973)

Fed. Rules Civ. Proc. Rule 42, 28 U.S.C.A., FRCP Rule 42
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 43

Rule 43. Taking Testimony

Currentness

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; November 20, 1972, and December 18, 1972, effective July 1, 1975; March 2, 1987, effective August 1, 1987; April 23, 1996, effective December 1, 1996; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, § 635 (Proof in common-law actions), [former] § 637 (see §§ 2072, 2073) (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify U.S.C., Title 28, § 725 (now 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson,

Evidence and the New Federal Rules of Civil Procedure, 45 Yale L.J. 622 (1936), and *Same: 2,* 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) § 1885 et seq.

Note to Subdivision (c). See [former] Equity Rule 46 (Trial--Testimony Usually Taken in Open Court-Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren,* 143 Fed. 211 (C.C.A. 8th, 1906). See also *Blease v. Garlington,* 92 U.S. 1, 23 L.Ed. 521 (1876); *Nelson v. United States,* 201 U.S. 92, 114, 26 S.Ct. 358, 50 L.Ed. 673 (1906); *Unkle v. Wills,* 281 Fed. 29 (C.C.A. 8th, 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary Note on Advisory Committee Regarding Rules 43 and 44

Note. These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence,* 3d ed. 1940, 200-204; Green, *The Admissibility of Evidence Under the Federal Rules,* 1941, 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States,* C.C.A.2d, 1941, 117 F.2d 387, cert. den., 1941, 313 U.S. 587, 61 S.Ct. 1120; *Mosson v. Liberty Fast Freight Co.,* C.C.A.2d, 1942, 124 F.2d, 448; *Hartford Accident & Indemnity Co. v. Olivier,* C.C.A. 5th, 1941, 123 F.2d 709; *Anzano v. Metropolitan Life Ins. Co. of New York,* C.C.A.3d, 1941, 118 F.2d 430; *Franzen v. E. I. DuPont De Nemours & Co.,* C.C.A.3d, 1944, 146 F.2d 837; *Fakouri v. Cadais,* C.C.A. 5th, 1945, 147 F.2d 667; *In re C. & P. Co.,* S.D.Cal.1945, 63 F.Supp. 400, 408. But cf. *United States v. Aluminum Co. of America,* S.D.N.Y.1938, 1 Fed.Rules Serv. 43a.3, Case 1; Note, 1946, 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure,* 4 F.R.D. 124, 137-138.

1966 Amendment

Note to Subdivision (f). This new subdivision [subdivision (f)] authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

1972 Amendment

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 [sic; probably means 607], and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

1987 Amendment

The amendment is technical. No substantive change is intended.

1996 Amendment

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly

likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

2007 Amendment

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

Notes of Decisions (37)

Fed. Rules Civ. Proc. Rule 43, 28 U.S.C.A., FRCP Rule 43
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 44

Rule 44. Proving an Official Record

Currentness

(a) Means of Proving.

(1) ***Domestic Record.*** Each of the following evidences an official record--or an entry in it--that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record--or by the officer's deputy--and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) ***Foreign Record.***

(A) *In General.* Each of the following evidences a foreign official record--or an entry in it--that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record--or a copy--that is attested by an authorized person and is accompanied either by a final certification of

genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record--or an entry or lack of an entry in it--by any other method authorized by law.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some of those statutes are:

U.S.C., Title 28 [former sections]:

§ 661[now 1733] (Copies of department or corporation records and papers; admissibility; seal)

§ 662[now 1733] (Same; in office of General Counsel of the Treasury)

§ 663[now 1733] (Instruments and papers of Comptroller of Currency; admissibility)

§ 664[now 1733] (Organization certificates of national banks; admissibility)

§ 665[now 1733] (Transcripts from books of Treasury in suits against delinquents; admissibility)

§ 666[now 1733] (Same; certificate by Secretary or Assistant Secretary)

§ 670[now 1743] (Admissibility of copies of statements of demands by Post Office Department)

§ 671[now 1733] (Admissibility of copies of post office records and statement of accounts)

§ 672[former] (Admissibility of copies of records in General Land Office)

§ 673[now 1744] (Admissibility of copies of records, and so forth, of Patent Office)

§ 674[now 1745] (Copies of foreign letters patent as prima facie evidence)

§ 675[former] (Copies of specifications and drawings of patents admissible)

§ 676[now 1736] (Extracts from Journals of Congress admissible when injunction of secrecy removed)

§ 677[now 1740] (Copies of records in offices of United States consuls admissible)

§ 678[former] (Books and papers in certain district courts)

§ 679[former] (Records in clerks' offices, Western District of North Carolina)

§ 680[former] (Records in clerks' offices of former district of California)

§ 681[now 1734] (Original records lost or destroyed; certified copy admissible)

§ 682[now 1734] (Same; when certified copy not obtainable)

§ 685[now 1735] (Same; certified copy of official papers)

§ 687[now 1738] (Authentication of legislative acts; proof of judicial proceedings of State)

§ 688[now 1739] (Proofs of records in offices not pertaining to courts)

§ 689[now 1742] (Copies of foreign records relating to land titles)

§ 695[now 1732] (Writings and records made in regular course of business; admissibility)

§ 695e[now 1741] (Foreign documents on record in public offices; certification)

U.S.C., Title 1:

§ 30[now 112] (Statutes at large; contents; admissibility in evidence)

§ 30a[now 113] ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)

§ 54[now 204] (Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.)

§ 55[now 208] (Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original)

U.S.C., Title 5:

§ 490[former] (Records of Department of Interior; authenticated copies as evidence)

U.S.C., Title 6:

§ 7[now Title 31, § 9306] (Surety Companies as sureties; appointment of agents; service of process)

U.S.C., Title 8:

§ 9a[see 1435(c)] (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings)

§ 356[see 1443] (Regulations for execution of naturalization laws; certified copies of papers as evidence)

§ 399b(d)[see 1443] (Certifications of naturalization records; authorization; admissibility as evidence)

U.S.C., Title 11:

§ 44(d), (e), (f), (g)[former] (Bankruptcy court proceedings and orders as evidence)

§ 204[former] (Extensions extended, etc.; evidence of confirmation)

§ 207(j)[former] (Corporate reorganizations; certified copy of decree as evidence)

U.S.C., Title 15:

§ 127 (Trade-mark records in Patent Office; copies as evidence)

U.S.C., Title 20:

§ 52 (Smithsonian Institution; evidence of title to site and buildings)

U.S.C., Title 25:

§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)

U.S.C., Title 31:

§ 46[now 704] (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)

U.S.C., Title 38:

§ 11g[see 202] (Seal of Veterans' Administration; authentication of copies of records)

U.S.C., Title 40:

§ 238 [former 44 U.S.C.A. § 300h] (National Archives; seal; reproduction of archives; fee; admissibility in evidence of

reproductions)

§ 270c [see now 40 U.S.C.A. § 3133(a)] (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)

U.S.C., Title 43:

§§ 57-59 (Copies of land surveys, etc., in certain states and districts admissible as evidence)

§ 83 (General Land Office registers and receivers; transcripts of records as evidence)

U.S.C., Title 46:

§ 823 (Records of Maritime Commission; copies; publication of reports; evidence)

U.S.C., Title 47:

§ 154(m) (Federal Communications Commission; copies of reports and decisions as evidence)

§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)

U.S.C., Title 49:

§ 14(3)[now 10310] (Interstate Commerce Commission reports and decisions; printing and distribution of copies)

§ 16(13)[now 10303(b)] (Copies of schedules, tariffs, etc. filed with Interstate Commerce Commission as evidence)

§ 19a(i)[now 10785(c)] (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

Supplementary Note of Advisory Committee Regarding Rules 43 and 44.

For supplementary note of Advisory Committee on this rule, see note under Rule 43.

1966 Amendment

Note to Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. Cf. *Banco de Espana v. Federal Reserve Bank,* 114 F.2d 438 (2d Cir. 1940).

Note to Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States v. Aluminum Co. of America,* 1 F.R.D. 71 (S.D.N.Y.1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, *Comparative Law 57* (2d ed. 1959); Smit, *International Aspects of Federal Civil Procedure,* 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See *New York Life Ins. Co. v. Aronson,* 38 F.Supp. 687 (W.D.Pa.1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See *United States v. Grabina,* 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 Yale L.J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final

certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ.Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp.L. 123, 130-31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Note to Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Note to Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740-42, 1745; *Fakouri v. Cadais,* 149 F.2d 321 (5th Cir.1945), cert. denied 326 U.S. 742 (1945); 5 *Moore's Federal Practice,* par. 44.05 (2d ed. 1951).

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The amendment to paragraph (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official records should be treated as domestic records.

The amendment to paragraph (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Moreover, it does not affect the former practice of attesting the records, but only changes the method of certifying the attestation.

The Hague Public Documents Convention provides that the requirement of a final certification is abolished and replaced with a model *apostille,* which is to be issued by officials of the country where the records are located. See Hague Public Documents Convention, Arts. 2-4. The *apostille* certifies the signature, official position, and seal of the attesting officer. The authority who issues the *apostille* must maintain a register or card index showing the serial number of the *apostille* and other relevant information recorded on it. A foreign court can then check the serial number and information on the *apostille* with the issuing authority in order to guard against the use of fraudulent *apostilles.* This system provides a reliable method for maintaining the integrity of the authentication process, and the *apostille* can be accorded greater weight than the normal authentication procedure because foreign officials are more likely to know the precise capacity under their law of the attesting officer than would an American official. See generally Comment, *The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents,* 11 HARV. INT'L L.J. 476, 482, 488 (1970).

2007 Amendment

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

TREATIES AND CONVENTIONS

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

ARTICLE 1

The present Convention shall apply to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) Documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process server ("huissier de justice");

(b) Administrative documents;

(c) Notarial acts;

(d) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

(a) To documents executed by diplomatic or consular agents;

(b) To administrative documents dealing directly with commercial or customs operations.

ARTICLE 2

Each contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

ARTICLE 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation.

ARTICLE 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an “allonge”; it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title “Apostille (Convention de La Haye du 5 octobre 1961)” shall be in the French language.

ARTICLE 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.

When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp on the certificate are exempt from all certification.

ARTICLE 6

Each contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.

It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

ARTICLE 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

(a) The number and date of the certificate,

(b) The name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

ARTICLE 8

When a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

ARTICLE 9

Each contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

ARTICLE 10

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph (d) of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

ARTICLE 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extension shall be notified to the Ministry of Foreign Affairs of the Netherlands.

When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

ARTICLE 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

ARTICLE 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

(a) The notifications referred to in the second paragraph of Article 6;

(b) The signatures and ratifications referred to in Article 10;

(c) The date on which the present Convention enters into force in accordance with the first paragraph of Article 11;

(d) The accessions and objections referred to in Article 12 and the date on which such accessions take effect;

(e) The extensions referred to in Article 13 and the date on which they take effect;

(f) The denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

[Signatures omitted.]

———

ANNEX TO THE CONVENTION

Model of certificate

The certificate will be in the form of a square with sides at least 9 centimetres long

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: .....

This public document

2. has been signed by .....

3. acting in the capacity of .....

4. bears the seal/stamp of .....

.....

Certified

5. at .....

6. the .....

7. by .....

8. N° .....

9. Seal/stamp:

10. Signature:

.....

_____

Convention abolishing the requirement of legalization for foreign public documents, with annex. Done at The Hague October 5, 1961; entered into force for the United States October 15, 1981. (TIAS 10072; 527 UNTS 189).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Notes of Decisions (51)

Fed. Rules Civ. Proc. Rule 44, 28 U.S.C.A., FRCP Rule 44
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 44.1

Rule 44.1. Determining Foreign Law

Currentness

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

CREDIT(S)

(Adopted February 28, 1966, effective July 1, 1966; amended November 20, 1972, effective July 1, 1975; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1966 Adoption

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the *first sentence* of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded--compare *Siegelman v. Cunard White Star, Ltd.,* 221 F.2d 189 (2d Cir.1955), and *Pedersen v. United States,* 191 F.Supp. 95 (D. Guam 1961), with *Harrison v. United Fruit Co.,* 143 F.Supp. 598 (S.D.N.Y.1956)--is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court

should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The *second sentence* of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. See, generally, Nussbaum, *Proving the Law of Foreign Countries,* 3 Am. J. Comp. L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. N.Y. Civ. Prac. Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va. Code Ann. tit. 8, § 8-273; 2 W. Va. Code Ann. § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, *Comparative Law* 142 (2d ed. 1959); Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 Harv.L.Rev. 1281, 1296 (1952); cf. *Siegelman v. Cunard White Star, Ltd.,* supra, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, *Foreign Law in the Courts: Judicial Notice and Proof,* 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the *third sentence,* the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). *Cf. Uniform Judicial Notice of Foreign Law Act* § 3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that § 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, *Conflict of Laws,* § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, *Evidence,* § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, *Evidence* § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl.1961, at 134); N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, loc. cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Jansson v. Swedish American Line,* 185 F.2d 212, 216 (1st Cir.1950); *Bank of*

Nova Scotia v. San Miguel, 196 F.2d 950, 957, n. 6 (1st Cir.1952); *Liechti v. Roche,* 198 F.2d 174 (5th Cir.1952); *Daniel Lumber Co. v. Empresas Hondurenas, S.A.,* 215 F.2d 465 (5th Cir.1954).

1972 Amendment

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendment

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

Notes of Decisions (104)

Fed. Rules Civ. Proc. Rule 44.1, 28 U.S.C.A., FRCP Rule 44.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 45

Rule 45. Subpoena

Currentness

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements--In General*. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition--Notice of the Recording Method*. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information*. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations*. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing Court.*** A subpoena must issue from the court where the action is pending.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) ***Notice to Other Parties Before Service.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States.

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

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

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

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

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required*. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the

subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required*. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

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

(iv) subjects a person to undue burden.

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

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

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

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

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

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

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information*****.** These procedures apply to producing documents or electronically stored information:

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

(B) *Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information*. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection*****.**

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

(i) expressly make the claim; and

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

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required--and also, after a motion is transferred, the issuing court--may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 29, 1985, effective August 1, 1985; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 25, 2005, effective December 1, 2005; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013.)

PRACTICE COMMENTARIES

by David D. Siegel

TABLE OF CONTENTS

C45-1. Introductory.

Subdivision (a)

C45-2. Content of Subpoena; Form.

C45-3. Subject Matter Scope of Subpoena.

C45-4. Issuance; From What Court?

C45-5. Who “Issues” Subpoena?

C45-6. Document Production.

C45-7. Inspection of Premises.

Subdivision (b)

C45-8. Who Serves Subpoena?

C45-9. Method of Subpoena Service.

C45-10. When and Where Subpoena Returnable.

C45-11. Attempt to By-Pass Notice Requirement.

C45-12. Territorial Reach of Subpoena; Background.

C45-13. Territorial Reach of Subpoena; Where to Serve Trial Subpoena.

C45-14. Territorial Reach of Subpoena; Where to Serve Deposition and Pretrial Production Subpoena.

C45-15. The 100-Mile “Bulge”.

C45-16. Requiring Nonparty to Appear in Distant Trial District.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

C45-17. Serving U.S. Citizen Outside Country.

C45-18. Serving Parties with Notices of Subpoena; Proof of Service.

C45-19. Fees and Mileage.

Subdivision (c)

C45-20. Duty to Avoid "Undue Burden" on Subpoenaed Person; Sanctions for Abuse.

C45-21. Complying with Subpoena Duces Tecum; Objections by Subpoenaed Party; Motion to Compel.

C45-22. Motion to Quash or Modify Subpoena.

C45-23. Conditional Order.

Subdivision (d)

C45-24. Responding to Document Subpoena.

C45-25. Withholding Matter on Grounds of Privilege.

Subdivision (e)

C45-26. Contempt.

C45-1. Introductory.

Rule 45 of the Federal Rules of Civil Procedure governs subpoena practice in the federal courts, as to both deposition subpoenas and subpoenas used for the trial or hearing itself. It prescribes on matters of issuance right through matters of enforcement.

Rule 45 was extensively amended in 1991, effective December 1st of that year. Because of that, the ensuing Commentaries, in treating the rule generally, will stress changes made by the 1991 amendment.

A subpoena, like a summons, is a jurisdiction-getting paper. The summons secures jurisdiction of a defendant in an action, subjecting the defendant to the jurisdiction of the court so that any judgment that may be rendered in the action will bind the defendant. The mission of the subpoena is to secure jurisdiction of a witness, who is usually not a party to the action, so as to obtain from the witness testimony or documents (or other things) needed by one of the parties.

The incentive of the summoned defendant is to appear in the action so as to avoid a default judgment. The incentive of the subpoenaed witness is to obey the subpoena so as to avoid punishment for contempt, the sanction that backs a subpoena. See Commentary C4-26 below.

There are two kinds of subpoenas. The common one that seeks the testimony of the witness is usually referred to simply as a "subpoena". It's full Latin name is "subpoena ad testificandum". The other one is the "subpoena duces tecum", which usually keeps its Latin name in practice to distinguish it from the testimonial subpoena. The subpoena duces tecum seeks documents and other tangible things instead of testimony. If both testimony and things are sought from the same person, a single subpoena, containing both testificandum and duces tecum clauses, can be used. The form presently used is a simplified one in which the user need merely check off the applicable boxes and fill in the appropriate blanks. Commentary C45-2, below, discusses the form.

As a general rule a subpoena is used only on a nonparty. (A party can of course be subpoenaed, too, if need be.) A mere notice or request ordinarily suffices to get testimony or things from a party, with the sanctions of Rule 37 of the Federal Rules of Civil Procedure standing by to assure the party's compliance.

Rule 37 is a component of the "Depositions and Discovery" segment (Part V) of the Rules, embracing Rules 26-37. That part interplays with Rule 45 frequently, an interplay that will be noted at a number of junctures in the ensuing Commentaries. Rule 34, for example, in requiring the production of documents and other tangibles, applies only against a party. It is Rule 45 that must be turned to when those things are sought from a nonparty. The 1991 amendment of subdivision (c) of Rule 34 recognizes this with a cross-reference to Rule 45. See Commentary C45-6 below.

The attorney consulting these Commentaries on any point will do well to consult the table of Practice Commentaries immediately above. An effort has been made to break the subject down into specific constituents, so

that a scanning of their captions may quickly highlight the topic the reader is after.

The power of administrative agencies and arbitrators to issue subpoenas or their equivalent does not come from Rule 45. But if the subpoena power has been conferred on such bodies by other sources, enforcement of the subpoena may be sought in the courts. Special provisions can be found so instructing. See, for example, § 7 in U.S.C.A. Title 9, in respect of arbitrators, and Rule 81(a)(3) of the Federal Rules of Civil Procedure, in respect of federal officers and agencies.

For enforcement purposes, therefore, Rule 45, as the courts' main provision on subpoenas, may become relevant on an administrative or arbitration subpoena (or "summons", as it may be called, see 9 U.S.C.A. § 7, not just a judicial one.

Subdivision (a)

C45-2. Content of Subpoena; Form.

The content of the subpoena is prescribed by subdivision (a) of Rule 45, which was among the provisions substantially amended in 1991.

In addition to the caption of the action, subdivision (a) previously directed that the subpoena state the name of the court, which was automatically taken to mean the name of the court in which the action was pending. It now prescribes more specifically, in subdivision (a)(1), that the subpoena state the name of the court "from which it is issued". This recognizes that the court in which the action is pending, while it will still most often be the court "from" which the subpoena "issues", will not necessarily be the only one. Under paragraph (2) of subdivision (a), a deposition subpoena will now issue "from" the court in the district in which the deposition is to be taken, even though it may not be "issued" by the court at all, but by the attorney for the party seeking the data or material. It is no longer necessary, for a deposition subpoena, that an application be made for its issuance to the court in the district where the deposition is to be held. See Commentaries C45-4 and C45-5 below.

Under the old rule, the subpoena called for testimony--i.e., it was a "testificandum" subpoena--and if it sought documents or other tangibles, it would "also" contain a duces tecum clause. This was for the reason that old subdivision (b) provided that the subpoena could "also" direct the production of papers and other tangibles, which implied that it could do so only as an adjunct of an ordinary testimonial subpoena. The new subparagraph (C) of subdivision (a)(1) clearly allows the duces tecum subpoena to stand as an independent process, no longer limited to service as a mere appendage of a testimonial subpoena. See Commentary C45-6 below.

Hence the subpoena can contain either the testimonial clause, or the duces tecum clause, whichever the server seeks. It can of course contain both, and would, if the person served is both the custodian of the papers or tangibles as well as a person from whom testimony is sought. Another possible mission of a subpoena may be to require the person in control of real property to permit an inspection of it. See Commentary C45-7 below.

The simplified form of subpoena issued by the district courts in fulfillment of the requirements of the 1991 amendment of Rule 45, entitled "SUBPOENA IN A CIVIL CASE", contains paragraphs covering all four of the subpoena's possible functions:

(1) trial testimony;

(2) deposition testimony;

(3) document or chattel production (for trial or pretrial); and

(4) inspection of premises.

The issuer of the subpoena merely fills in the blanks in the relevant paragraphs and checks off the small box immediately preceding each paragraph used. If the issuer wants both the deposition of the person served as well as the production of documents in that person's control, for example, the second and third boxes as listed above would be checked.

Subdivisions (c) of the amended Rule 45, entitled "protection of persons subject to subpoena", and (d), entitled "duties in responding to subpoena", are concerned with advising subpoenaed persons of both their obligations and their rights. (They are discussed in Commentaries C45-20 through C45-25 below.) In order to assure that the subpoenaed person has all of this information at hand, it is explicitly required that the text of both subdivisions be set forth verbatim in the subpoena. The form of subpoena devised in satisfaction of the 1991 amendment reprints both subdivisions in small print.

The subpoena need no longer bear the court's seal. See Commentary C45-5 below.

C45-3. Subject Matter Scope of Subpoena.

Although the subpoena purports in Rule 45 to stand by itself, it is tied in with two other realms: the rules of evidence applicable at the trial and the rules of pretrial discovery supplied by Part V of the Federal Rules of Civil Procedure, which covers Rules 26-37. The discovery rules in turn refer to the standards of evidence applicable at the trial. Rule 26(b)(1) allows discovery of any unprivileged matter "relevant to the subject matter involved in the pending action", but does not insist that the material sought itself qualify as "evidence". It permits pursuit of any "information ... reasonably calculated to lead to the discovery of admissible evidence". It is this language that accounts for the broad scope of pretrial discovery in the federal courts, and the federal standard has had great influence on pretrial discovery in the state courts as well.

These broad standards also govern what a subpoena can seek. While the explicit reference to Rule 26(b) that the old Rule 45(d)(1) contained is omitted from the amended rule, specific references to privileged matter, trade secrets, expert opinions, materials prepared for litigation, and the like, see subdivisions (c)(3) and (d)(2), which developed in and around the Rule 26 standards, indicate that Rule 26 is still to be the criterion. Nothing in the amendment itself or in the Advisory Committee notes indicates any intention to curtail that scope. The trade secrets, expert opinions, litigation materials, and like things just noted have so profuse a protective case law built around them under the discovery rules themselves that the effort to list them in the subpoena rule, with yet a repetition of the protections, seems more like an excess of caution than a needful part of Rule 45. An adoption of the Rule 26 standards and case law, in a terse statement, would probably have done just as thorough a job, and left Rule 45 with a trimmer figure to boot.

If a further assist from the Advisory Committee as a source is needed to clarify that the scope of subpoena discovery under Rule 45 is to be the same as that applicable under the general discovery rules, a statement appears to that effect in the committee's notes on the 1970 amendment of Rule 45, reprinted following these Commentaries. And as already noted, there is no evidence, in conjunction with the 1991 amendment, of any intention to retreat from that adoption.

All this has dealt with the subject matter scope of the subpoena. Its geographical scope--i.e., the area within which the subpoena may be served--is discussed in Commentary C45-12 et seq., below.

C45-4. Issuance; From What Court?

Under the old (pre-1991) version of Rule 45, there was no need to determine the court "from" which the subpoena would issue. One had to apply to the clerk for a subpoena, and each clerk would issue a subpoena captioned only out of the clerk's own court. If a subpoena had to be used in some distant district, such as to take the deposition of a witness in that district, the application for the subpoena had to be made to the clerk of the district court in that district, not in the district in which the action was pending, and the subpoena would be captioned out of that district. Because each subpoena issued only "from" the district court of the clerk that issued it, there was nothing special that the rule had to say about the matter.

There now is. Under the amended Rule 45, a subpoena may now be issued and signed by the attorney without any application at all to the court or clerk, although the clerk of course retains issuance powers and will exercise them when a party seeks a subpoena itself rather than through an attorney. (See Commentary C45-5 below.) The attorney must issue it "from" the right district court, however. That will most often be the court of the district in which the action is pending. But when the subpoena seeks testimony or materials from a witness beyond the territorial reach of the action-pending district (see Commentary C45-12 et seq. below), it must issue "from" the district court of the district in which the deposition or production is sought. See subdivision (b)(2). The attorney must be careful to caption the subpoena "from" the appropriate district, as to both the testimonial and duces tecum subpoenas. This merely entails inserting the name of the appropriate district in the space provided on the subpoena form.

It is the court "from" which the subpoena issues--either the trial court or the court in the distant district--that has the needed jurisdiction to enforce the subpoena. Motions to quash, modify, or condition the subpoena are also made to the district court of the district from which the subpoena issued. See subdivisions (c)(1), (c)(3)(A), and (e), and Commentaries C45-21, C45-22, and C45-26, below.

C45-5. Who "Issues" Subpoena?

No court order is necessary for the issuance of a subpoena, and under the 1991 amendment no request for a subpoena need even be made of the clerk: a significant achievement of the 1991 amendment is that it allows the attorney to issue the subpoena, without even a pro forma application to the court. Subdivision (a)(3).

This merely carries to fruition a practice that had taken place for years in all but form. Under old Rule 45, it had to be the clerk that issued the subpoena, but the clerk would issue it "in blank" just about for the asking. The attorney would then fill it in and arrange for its service. Hence it was the attorney who was doing everything, with the clerk doing nothing more than furnishing the form. The 1991 amendment recognizes this by relieving the clerk of the issuance duty altogether, at least when the party seeking the subpoena has an attorney.

The clerk will still issue the subpoena when a party itself applies for it, and in that event the party can fill it in and have it served.

The attorney empowered to issue a subpoena must be an attorney admitted to practice (even if only pro haec vice) in the district in which the action is pending. As long as the attorney is admitted in that district, the attorney can issue the subpoena. The attorney can issue it in the name of that court, or, when the subpoena seeks a deposition or discovery in a distant district, under the name of the court in the distant district. Hence an attorney not admitted in the distant district may, under subdivision (a)(3)(B), issue a subpoena captioned in that distant district, as long as the subpoena "pertains to an action pending in a court in which the attorney is authorized to practice".

Thus an attorney admitted to practice before the Southern District of New York may, in an action pending there, issue a subpoena captioned out of the District of Nevada when the deposition is sought of a Nevada witness. This is clearly a convenience that dispenses with having to apply to the Nevada federal court to get the subpoena, or with having to retain an attorney admitted before the Nevada federal court to make the application for it. And presumably the New York attorney can conduct the deposition in Nevada. But should an application of some kind have to be made there, such as a motion to compel the testimony of a recalcitrant witness, or to punish the witness for contempt, the rule does not say that the New York lawyer can make that motion to the Nevada federal court if she is not admitted there. It would seem that an application would first have to be made to admit her pro haec vice, and only upon that admission would she be able to argue the merits of the motion to the Nevada court.

A two-part motion might be made, asking for the pro haec vice admission in the first breath and presenting the merits of the subpoena motion in the other. If the court promptly rules on the first part of the motion, and grants the pro haec vice admission (holding off the merits part of the motion until oral argument can be had on it), the fact of the grant can be communicated to the New York lawyer, who can then travel out to Nevada, if disposed to, to make the argument. But if the court elects to rule on both parts of the motion at the same time, the New York lawyer who has traveled out to argue the merits on the assumption that the pro haec vice application would be granted may be on a fool's errand if the unexpected happens, and the pro haec vice application is denied.

The lawyer (the New York lawyer in our example) must note carefully that while it is convenient to be able to issue the subpoena in the name of the Nevada court, the subpoena does not enjoy nationwide service and does not operate to compel a Nevada witness to come to New York for the testimony. It is subject to the other restrictions of Rule 45 concerning both the place where the subpoena may be served and the place where the deposition may be scheduled. These are sometimes complicated questions, as Commentaries C45-12 through C45-17 manifest. The deposition has to take place in the Nevada area, as those Commentaries explain.

Hence the enthusiastic assertion that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States", made in the committee's "Second" comment on subdivision (a) of the amended rule, may be a bit puffy. Rule 45 now permits a New York lawyer in a New York federal action to caption a deposition subpoena out of the Nevada federal court, but that subpoena is by no means servable "anywhere in the United States", nor can it set up a deposition "anywhere in the United States". Both service of the subpoena and the situs of the deposition are clearly limited. See Commentary C45-14 below.

Not even for a trial subpoena (as opposed to a mere deposition subpoena) can a simple nationwide service be spelled out. Under clause (iii) of subdivision (c)(3)(B) of Rule 45, there does appear to be authority for the court to direct a witness to travel far, clearly within a state and possibly far beyond state lines as well, but only when there is a special need of a witness's live testimony. The circumstances apparently have to be super special, and even

when they are there is some doubt about whether clause (iii) really goes all that far. There is a 100-mile restriction, contained in clause (ii) of subdivision (c)(3)(A) of Rule 45 and measured from the witness's base, beyond which the witness may not be required to travel unless the court exercises its special discretion under clause (iii) of subdivision (c)(3)(B), and it can be argued that all clause (iii) does is permit a stretch of the 100 miles from one point to another within the same state. See Commentary C45-16 below. If that's the construction of clause (iii) that prevails, then the revisors' comment that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States" will prove puffier still.

Further discussion on the interplay of the various provisions affecting who issues the subpoena, what court must be named in its caption, where it can be served, and how far a witness can be made to travel to honor it, will have to await the cited Commentaries (Commentaries C45-12 through C45-17), below.

When a deposition has to be taken in a distant district, and a motion to enforce it becomes necessary, many lawyers deem it wiser to retain local counsel to make the motion in the distant court rather than bother with a pro haec vice application. Which course to take is likely to depend on how important the witness is, how important the motion is, how high the stakes are, etc.

The attorney must "sign" the subpoena, but the seal of the court is no longer required. Under the mere signature of the attorney the subpoena acts as process of the court, fully backed by the sanction provisions of Rule 45, including the ultimate sanction of contempt now found in subdivision (e).

Since a subpoena is of course a judicial "process", an infrequently cited statute, § 1691 of Title 28, still recites that it must be under the seal of the court, which the prior rule required but which the present rule deliberately does not. No argument should arise on that point, however, since the matter is entirely procedural and another statute in Title 28--subdivision (a) of § 2072--authorizes the U.S. Supreme Court to promulgate rules of practice, and an issue of sealing is an issue of practice. While the rules promulgated by the U.S. Supreme Court under subdivision (a) of § 2072 may not, under subdivision (b), "abridge, enlarge or modify any substantive right", to the extent that they address only procedure they supersede "[a]ll laws in conflict". (An analogous issue, and resolution, arises in conjunction with summons service. See Commentary C4-16 on Rule 4 in the 28 U.S.C.A. set.) The form of subpoena that the federal courts distributed after the new Rule 45 took effect on December 1, 1991, requires no seal when the attorney is the issuer.

For the court "from" which the attorney must issue the subpoena, see Commentaries C45-4 above and C45-12 et seq. below.

As to who may serve the subpoena, see Commentary C45-8 below.

C45-6. Document Production.

Under Rule 45 as amended in 1991, a subpoena duces tecum seeking the production of documents (or other materials) from a nonparty may be used independently of the regular testimonial subpoena; the two are no longer wedded, as they were under the prior version of Rule 45.

Document production under Rule 34 of the Federal Rules of Civil Procedure operates, and has long operated, to get documents and other tangibles from a party wholly independent of a deposition of that party, but Rule 34 applies

only to a party, not to a nonparty. Rule 45, on the other hand, did make document production available from a nonparty, but only in conjunction with a deposition to be taken of the nonparty. Hence, the seeking party had to set up what was often an unwanted deposition of the nonparty under old Rule 45, just to get the desired documents or other things of which that nonparty had custody or control. Subdivision (c) of old Rule 34 authorized an "independent" action against the nonparty to secure documents, but what a bother that was as against what a simple subpoena or application within the context of the pending action would be.

A simple subpoena duces tecum is now available for service on a nonparty under Rule 45, without any purported scheduling of a deposition of the nonparty. An amended subdivision (c) of Rule 34 recognizes this by dropping the reference to an independent action and leaving the matter to Rule 45. (An independent action would still be available, but should seldom be necessary. One instance in which the bar may be thankful to have a separate action available, however, with which to seek a document production from a nonparty is where the sometimes awkward geographical restrictions imposed by the 1991 amendment of Rule 45 make it possible for a witness to avoid a subpoena--even a pretrial subpoena--just by remaining more than 100 miles from his own residence and place of business. See the elaboration of this point in Commentary C45-14, below.)

Hence, where the desired documents or other tangibles are in the custody of a nonparty, a subpoena duces tecum can get them. And it can get them for use at the trial itself or for use in conjunction with a deposition. If testimony is also sought from the custodian of the documents, the subpoena served on the custodian of course can, as before, include both testimonial and document-production (duces tecum) clauses. Insofar as they discuss the subpoena duces tecum as being available for service on a nonparty only in concert with a deposition, old cases are now irrelevant.

The scope of a subpoena duces tecum is intended to be as broad against a nonparty as against a party, a point the Advisory Committee makes by citing Rule 34 (which governs parties) as also governing Rule 45.

As long as the subpoena is served on the subpoenaed person within the proper territorial range of the subpoena (for the subpoena's range, see Commentaries C45-12 et seq. below), it makes no difference that the materials sought are located beyond that range. Control of the documents or other things sought is the key, and if the entity servable locally has control, it must exercise that control to bring the materials in. Perhaps the most common example of this in practice is where a broad-based corporation present and served locally is required to produce locally records that it maintains at some distant place (e.g., at its main office, some other branch, etc.).

Expenses connected with the production of the materials can be adjusted by the court if need be, and are likely to be if the matter is brought to the court's attention and the subpoenaed person is a nonparty, a matter treated in Commentary C45-21 below.

While a party can of course approach a document custodian and simply ask permission to inspect designated papers, the party who has to rely on a subpoena under Rule 45, or for that matter on any other judicial process, to get those papers can't do it without notice to all other parties to the action. Under the last sentence of subdivision (b)(1) of Rule 45, the party who seeks a pretrial production of documents from a nonparty through use of a subpoena duces tecum must serve notices on all the other parties. The notice should spell out for the parties the essentials of the directed production, so that any interested party can attend at the time and place of the discovery, review the produced documents or other things itself, and otherwise monitor the proceedings. These notices may be served on the other parties through the usual within-the-action methods of Rule 5(b) (mail to the other parties' attorneys being the most common method).

This requirement of notice of a pretrial subpoena duces tecum is analogous to what Rule 30(b)(1) requires when it is a deposition that is sought of a person (a party or nonparty): all the other parties must be given notice of the time and place of the examination and of all related particulars. Indeed, Rule 30(b)(1) may even be repetitive of Rule 45 when the person being deposed is a nonparty witness from whom document production is also sought. It says that if the person to be examined is also served with a subpoena duces tecum seeking tangible materials, the notice of the deposition served on the other parties must also identify the materials that the subpoena duces tecum has demanded.

The requirement that other parties be notified enables them to object to the production of the documents or other things if they find ground, as with a motion to quash or modify the subpoena under subdivision (c)(3), or to take their own steps to secure the production of yet other documents that they deem important in conjunction with the pending discovery. It enables them in any event to monitor proceedings so as to protect their own interests.

When a deposition is sought, as opposed to a document production, Rules 30 and 31 (which apply to parties and nonparties alike) contain analogous protections, relieving Rule 45 of having to prescribe them.

C45-7. Inspection of Premises.

It may sometimes become necessary, in connection with a litigation, to conduct an inspection of real estate, improved or not. An inspection of premises is allowed by the Federal Rules of Civil Procedure on the same terms and through the same devices that a production of documents is, both as against a party, where Rule 34 governs, and against a nonparty, where Rule 45(a)(1)(c) governs.

In respect of the nonparty, this is new. The inspection can now be compelled by subpoena, dispensing with the need of a separate action (as prior law required) to secure the inspection of premises controlled by a nonparty. The subpoena would be directed to the person who has control of the premises and the authority to permit entry and inspection. If testimony is also sought of that person, the same subpoena that commands the inspection of premises can also require the subpoenaed person to testify, either at a trial or hearing or at a deposition. On that score, too, then, the rule with the inspection of premises is the same as that for the production of documents and other personal property.

In some state practices, a court order may be needed for the inspection of realty owned or controlled by a nonparty, as in New York under Rule 3120(b) of its Civil Practice Law and Rules. Under Rule 45 of the Federal Rules of Civil Procedure, no preliminary court order is needed for the issuance of the subpoena or for permission in any other form to inspect a premises. But, in common with the procedure for the production of documents and other tangibles, the recipient of the “inspection” subpoena can temporarily undo his obligation to obey the subpoena and make a court order necessary just by serving the seeking party with objections to the inspection, pursuant to subdivision (c)(2)(B) of Rule 45. On that point see Commentary C45-21 below.

The availability of that automatic cancellation of the obligation to comply, or at least its suspension, makes the federal procedure similar to one that requires a court order in first instance. The difference lies in who has the initiative. In the New York practice the seeking party must apply for the order in first instance. In the federal practice under Rule 45, the seeker just issues and effects service of a subpoena, but if the recipient then takes the modest initiative of serving the seeking party with objections, that simple doing shifts back to the seeking party the more demanding initiative of a court application. Without this federal “shifting” feature, the person served could still attack the subpoena before complying, but would have to do so with a motion to quash or modify, i.e., assume the burden of a court application himself.

The same points made in the discussion of the production subpoena, Commentary C45-6 above, and stressed in Commentary C45-11 below, apply to the inspection of premises as well. While a party can seek an inspection of relevant real estate just by asking its proprietor for permission, and would ordinarily need no court process for that, any invocation of judicial process (subpoena or otherwise) to authorize the inspection must be on notice to the other parties to the action. Rule 45(b)(1).

Subdivision (b)

C45-8. Who Serves Subpoena?

The subpoena may be served by any person over the age of 18 who is not a party to the action. That was so under subdivision (c) of the old Rule 45 and remains so under subdivision (b)(1) of the rule as amended in 1991. The prior rule also referred to the marshal. The amended rule drops the reference to the marshal, but, simply as a person over 18, a marshal or deputy can still serve the subpoena under the amended rule. That is, if the marshal is willing to. Nothing in the amended rule imposes this function on the marshal's office as any kind of duty.

The nonparty over 18 is also the one who may serve a summons under Rule 4(c)(2)(A).

Since a corporation is an entity distinct from its officers and staff, a corporate employee would apparently be able to serve a subpoena in behalf of the corporation. Rule 45 says nothing to indicate otherwise, but it may not be a good idea, at least as a general practice. Some lawyers prefer to use independent process servers in all circumstances just on the outside chance that an issue may arise about whether the subpoena was served, or was served properly, and the issue may turn in some measure on credibility. Their theory is that the testimony of an independent process server in such circumstances may come off a mite stronger than that of a party's officer or employee.

C45-9. Method of Subpoena Service.

Service of a subpoena is made "by delivering a copy" to the person named. That was the requirement before the 1991 amendment and it remains the requirement under subdivision (b)(1) of the amended Rule 45. Personal delivery is the only method specified, and this differs substantially from service of the summons under Rule 4, for which a variety of methods are made available. The recently adopted mail method for summons service, for example, which does not even entail use of a process server, Rule 4(c)(2)(C)(ii), is not available for subpoena service.

Mail would ordinarily be inadvisable even if it were available, especially when the return time of the subpoena is limited. (See Commentary C45-10 below on the return time of subpoenas.) The use of the mails delays the process, reducing the preparation time of the subpoenaed person (who may have to rearrange a schedule, prepare materials, etc.), and it consequently reduces the likelihood of a contempt penalty for disobedience by giving the witness excuses for non-compliance.

One immediate alternative for summons service under Rule 4(d)(1) is the delivery of the summons to a person of suitable age and discretion at the defendant's residence, but that alternative, too, is unavailable for subpoena

service, either directly or even with a court order. See Federal Trade Commission v. Compagnie de Saint-Gobian-Pont-A-Mousson, 636 F.2d 1300 (D.C.Cir.1980). Lawyers report that this and other methods are nevertheless sometimes used when the witness can't be readily located, and that it frequently happens that the witness so served will honor the subpoena anyway, unaware of the service deviation, or, if aware of it, too intimidated to chance disobedience. Rule 45 authorizes only "delivering" a copy, however, and the party relying on the subpoena had best be mindful that if the subpoenaed person has the courage to disobey the subpoena because of the defective service, the court is not likely to punish the disobedience; the defect is likely to be held jurisdictional.

At least when there is ample time for service before the subpoena is returnable (and there often is), it would of course be helpful to be able to use a method of service other than personal delivery, especially something like the delivering of the subpoena to someone at the witness's residence or place of business. Indeed, the fact that subpoena service is restricted to the method of personal delivery contributes to the situation, discussed in Commentaries C45-12 through C45-14 below, in which a witness may be able to frustrate all efforts to obtain his testimony just by remaining physically more than 100 miles from his residence or place of business. An effort by the revisors to expand the methods of service, at least in designated circumstances, would have been welcome. It was not to be, however, and personal delivery remains the sole method prescribed.

If a particular person in the employ of a corporation or other entity is the person sought as a witness, the subpoena should of course be delivered to that person, but if the corporation itself is the subpoenaed person, as on a subpoena duces tecum that seeks only materials and it doesn't matter who actually produces the materials, the subpoena can be directed to the corporation and served on any appropriate corporate agent. It is a good idea in that case to have the subpoena delivered to a person who could be served with a summons in the corporate (or other entity's) behalf, such as an officer or managing agent (see Rule 4[d][3]), which will clarify that the subpoena has reached someone of responsibility. Serving a person in some menial position in the corporate employ, while it may work, reduces the prospect of a contempt punishment for disobedience if the corporation should claim that it never got notice. The cited rule, Rule 4(d)(3), allows summons service on corporate agents designated by law, like certain state officials under state statutes, and some case law has also sustained subpoena service through such officials, but recourse to that should always be a last resort only.

Attorneys often report that here, too--as long as the intended person, corporate or otherwise, has gotten the requisite notice--subpoenaed persons often respond to the subpoena on the merits without making an issue of the method of service. It is often economically better to do that. If they choose instead to make a motion to quash, for example, attorneys understand, rightly, that the motion will cost time, effort, and money, and that even if it is granted the seeking party will often just turn around and serve the subpoena again, with the service defect cured. Their attitude is that there's nothing to be gained; that it's better to respond to the subpoena without raising these technical objections.

Service of the subpoena on a witness's attorney is not permissible, even if the attorney-client relationship is known, and this is so of individual as well as corporate subpoenas. Hence the effort must be made to serve the party.

Rule 45(b)(1) also addresses the situation in which the subpoena is a duces tecum subpoena being served on a nonparty for the production of documents, the inspection of premises, etc. It requires that notice of such production or inspection also be given to each party. The notice served on the party need only follow the Rule 5(b) methods of service, however, which are the usual intra-action methods used for serving non-jurisdictional papers. Among those methods is the commonly used ordinary mail to the party's attorney.

A party is also entitled, of course, to notice of a deposition being set up of a nonparty witness (on whom the ordinary testimonial subpoena is used). The procedure for notifying the parties of a nonparty's deposition comes

directly from Rule 30 and is therefore not addressed in Rule 45.

Fees in the proper sum must accompany the subpoena. Fees are discussed in Commentary C45-19 below.

C45-10. When and Where Subpoena Returnable.

There is no specific time period set forth in Rule 45 for when the subpoena is returnable, i.e., for the notice time the recipient must be given before compliance is called for. The bar understands the rule to be that a "reasonable" time must be allowed, and the 1991 amendment makes no change on that front. Under subdivision (c)(3)(A)(i), for example, one of the grounds for quashing a subpoena is that it "fails to allow reasonable time for compliance". What is reasonable is not defined. It depends on the circumstances.

Some lawyers try to give at least 10 days notice time as a rule of thumb, giving less only when it is unavoidable. Others report using five days as a general standard. Still others report that as long as the time is available, they will give notice time of 30, or even 45 days. That may be a lot easier to do on subpoenas seeking a deposition or a pretrial production of documents than on trial subpoenas, at least where the trial date has not been rigidly set. And even when it has been, it can be changed on any of a variety of contingencies, all of them of course requiring that previously subpoenaed persons be notified of the change.

There are instances when notice of only a day or two will be possible, of course, and some lawyers report having sometimes had to use a "forthwith" subpoena, as when the need of something comes up without warning right in the middle of a complicated trial. Whether any of these shortened return times is "reasonable" depends on the context, and the court will of course be the judge of that if the point should arise, as on a motion to quash, for example, or to punish for contempt.

From the witness's point of view, it remains safer to move to quash the subpoena if it is claimed that there is inadequate time to meet its requirements, as where it is a subpoena duces tecum requiring the production of materials that the witness has not been allowed enough time to gather up. Subdivision (c)(2)(B) even has a special remedy for subpoenaed persons in that situation, sparing them altogether the need to take the initiative of a court application. It provides, as subdivision (d)(1) of the prior rule did, that the subpoenaed person need only serve on the party or attorney designated in the subpoena a "written objection" to the production of the documents: the mere service of the objection then shifts the initiative to the party in whose behalf the subpoena was issued to move to compel compliance.

The subpoenaed person who fails to serve such an objection, or move to quash or modify the subpoena, may confront a contempt application without a defense, unless perhaps the time was so tight that there was not even an opportunity to draw and serve a written objection to the subpoena.

The specific date and time of return should be set forth in the appropriate box allotted to it on the form.

There is also a box entitled "place" in each of the alternative paragraphs on the subpoena form. The issuer should of course be as specific as possible in filling in this box. The person served with the subpoena should not be left to guess about any detail. If it's a subpoena seeking trial testimony, the issuer should not only identify and include the address of the courthouse, but also the very courtroom involved if it is possible to do that in advance. If it's a duces tecum subpoena seeking the production of documents or things for the trial, designation of the trial courtroom may

do, as long as the return time is set for the time and place of the trial. Otherwise the issuer should ascertain where in the particular courthouse it is customary to have a witness bring documents and other subpoenaed items, and designate that place (by room number or other identification).

The same applies to the deposition and pretrial production subpoena. If a deposition is to take place in a lawyer's office, for example, the lawyer's address including suite or room number should be included. When both testimony and the production of documents or other things are sought from the same person, the subpoena can just repeat in the production clause the same place specified in the testimonial clause.

Under the 1991 amendment of Rule 45, the production of documents and things even from a nonparty may be subpoenaed independently of a deposition. See Commentary C45-6 above. There, too, of course, the specific place of production should be set forth. And the issuer of the subpoena must at all times remember to give all other parties timely notice of pretrial subpoena proceedings, including, as required by subdivision (b)(1), those attending the pretrial subpoena duces tecum. Failure to give that notice can carry heavy consequences. See Commentary C45-11 below.

C45-11. Attempt to Bypass Notice Requirement.

A clear theme present in Rule 45 as well as in Part V of the Federal Rules of Civil Procedure (the discovery provisions covering Rules 26 through 37) is that any discovery from any source, party or nonparty, that has to enlist judicial process in its cause must be done on notice to all other parties to the action, or in any event to those who have appeared in the action. (See Rule 5[a] of the Federal Rules of Civil Procedure.) An attempt to bypass this notice requirement through any subterfuge at all can carry heavy consequences. A recent case in the New York courts, built around analogous provisions, can illustrate. The case is Matter of Weinberg, 129 A.D.2d 126, 517 N.Y.S.2d 474, reargument denied with further opinion In Matter of Beiny, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dep't 1987).

For document discovery (as opposed to a mere deposition) from a nonparty, New York requires a motion under Rule 3120(b) of its Civil Practice Law and Rules (CPLR). But no court order is necessary for a mere deposition of the nonparty. The seeking party need only subpoena the witness to the deposition and give other parties notice of it. In conjunction with the deposition, the seeking party can include a document demand under CPLR 3111.

Because CPLR 3111 is an adjunct of a deposition, and notice of the deposition must be given to all parties, all parties are also entitled to notice of whatever documents or materials are sought of the deponent in conjunction with the deposition under CPLR 3111.

In Weinberg, the seeking party set up a deposition of a nonparty witness and served a subpoena duces tecum on the witness to elicit key materials as a deposition appendage under CPLR 3111. The party then cancelled the deposition, but, without advising the other side, collected up the materials that the subpoena produced, armed itself with a thorough ex parte review of them, and then used them tellingly in deposing--and surprising--the other side. An irate appellate court suppressed all of the materials, disqualified the offending law firm from continuing to represent the client in the proceedings, and remitted the matter to the local disciplinary committee for investigation.

What is contemplated by the New York provision in point, CPLR 3111, is that the materials produced be produced at the deposition, or in any event at such time and place as will give access to all parties equally, and more or less simultaneously. The same is of course contemplated, even more explicitly, in the requirements that Rule 45 and the

discovery provisions of the Federal Rules of Civil Procedure impose on the party who seeks materials from a nonparty through the use of a subpoena: all other parties must be given notice. The failure to give that notice can lead to penalties just as severe as those imposed in the Weinberg case.

With the permission that Rule 45 now confers for the service of a pretrial subpoena duces tecum on a nonparty independently of a deposition subpoena, a party may be tempted to try some kind of maneuver that will give that party an exclusive review of the materials sought, or even just an earlier review than the other parties can have. Rule 45(b)(1) will tolerate neither attempt; it mandates that all parties be notified of any production or inspection, and its aim is to assure that the other parties' opportunity to review the subpoenaed materials be concurrent with and just as extensive as that of the party issuing the subpoena.

C45-12. Territorial Reach of Subpoena; Background.

Paragraph (2) of subdivision (b) addresses the geographical reach of a subpoena, but it can be misleading if not immediately considered in light of clause (ii) of subdivision (c)(3)(A), clause (iii) of subdivision (c)(3)(B), and the new final sentence added to the contempt provision in subdivision (e). That's quite a mouthful, and it makes the subject a complicated and often confusing one, a misfortune all the more because it is also one of the most important subjects in Rule 45 and, indeed, in all of civil practice. It determines how effective judicial process can be in securing testimony and evidence from a nonparty, not only for the trial itself, but in advance of it as an aid in trial preparation.

On the criminal side of the court, the subpoena can be served nationwide. See Rule 17(e)(1) of the Federal Rules of Criminal Procedure. No such facile rule obtains on the civil side, where service is much more localized. When testimony or things are needed from a far-off witness who is not willing to assist voluntarily--far off, that is, from the courthouse in which the action is to be tried--attorneys have had to rely on depositions, and discoveries in conjunction with depositions, bringing the fruits of their efforts back with them and relying at the trial on the deposition as a substitute for live testimony.

That is still likely to be the case in most instances of the distant but recalcitrant witness, but, under the new rule, apparently not always. In special circumstances, described in subdivision (c)(3)(B)(iii), there appears to be the possibility of compelling a distant witness to attend at the trial, but from the phraseology of the rule itself and even more so from the timidity with which the point is broached, the circumstances would have to be very special, indeed. The point is separately discussed in Commentary C45-16 below. There is much to be said before then.

The Advisory Committee observes that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States" (the quote comes from the committee's "Second" comment on subdivision (a) of the amended rule), and this nationwide service may be carried out, presumably, regardless of what district the action is pending in. But the subpoena's issuer must also consider, before issuance and service, what district an application would have to be made in to enforce the subpoena, or to quash or modify it, or to move to punish for a contempt if the witness defies it. Asking and answering those questions at the outset may well affect the decision about which district court to issue the subpoena "from", which in turn plays a role in determining where the subpoena may be served.

In addition to offering the district of issuance itself for subpoena service, and in some circumstances the state in which that district is located, Rule 45 speaks at one point about serving the subpoena "within 100 miles" of the site of the trial or of a deposition. Subdivision (b)(2). At another point, however, it insists that the subpoena take the subpoenaed person no farther than 100 miles from that person's residence or place of employment. Subdivision (c)(3)(A)(ii). And at yet another it imposes a 100-mile restriction without prescribing at all the point from which

the 100 miles is to run. Subdivision (c)(3)(B)(iii). These provisions, moreover, are not independent ones governing different things; they interplay, and dependence on one may create difficulty if not negotiated alongside the other. In some situations when one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited, the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues.

With this interplay in mind nevertheless, and prepared to make the necessary cross-references with all the profuse and unpleasant subdivisioning they require, the ensuing sections treat, or at least try to, the territorial reach of the subpoena under the 1991 amendment of Rule 45. Some of the territorial language is new; some of it is carried over from the prior rule. Our treatment will address the present rule and what it does, referring to the prior rule only if helpful to an understanding of the present one.

C45-13.Territorial Reach of Subpoena; Where to Serve Trial Subpoena.

Under the explicit terms of subdivision (b)(2), the subpoena can be served anywhere within the district of the court from which the subpoena is issued, anywhere within 100 miles of the place of "deposition, hearing, trial, production, or inspection", or, if state law would so allow for a subpoena issued out of a state court of general jurisdiction, anywhere within the state. The district referred to is the district "by which" the subpoena issued. As earlier noted in Commentary C45-5, the attorney may issue the subpoena, and in doing so must specify the district court "from" which it is issued. So states subdivision (a). While a better coordination of prepositions would have been welcome, the district "from" which the subpoena is issued under subdivision (a)(2) is apparently the district that subdivision (b)(2) means with its "by which" provision.

Which district is that to be? We should divide the subject into two parts at this point, one addressed to a trial (or hearing) subpoena, the other addressed to a deposition or pretrial production subpoena. Here we treat the trial subpoena. The deposition subpoena is the subject of the next Commentary, Commentary C45-14.

Under subdivision (b)(2), inquiry must be made into where the witness is. (The troublesome creature is the nonparty witness. Over parties, the court has all kinds of leverage, which makes for an infrequency of geographical problems. Discussion will thus assume that the witness being sought is not a party to the action, and we will use "witness" to include a person from whom documents or other tangibles are sought as well as a person from whom testimony is sought.)

If the witness is amenable to service within the district in which the trial court is situated, that will be the court "from" which to issue the subpoena. But right here at the outset, a cross-reference must be made to subdivision (c)(3)(A)(ii) (which subdivision [b][2] itself refers to), which manifests that the subpoena may not be effective if it purports to require the witness to travel more than 100 miles from the witness's residence or place of employment or business. Hence, service within the district in which the action is pending, even though it may be made upon the witness--as where the witness is temporarily passing through, or in for a visit, etc.--will not insulate the service from a motion to quash under subdivision (c)(3)(A)(ii) if the witness resides and works elsewhere and the elsewhere is more than 100 miles from the courthouse. To make the matter all the more critical, the contempt provision of subdivision (e) says that obedience of the subpoena is excused if the geographical limits of subdivision (c)(3)(A)(ii) are exceeded.

If the witness's residence or employment is more than 100 miles from the place of trial but nevertheless within the state in which the trial court sits, the court can "command" the witness, pursuant to subdivision (c)(3)(A)(ii), to appear for the trial. But that takes a court order. If the subpoena is simply ignored by the witness, it would appear

that no contempt punishment would lie under subdivision (e).

For these reasons, the geographical reaches of "service", as prescribed in subdivision (b)(2), may be misleading. If the subpoena is captioned out of the district court of the trial district, and is served on a transient witness within the district, all in conformity with subdivision (b)(2), the subpoena can apparently be disregarded by the witness nevertheless, and safely, if it turns out that the witness lives and works more than 100 miles from the courthouse. The reason once again is that if the witness disobeys the subpoena, contempt will apparently not lie under subdivision (e). And if a motion is made under subdivision (c)(3)(A)(ii) to "quash or modify" the subpoena, the court, according to that provision, "shall" grant the motion.

Perhaps the "shall", if used in conjunction with the "modify" in that situation, would give the court, even in a district more than 100 miles away from the witness's residence or employment, at least some measure of leverage to exact performance from the witness with a court order. (If a court order issues and is disobeyed, presumably the order will not be subject to the restrictions on the contempt punishment that subdivision (e) imposes on direct disobedience of the subpoena.)

Keep in mind that we are concerned here with a trial subpoena; that we are looking to get the witness into the courtroom to testify, not into a mere deposition session. If the witness lives and works more than 100 miles from the courthouse, and beyond the state in which the action is pending, can the witness be directed to attend? The answer is an apparent yes, but only if the requirements of yet another provision are met. The other provision is subdivision (c)(3)(B)(iii), which permits the court to direct such distant attendance on the special showing that adequate substitutes are not available and that hardship will otherwise result to the party who issued the subpoena. (See the discussion of that point in Commentary C45-16 below.)

Which court can issue such a direction? Subdivision (c)(3)(B) doesn't say. Subdivision (c)(3)(A), just preceding it, however, does. It refers to the court "by which" (which equals "from" which) the subpoena issued. If subparagraph (B) means to import this from subparagraph (A), then the court that is empowered to make the distant-appearance direction against the witness is the court from which the subpoena issued. Would that include any court from which the subpoena issued? Suppose it issued from a court that is not the trial court, or anywhere near it, or any other court anywhere near the residence or employment of the witness; suppose the subpoena issued "from" a court hundreds of miles from the witness's base. Can that court make the necessary direction? If the subpoena issued "from" that court, and was served on the witness within the geographical area surrounding that court under subdivision (b)(2), that court would presumably have the in personam jurisdiction of the witness requisite to any kind of court order. If that court makes an order that requires something of the witness, whether an appearance at a designated place or anything else, it would be a foolhardy witness who would chance disobeying it.

In other words, while a subpoena requiring an appearance more than 100 miles from the witness's residence or employment may be a disobeyable item under the terms of subdivision (e) (the contempt provision), a court order issued by a court that has jurisdiction of the witness is not. We are apparently supposed to assume that any court from which the subpoena issued, if served on the witness while the witness is physically--though perhaps only transiently--present in the area surrounding that district has obtained the requisite jurisdiction of the witness, even if that area is a thousand miles from the trial court in one direction and the witness's residence and employment in the other. It would then be that court that would have the power to require the witness to travel to the trial court.

Clearly, under subdivision (b)(2), the subpoena can be served on the witness within the district of the subpoena's issuance. But does subdivision (a)(2) authorize the subpoena's issuance from a district merely because the witness is physically present there? Insofar as subdivision (a)(2) authorizes the issuance of a subpoena from the trial court, subdivision (b)(2) permits the service of that subpoena only in the area surrounding the trial court. How, then, do

we get authority to issue a subpoena from the only court that would seem to have jurisdiction to make the witness do anything, which is the court in the area in which the witness is now present, if that court is a thousand miles from the trial court? When it speaks of a subpoena "commanding attendance at a trial", subdivision (a)(2) says that the subpoena "shall" issue from the trial court. Subdivision (a)(2) lists other courts from which a deposition subpoena may issue, but not a trial subpoena. When no deposition is involved, therefore, and the witness is sought only for the trial, and that witness is far away from the trial court, to which court is it that an application would be made, in the contemplation of subdivision (c)(3)(B)(iii), to have the witness ordered to attend the trial?

To make sense of these provisions, perhaps we have to find implicit authority, whether in subdivision (a), or (b), or (c), or (e), or some combination of them, to issue a subpoena "from" a court that is neither the trial court nor a deposition-connected court, but just a court in a district where the witness can be reached with process. That would at least furnish the party in pursuit of the witness a court that can lay hands on the witness under the service restrictions of subdivision (b)(2), so as to give the court jurisdiction to issue the directive contemplated by subdivision (c)(3)(B)(iii). One might be disposed to suggest that if, because of these issuance/service barriers, a subpoena can't do the job of making the witness travel in for the trial, then perhaps a separate action or proceeding of some kind, in the district court of a district where the witness may be found, can do it. But that would seem negated in that it is subdivision (c)(3)(B)(iii) that authorizes this distant-travel order, and that provision is built entirely around subpoena service, not independent proceedings. Back to square one.

Perhaps the villain here is subdivision (b) with its restrictions on place of "service". An argument can be made that the geographical restrictions on place of service contained in subdivision (b)(2) are only illusory, anyway; that service of the subpoena can be made on the witness anywhere in the country, and regardless of proximity to the issuing court, as long as it requires the witness to travel no farther than 100 miles from the witness's home or employment to the place of trial or deposition. The argument is fleshed out in Commentary C45-14 below, but the point should be kept in mind here, too, in considering the trial subpoena.

Subdivision (b)(2), speaking directly of where a subpoena may be served, has its own 100-mile provision. (Each of these 100-mile provisions, by the way, including the one that Rule 4 uses for summons service, is commonly known as the "100-mile bulge" provision in federal practice. See Commentary C4-31 on Rule 4 of the Federal Rules of Civil Procedure set.) The 100 miles under subdivision (b)(2) is measured from the place of the deposition, trial, hearing, etc. Since we're concerned in this part only with the trial subpoena, we'll restrict discussion to that.

The subpoena may be served anywhere within 100 miles of the trial courthouse. If it is, however, and it turns out that the witness lives and works more than 100 miles from the courthouse, the same problem arises as discussed above with service within the district itself: any hope of backing the subpoena with the contempt punishment--the only teeth that the subpoena has when used on a nonparty witness--is lost under the language of the second sentence of subdivision (e), which harks back to the language of subdivision (c)(3)(A)(ii). This means that if the witness lives and works more than 100 miles from the courthouse, the witness has an excuse for disobedience, and never mind that the subpoena was served on the witness while the witness was physically within the 100-mile bulge around the courthouse.

Dwelling on subdivision (c)(3)(A)(ii) for a moment, note that it speaks of the witness having to travel more than 100 miles "from the place where that person resides, is employed or regularly transacts business". The word "or" in that quotation was probably intended to be "and". It was probably intended to say that if the courthouse is within a 100-mile radius of any of those places, compliance is mandatory.

Suppose, for example, that the action is pending in Manhattan, in the Southern District of New York. The witness lives in Poughkeepsie, within 100 miles of the courthouse, but commutes to work in Albany, which is substantially

more than 100 miles from the Manhattan courthouse. Can the witness disobey the subpoena, on the authority of subdivision (e) as applied to subdivision (c)(3)(A)(ii), because while residing within 100 miles of the courthouse, the witness works more than 100 miles from it? Compliance ought to be obligatory in that situation, but in the linguistic structure of subdivision (c)(3)(A)(ii) that would require an "and" rather than an "or". As it stands, the language suggests that the witness is free of compliance if the courthouse is more than 100 miles away from the residence or the employment. If intent, which in this case seems clear enough, is allowed to control language, the "or" should be read as "and", and witnesses should be promptly warned by case law that if the courthouse is within 100 miles of either residence or employment, compliance is required and contempt under subdivision (e) will be ready to back it up.

Of course, subdivision (c)(3)(A)(ii) has a cross-reference of its own to make. It refers to subdivision (c)(3)(B)(iii), which in turn allows the court to "order [the] appearance" of the witness at a place beyond the 100-mile bulge. Under this series of cross-references, then--subdivision (b)(2) and subdivision (e) referring to subdivision (c)(3)(A)(ii) and subdivision (c)(3)(A)(ii) referring in turn to subdivision (c)(3)(B)(iii)--it may be possible to arrive at the conclusion that everything comes back into the court's hands anyway, including a power in the court to direct a witness to travel far to testify at a trial. But if that's so, Rule 45 goes about saying it in oblique fashion. Key points are made by indirection rather than head-on. And Rule 45 on subpoena service, like Rule 4 on summons service, is not some obscure provision hiding in a corner of the Federal Rules of Civil Procedure with an occasional guest dropping by. Rule 45 is a daily fundamental in civil trial practice, and yet it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena "from" and where to effect its service with some assurance that the subpoena will be backed by the contempt sanction if it should be disobeyed.

While some attorneys report that even subpoenas served on nonparty witnesses by a technically improper method, or beyond their proper geographical scope, are usually complied with by nonparty witnesses without objection, the attorney who wants to be secure about the force that backs the subpoena should not be relying on voluntary compliance--on the simple "in terrorem" effect of a subpoena. The attorney should be able to assume that if the subpoena is disobeyed, contempt will be available.

The attorney who effects service of the subpoena within the surroundings of the trial court instead of the witness's residence or employment, or who has any uncertainty for any other reason about whether the witness will show up at the courthouse, had best have taken the precaution of deposing the witness before trial. And if the witness is truly a key one, but also an uncooperative one, the attorney, even before commencing the action, would do well to consider, under 28 U.S.C.A. § 1391, whether the venue of the action might be set in a district in which, or within 100 miles of which, the witness's residence or employment lies.

The third alternative stated by subdivision (b)(2) for service of a trial subpoena is anywhere in the state in which the trial court is sitting, as long as it is shown that a court of general jurisdiction in that state would have such statewide subpoena power. But here, too, the invitation may be misleading. Like the earlier parts of subdivision (b)(2)--those allowing service in the district or within the 100-mile bulge--this one, too, is subject to clauses (A)(ii) and (B)(iii) in subdivision (c)(3), and to the second sentence of subdivision (e). There may be a slight benefit in this service-in-the-state situation, however. Under subdivision (c)(3)(A)(ii), attendance can be compelled from anywhere within the state in which the trial is taking place even if it exceeds the 100-mile measure from the courthouse, and whether state law so provides or not.

If some special federal statute should provide for nationwide service of a subpoena in the particular case, the statute by itself would permit such service without further dependence on subdivision (b)(2), as the latter itself acknowledges. But be wary of any restriction the special statute itself may have. Section 1984(c) of 38 U.S.C.A., for example, permits nationwide service of a subpoena in suits involving veterans' insurance, but insists on court

permission if the service is to be made more than 100 miles from the court.

Service of a U.S. subpoena on an alien outside the country is a nullity, but service outside the country on a United States citizen is permissible under a special, albeit rarely used, statute, § 1783 of Title 28, discussed in Commentary C45-17 below.

C45-14. Territorial Reach of Subpoena; Where to Serve Deposition and Pretrial Production Subpoena.

Subdivision (b)(2), discussed in the prior Commentary as it applies to the trial or hearing subpoena, applies also to the deposition subpoena and to the subpoena that seeks the pretrial production of documents or other intangibles or an inspection of premises. These "pretrial" subpoenas, if we may call them that as a convenient handle, are subject to similar but not identical restrictions. They also involve, necessarily, less tension than the trial subpoena does, for the obvious reason that time is not as tight, but in point of geography they pose some special questions.

The areas within which the pretrial subpoena may be served under subdivision (b)(2), also as discussed in the prior Commentary, are the same or similar to the three alternative areas that the provision supplies for the trial subpoena:

(1) anywhere within the district of the court "by which" the subpoena is issued; or

(2) anywhere within a 100-mile radius of the site selected for the deposition, production, or inspection; or

(3) anywhere within the state containing that site.

It is necessary to issue the subpoena in the name of a distant (from the place of trial) district court whenever the witness from whom testimony or a document or other tangible is sought can't be reached within any of the three enumerated areas as measured from the trial court. But that happens often enough. In the common situation, for example, well known under prior Rule 45 as well, in which the witness resides hundreds or thousands of miles from the trial court and will not travel "in" voluntarily or otherwise cooperate, the attorney in need of the witness's testimony or documents has little choice but to travel "out" to the witness's base and subpoena the witness to a deposition there. That is still generally true, but, at least in respect of the trial, there now does appear to be a way, under a very special showing, to have the court direct the witness to travel "in". That's where the court--in the witness's (not the trial court's) area--has been prevailed on to apply subdivision (c)(3)(B)(iii), a matter discussed in Commentary C45-16 below.

That should of course be rare, so that there is the comfort of knowing that some of the problems we now discuss will arise only in unusual situations.

In seeking out the proper district from which to issue a pretrial subpoena--when the witness is not amenable to service within the stated areas measured from the trial court--the attorney should be careful to choose a district whose geography fully satisfies not only subdivision (b)(2), which governs place of service of the subpoena, but also subdivisions (c)(3)(A)(ii) and (e), if that is at all possible. The latter two references (elaborated in respect of the trial subpoena in the prior Commentary) clarify the importance of seeing to it that the site of the deposition or production is within 100 miles of the witness's residence or place of employment or business. No contempt backs the subpoena unless it is.

Technically, for example, under subdivision (b)(2), the subpoena can be served on the witness anywhere within 100 miles of the place the attorney has selected for the deposition, but in selecting that place the attorney had best assure that it is within 100 miles of the witness's residence or employment. Suppose, for example, that the action is pending in the federal district court in Boston, Massachusetts, and a party's attorney wants to depose a witness who lives in Albany, New York, more than 100 miles from Boston. If the attorney happens to be able to serve the witness in Philadelphia, where the witness is attending a convention, the attorney may be tempted to issue the subpoena in the name of the district court for the Eastern District of Pennsylvania, which embraces Philadelphia, and schedule the deposition to take place in that area. But that subpoena can apparently be disobeyed with impunity if the witness both lives and works in Albany. See subdivisions (c)(3)(A)(ii) and (e).

Perhaps the subpoena in that example should be issued under the name of the district court of the Northern District of New York, which embraces Albany. That would satisfy the two cited provisions, which seek to assure the witness's convenience by requiring the deposition or production to be within 100 miles of the witness's base. But here is another enigma under this peculiar amendment of Rule 45. If the Northern District of New York is selected as the issuer court, as it should be, isn't the subpoena restricted to service only in the Northern District of New York, or within 100 miles of Albany, or somewhere in New York State, under the three alternatives for service authorized by subdivision (b)(2)?

One might argue that it is, but the most reasonable construction of subdivision (b)(2) in the example just used, where the deposition or production has been set for a site within the subdivision (b)(2) boundaries as measured from Albany, is to read the provision as permitting service of the subpoena on the witness anywhere, even if the "anywhere" turns out to be Philadelphia, St. Louis, or Anchorage. Any other construction would stultify Rule 45 and its geography altogether by enabling a witness to avoid the subpoena just by remaining outside the witness's home state and beyond 100 miles from the witness's own residential and employment base. That was manifestly not the intention of subdivision (c)(3)(A)(ii), which is referred to explicitly by subdivision (b)(2).

That explicit reference ought to be taken as authority to effect service of the subpoena anywhere at all, within or without--and even far without--the boundaries explicitly listed in subdivision (b)(2), as long as the performance that the subpoena calls for satisfies the convenience standards of subdivision (c)(3)(A)(ii). The latter is concerned not with the distance from the place of service to the deposition site, but with the distance from the place of residence or employment to the deposition site.

A balancing of all relevant provisions together, in other words, suggests that it is really not subdivision (b)(2) that sets the boundaries for service. In reality there are no boundaries on service, at least not as long as service is made in the United States. The most meaningful boundaries are the residential and business boundaries that enclose the site of the deposition or production--the boundaries contained in subdivision (c)(3)(A)(ii). If that site is properly selected, it should make little difference where the witness may be reached with the subpoena. A construction any more rigid than that would allow subdivision (b)(2) to undermine rather than implement the aims of subdivision (c)(3)(A)(ii).

One may point also to the first alternative offered by subdivision (b)(2) as a proper place for service: any place within the district of the court from which the subpoena issued. The trouble with this is that it harks back to subdivision (a)(2) and its list of proper "issuance" districts. If the issuing attorney, in choosing the district from which to issue the subpoena, tries to satisfy the 100-miles-from-the-witness's base rule contained in subdivision (c)(3)(A)(ii), but the witness can't be served within that district at the present time, should the attorney issue the subpoena instead from a district within which the witness can be presently served, even if it is not within 100 miles of the courthouse, or of the witness's residence or employment, or within the state of either?

This seems to be a problem created by the interweaving and apparent interdependence of these several provisions. Under the prior Rule 45, a simple statement was made, in the provision governing the pretrial subpoena, old subdivision (d)(2), that the deposition (with its adjunct of a document production if documents were also sought) could be initially set up at any place within 100 miles of the place where the witness was "served". No such site-setting measured from the place of service is provided for under the new Rule 45. Trying to set the site so as to pick out the issuing court under subdivision (a)(2), figure out where to make the service under subdivision (b)(2), and satisfy the ultimate requirement of seeing to it that the site selected does not exceed the witness's convenience limitations set by subdivision (c)(3)(A)(ii), creates a circle from which escape is difficult.

It will be difficult, that is, if subdivision (b)(2) is narrowly construed in point of geography, i.e., construed as imposing an outright limit on the court's jurisdiction. If the courts will recognize this occasional geographical dilemma faced by a party using a pretrial subpoena, perhaps they will withhold the "jurisdictional" label from deviations under subdivision (b)(2) and will regard jurisdiction as having been acquired as long as the witness was properly served anywhere in the country. The matter can then be left to the more flexible realm of the court's discretion, which will much better comport with rearranging things to satisfy the rule's more positive indications, such as those about the witness's convenience set forth in subdivision (c)(3)(A)(ii). As long as the courts do not affix a "no jurisdiction" label to the proceedings, and they have the subpoenaed person in front of them, the courts can proceed to implement Rule 45 with an application of its clear intentions.

Avoidance of a "jurisdictional" stamp should be possible simply by taking account of Rule 45's unfortunate ambiguities, manifest in the quadruple by-play among subdivision (a)(2), subdivision (b)(2), subdivision (c)(3)(A)(ii), and subdivision (e)'s second sentence. A court can't be expected to implement the ultimate aim underlying all of them if its hands are tied by a rigid jurisdictional stamp appended to just one of them.

Another thing the courts will of course have to guard against is putting a nonparty witness to the burden of appearing in a distant district just to respond to a motion, such as a motion to compel testimony or production or a motion to punish for contempt. Those motions have to be made to the court from which the subpoena issued. If other jurisdictional questions are resolved in favor of allowing a pretrial subpoena issued from any district court within the requisite range of the witness's residence or employment to be served anywhere in the country, then even if the witness is served farther than 100 miles from that place, the burden of responding to a motion in the district of issuance is once again mitigated by the proximity the court of issuance will have to the witness's base, if not to the place where the witness had to be served.

If these points are well taken--indeed, whether they are or not--the attorney should always make it a point to set the deposition for a place within 100 miles of the witness's residence or employment, without regard to what subdivision (b)(2) itself purports to provide about where the subpoena can be delivered to the witness. Reading subdivision (b)(2)'s own geographical prescription as rigidly preemptive of place of service can otherwise become a prescription for futility. The fact that subdivision (b)(2) explicitly makes itself "subject to" subdivision (c)(3)(A)(ii) should be warrant enough to avoid such rigidity.

This would seem to be corroborated further by the fact that all Rule 45 permits by way of method of service is the personal delivery of the subpoena to the witness. (This problem is discussed more fully in Commentary C45-9 above.) A witness who is not available for a "delivery" within the geographical confines set out in subdivision (b)(2) would be able to flout the judicial process of subpoena altogether, even if the subpoena calls for performance well within the 100-mile circle that surrounds the witness's home and employment.

One may even argue, in fact, that subdivision (b)(2)'s statement of where service can be made is superfluous, and even damaging to the revisors' own intent. A brief statement could have been included in subdivision (b)(2) to the effect that service anywhere is okay, as long as the deposition or production of which it gives notice is scheduled to take place no farther than 100 miles from the witness's residential or employment base. That's what subdivision (c)(3)(A)(ii) requires, anyway, and the cross-reference to it contained in subdivision (b)(2) seems to do nothing so much as cancel out subdivision (b)(2)'s own pronouncement in deference to the geographical pronouncement of subdivision (c)(3)(A)(ii). And then there's the second sentence of subdivision (e) to put the icing on the cake: unless the geography of subdivision (c)(3)(A)(ii) is satisfied, it says, there can be no contempt for the disobedience of the subpoena, which means that in some cases a subpoena served literally where subdivision (b)(2) prescribes can be ignored as a nullity by a canny witness.

A comforting factor, once again, is that problems of this kind should arise only in a rare case. In all but the unusual one the witness will be amenable to service within the witness's own bailiwick, and when that's the case the district court in that area should be the one from which to issue the subpoena. The surrounding area will then be one that satisfies the witness's convenience requirements, as established by subdivision (c)(3)(A)(ii), as well as an area within which the subpoena can be "served", as prescribed by subdivision (b)(2).

In the "rare" case, however, in which the witness is physically servable only beyond the areas described by subdivision (c)(3)(A)(ii), the attorney may have to use some imagination, especially if the courts do not accept the proposition, stated above, that service should be permissible anywhere as long as the contacts requirements of subdivision (c)(3)(A)(ii) are satisfied. What district should the subpoena issue "from" in that case? Subdivision (b)(2) allows service anywhere within the district of the issuing court, and one of the issuing courts subdivision (a)(2) allows is the one in the district "designated by the notice of deposition [see Rule 26(b)(1)] as the district in which the deposition is to be taken".

Should the attorney schedule the deposition to take place within the district in which the witness can be served, even if that district does not satisfy the contacts requirements of subdivision (c)(3)(A)(ii)? If the witness disobeys, citing the want of contacts as an excuse for disobedience under subdivision (e) (the contempt provision), the court should at least have jurisdiction of the witness, who was, after all, physically served in the district. With that jurisdiction, wouldn't the court, while not invoking contempt, be able to direct the witness to appear within the witness's own district, allowing the parties to reschedule the deposition for that district and leaving all further jurisdiction, for follow-up orders as needed, to the court of that district?

We put these matters as questions, because even those of us who have spent much time and effort trying to analyze these interweaving strands of Rule 45 can't offer any guarantee to the lawyer who gets tied up in the strands.

If the witness is away, and can't be served within the witness's own home or employment base, the best idea is of course to wait until the witness returns home and then issue the subpoena from the home district court and serve it in that district. That would answer and satisfy everyone: (a)(2), (b)(2), (c)(3)(A)(ii), and (e). But that can only be done if time is available, which is something the attorney who wants to use the subpoena has to figure out. And if the witness shows no sign of returning, the waiting solution won't do and the problems we have been dwelling on are right back with us. (Perhaps, if the geographical restrictions imposed by the cited clause (ii) prove an absolute barrier to nonparty discovery in a given case, the seeking party can resort instead to the plenary action previously authorized by Rule 34(c) explicitly and still apparently available as an alternative to simple subpoena service. See Commentary C45-6 above. The action should help for a pretrial discovery, but for reasons of time would seem to offer less hope if the discovery is needed for an impending trial.)

As applied to the pretrial subpoena, subdivision (b)(2)'s reference to the "state" as an alternative area for subpoena

service means the state in which the deposition or production is scheduled. It offers with that permission a further geographical option. If the subpoena issues from and sets up a deposition or production in the Southern District of New York (Manhattan), for example, where the witness lives or works, the subpoena can be served on the witness while the witness is temporarily in Buffalo or Rochester, cities that are more than 100 miles from New York City but still within New York State.

At this point another question arises. When subdivision (c)(3)(A)(ii) seeks to have the court relieve a nonparty from having to travel "more than 100 miles from the place where that person resides [etc.]", what exactly does it mean? Does it mean to assume that the person will be starting out from home to go to the site of the deposition (production, etc.)? That is apparently its assumption, or else we have another calculus to go through, measuring distances not from residence or employment, as the cited provision does, but from the point of actual service or from yet some other point.

On whether a corporation is amenable to service of a subpoena--i.e., is "servable"--at a given geographical point, the most appropriate test to apply is the usual "corporate presence/doing business" test evolved for personal jurisdiction and summons service. See Commentary C4-28 on Rule 4 of the Federal Rules of Civil Procedure in this U.S.C.A. set.

C45-15. The 100-Mile "Bulge".

We can center here on a few observations about the 100-mile "bulge" provision mentioned several times in Rule 45 and noted at a number of points in the prior Commentaries.

The reason for the 100-mile limitation is of course historic, premised on the slowness of transportation years ago and the great inconvenience and expense to the witness to have to go far to attend a trial or deposition. Apparently a civil action was not deemed sufficiently important to impose this burden on a witness. (The criminal case has been heard to sound a higher call, and the subpoena in a criminal action can go all around the nation with nothing like the complications of Rule 45. See Rule 17(e)(1) of the Federal Rules of Criminal Procedure.)

Times have obviously changed, and it is often easier and more comfortable today to cross a continent than it was back in colonial times to cross a county, but arguments on that score are best left to the rule-makers and the legislature. The 100-mile restriction exists, and our purpose here is the practical one of how to make do with it.

The better rule is that the 100 miles should be measured by air rather than by surface transportation with its twists and turns, i.e., that it should be measured "as the crow flies". The more recent decisions so hold. See, e.g., SCM Corp. v. Xerox Corp., 76 F.R.D. 214 (D.Conn.1977), holding that the measure should be the same as that applied to the 100-mile bulge used to measure personal jurisdiction in Rule 4. See Rule 4(f). The SCM case has been followed elsewhere, see, e.g., Hill v. Equitable Bank, 115 F.R.D. 184 (D.Del.1987), and the Second Circuit cited it in observing, on an analogous point, that a debate on how to apply a surface transportation measure, and whether that or an air measure is best, is best avoided. United States v. Ofarril, 779 F.2d 791 (C.A.2 1985) cert. denied 475 U.S. 1029, 106 S.Ct. 1231 (1986).

C45-16. Requiring Nonparty to Appear in Distant Trial District.

Among the parties themselves, there is the general assumption that each will appear at the trial, which relieves Rule

45 of any special concern about that. If it should for any reason become necessary to have a party appear at the trial who it turns out will not appear voluntarily--including a person who is in the control of a party, which sweeps the corporation under this category as well--the court has all the leverage it needs to compel the party's appearance. If the court directs the attendance of the party, disobedience can be compelled with something the seeking party would enjoy even more than the invoking of the contempt penalty: a default judgment against the recalcitrant party. Hence Rule 45 shows little tension when a party is involved.

It more than compensates for that relaxation by working hard, and often, on the nonparty witness, addressing at several points the protections erected for the convenience of nonparties and then adding a provision that allows even the nonparty to be directed to travel far to the courthouse, apparently even across the country if need be, but only on a very strong showing. That provision is subdivision (c)(3)(B)(iii), but it again takes some background to lead up to it. (One comes away from the language of the amendment and from the Advisory Committee's oblique notes on it with the impression that on this point the committee wanted the travel-far authorization, but, lest it prove a red flag in some quarters, the less said about it the better. A more head-on approach to this key matter, with a more detailed statement of intent and a few good examples, would have been more helpful to bench and bar.)

When a special statute authorizes nationwide service, a nonparty witness served anywhere in the country can be compelled to appear in the action even if it entails a trip of thousands of miles. There may even be a statute permitting a United States citizen to be subpoenaed home from a foreign country. Such statutes are rare, however (see Commentary C45-17 below). The path to compelling an unwilling nonparty witness to appear at a distant place of trial, even from point to point within the United States, is a cluttered one in Rule 45.

If the witness lives or works, and is servable, within the trial district, or within 100 miles of its courthouse, or within the state in which the trial court sits, Rule 45, now and under its pre-1991 amendment form as well, makes the compelling of an in-person appearance easy enough. The subpoena will generally do the job readily. When the witness is beyond that range, and won't leave it to appear at the trial voluntarily, the dilemma of securing the witness's testimony for use at the trial has been traditionally resolved through the deposition route. The seeking attorney has to go to the witness's base, exploiting the district/100-mile-bulge/state alternatives as measured now from the witness's residence or employment instead of the trial courthouse.

That produces a deposition, and it is the deposition that the attorney relies on at the trial.

The deposition is often a poor substitute for the live testimony of the witness before the jury or judge. The questions and answers are read by others, sometimes even actors, with no opportunity to observe demeanor, etc., but the geographical restrictions on the civil subpoena have nevertheless made the deposition the main alternative. It is still likely to be the alternative, with increasing help from the video tape, but there is at least a crack in the door of the new Rule 45 through which a court can force the witness to travel to a courthouse located wholly beyond the witness's own residential and employment base, and without help from a statute. It takes quite a showing to get to that point, but the authority for it appears in clause (iii) of subparagraph (B) of paragraph (3) of subdivision (c). It's quite a mouthful just to cite the provision--we may henceforth call it clause (iii) without necessarily including its superstructure--and other parts of Rule 45, as several times already noted, have to be negotiated before one arrives at it.

It takes a court order to compel this distant appearance under the terms of clause (iii), and the order can be granted only "if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.... "

In the Advisory Committee note on clause (iii) there is no explicit statement that this is the provision that provides for ordering a witness to give in person testimony at a distant place of trial. The note just assumes that it so provides, addressing explicitly only the fact that the clause requires the court to see to it, in what would amount to a conditional order, that the witness is given "reasonable compensation" for the effort.

Clause (iii) of subdivision (c)(3)(B) interplays with clause (ii) of subdivision (c)(3)(A). The latter assumes that a subpoena can direct a witness to attend a trial held beyond the stated limits measured from the witness's own base. So assuming, it then requires the court to quash or modify a subpoena that contains such a direction, but "subject to the provisions of clause (c)(3)(B)(iii)". In that "subject to" reference is the link that apparently permits the court to order a distant appearance.

Reading the language of clause (ii) of subdivision (c)(3)(A) strictly, it might be urged that the clause's assumption that the witness may have been subpoenaed to a place more than 100 miles from the witness's residence or employment relates only to the state in which the trial court sits. Under subdivision (b)(2), statewide service of the subpoena is permitted as long as the state courts in that state have such statewide subpoena powers (assume they have), and the more-than-100-miles situation contemplated by clause (ii) of subdivision (c)(3)(A)--the argument would run--relates only to this in-the-state service provision of subdivision (b)(2). An example of this would be where the trial court is in New York City in the Southern District of New York but the witness resides and works in Buffalo, well beyond 100 miles from the courthouse but nevertheless within the state. The witness would be properly served in Buffalo under subdivision (b)(2) in that situation, but would presumably be entitled to a quashing of the subpoena under clause (ii) of subdivision (c)(3)(A) unless the court acts to suspend the latter's geographical limits with an exercise of its powers under clause (iii) of subdivision (c)(3)(B).

Is that the sole assumption of subdivision (c)(3)(A)(ii)--the assumption that the exceeding of the 100-mile limit has occurred only because the subpoena was served at some more distant point within the same state? If it is, one may conclude that the court's power to order the 100-mile limit exceeded under clause (c)(3)(B)(iii) applies only if the further travel is to be directed to some other place in the same state.

The answer to that, however, is that clause (c)(3)(A)(ii) does not have to rely on clause (c)(3)(B)(iii) for an authorization to extend travel within the state; the final segment of clause (c)(3)(A)(ii), its "except" clause, itself authorizes that. The "except" clause is itself "subject to the provisions of clause (c)(3)(B)(iii)", but this is done just to assure that the court will be authorized to include conditions and to direct compensation for the witness who has to travel far even from one point to another within the state. (Clause [iii] is the provision that contains the conditioning and compensation authorization.) In authorizing the court to make a conditional order directing the witness to appear at a distant point, clause (iii) does not recite anything about being limited to points of travel entirely within a single state. It appears to apply to the entire federal court system, which means the entire nation.

Buttressing that conclusion is the very demanding showing that must be made under clause (c)(3)(B)(iii) before a court will order a nonparty to travel more than 100 miles to attend the trial. It must be shown that the party seeking the testimony has "substantial need" of it and that the need cannot be met "otherwise" than by the witness's in person testimony except with "undue hardship". Lawyers know that formula from Rule 26(b)(3), from which Rule 45 borrowed it. It's the formula that lifts immunity from trial preparation materials and requires discovery of the materials. Would so demanding a formula be settled on just to spare a nonparty the burden of traveling from one place to another within the same state? Was the provision drafted only with Alaska, Texas, California, Montana, and perhaps a few other very large states in mind? There's nothing at all in the Advisory Committee notes to suggest that. A more logical explanation is that the formula was used with the whole country in mind.

One might tentatively cite, as pointing in the other direction--as pointing to the conclusion that the court's power under clause (iii) to order a distant appearance does apply only to travel within the state--the brief statement at the very outset of the Advisory Committee's notes, where, in enumerating in summary form the main features of the 1991 amendment, the committee lists as number four a purpose "to enable the court to compel a witness found within the state in which the court sits to attend trial.... "

Reading that revisors' statement alone, it might appear to mean the state in which the trial court sits. But that's not what it says, and, more importantly, that's not what the rule itself says in the several parts of subdivision (c)(3) that relate to the matter. The court referred to in subdivision (c)(3) is the court that issued the subpoena--the court to which a motion to quash or modify would be made under subdivision (c)(3)(A)--which would be the court "from" which the subpoena issued, most likely the court in the district or state in which the witness was served under subdivision (b)(2). It is that court which has jurisdiction of the witness and hence it is obviously only that court which can direct the witness to do something. Among the things it can direct the witness to do under clause (iii) of subdivision (c)(3)(B) is leave the state, travel to the distant place specified by the court, and give testimony there.

If the witness is to be subjected to such a direction, as already noted, it will take quite a showing, and on this point the language of clause (iii) is clear. The showing must be of "substantial need" of the testimony and the unavailability of a substitute for the witness's live testimony except with "undue hardship". Among the supportive findings would apparently have to be that a deposition would not do the job, and in that regard there are likely to be many arguments under Rule 45. If the witness is a strong one, the attorney who would be helped by the testimony would want the witness before the jury in person. That attorney should make every effort to obtain the witness's attendance without having to rely on a subpoena. Bring the witness in on a path of roses, well compensated for lost time and effort as well as transportation, and put up comfortably for the entire stay required. Only if the witness resists such blandishments should the subpoena, and a court order as a follow-up under subdivision (c)(3), be relied on. (And of course the seeking attorney, hedging against a court's potential refusal to direct such distant travel, must be sure to have taken the precaution of a full deposition of the witness.)

Subdivision (c)(3)(B)(iii) refers to a witness having to travel "more than 100 miles to attend trial". We now ask, 100 miles from where? Is the residence or employment, as used in subdivision (c)(3)(A)(ii), to be the measuring point here as well? Perhaps it isn't. But if it isn't, then what is?

Shall the 100 miles of clause (iii) be measured simply from where the witness was at the moment of service? If the witness was 1000 miles from the courthouse at service time, but lives only 200 miles away from it and returned home after the subpoena was served but before its return day, that construction, as well as assuming a geographical scope of subpoena service broader than what subdivision (b)(2) contemplates on its face, would have the court measuring travel compensation not from residence to trial court (200 miles here), but from point of service (1000 miles). Or should the 100 miles be measured from where the witness happens to be when now required to stop present activity and go off to the trial? If the witness happens at that moment to be on a mission some 3000 miles away, that construction would suggest compensation for a 3000-mile trip, despite the fact that the witness lives only 200 miles from the courthouse.

The rule has not made things very clear. Suppose the application for a distant-travel order is now before the court, and, to simplify matters--if that's at all possible under Rule 45--assume the court has jurisdiction of the witness, however that may have come about. The court is now asked to make an order to assure compensation for the travel. From what point should the court now measure the required travel? From the place where the witness was served two weeks ago, although the witness has now left that place and is not returning to it? From the place where the witness happens to be staying now, when the subdivision (c)(3) motion is being argued? From the place from which the witness will be starting out to go to the courthouse at trial time? A reasonably fixed starting point is the residence or employment referred to in clause (c)(3)(A)(ii), but is a fixed point required for clause (c)(3)(B)(iii)?

Perhaps the best construction of all is that clause (c)(3)(B)(iii), by not specifying its own measuring point, does not care to "fix" one at all, preferring to stay flexible enough to permit the court to consider all relevant factors sui generis and base compensation on what strikes the court as reasonable on the particular facts. If it is shown, for example, that the witness will be on some mission in Seattle when required to break away and go to the trial court in Atlanta to satisfy the subpoena, the court can note that, and direct compensation accordingly. Since clause (c)(3)(B)(iii) orders will not be granted for the mere asking, but will require a special showing of need, perhaps most consistent with the court's obligation to assure that this need has been demonstrated is a concomitant power in the court to shape a clause (iii) order without fetters from any rigid directive about where the 100 miles has to be measured from.

It will have to be left to case law to determine whether the standards of clause (iii) have been met in the subpoena context. There is a large body of case law on Rule 26(b)(3), and its similar standards, that will offer some guidance, but only some. The requisite findings made under Rule 26(b)(3) require the production of materials, while such findings made under Rule 45(c)(3)(B)(iii) require a nonparty witness to travel a great distance to give testimony in person. The main indication of underlying intent, in any event, is that it must be a very special case indeed to warrant an order directing the witness to travel far to the trial, and the court must of course see to it that the witness is "reasonably compensated" for the trouble.

The compensation need not be directed in advance, but it will usually be the best time for it. Enough should be directed in advance, in any event (even if the rest is saved for later), to cover any actual travel expenses the witness may confront, especially if the witness's own resources are limited.

C45-17. Serving U.S. Citizen Outside Country.

Section 1783 of U.S.C.A. Title 28 provides for the service of a subpoena (including a subpoena duces tecum) outside the country, but only on a person who qualifies as a "national or resident" of the United States. It doesn't apply to an alien who does not have the requisite United States residence. Subdivision (c)(2) of Rule 45 cites and leaves entirely to § 1783 the matter of extra-national service.

While used only infrequently, and mainly in criminal cases at that, § 1783 does apply in civil actions when a proper showing is made. Treatment of § 1783 and its associated provisions is not part of our present mission. Since Rule 45 takes § 1783 as it finds it, we will do the same, but at least a few observations are in order.

The first is that a subpoena under § 1783 requires a court order. The new feature of Rule 45 that enables the attorney to issue a subpoena does not apply to the § 1783 subpoena.

A second is that even when the travel from one distant point to another that is directed of a nonparty pursuant to clause (iii) of subdivision (c)(3)(B) of Rule 45 is to be entirely within the country, the rule manifests great hesitancy and exacts a heavy showing. See Commentary C45-16 above. Its hesitancy can be expected to be all the greater, and hence the still heavier burden placed on the seeking party, when the travel the court is asked to direct is from a foreign country pursuant to § 1783. The attorney seeking testimony or the production of a document or other tangible from such a witness will in most cases have to rely on the deposition and pretrial discovery devices, seeking implementation of them, or the likes of them, in the foreign country, through a commission or letter rogatory (see 28 U.S.C.A. § 1781) if necessary.

The § 1783 subpoena, in the rare case when it does issue, is backed by the contempt punishment under § 1784 of Title 28, including rem proceedings against the witness's local property as a spur to getting the witness to cooperate.

A reciprocal section, § 1782, along with part of § 1781, addresses the use of the United States district courts to aid discovery from persons in the United States when the discovery is needed by a foreign tribunal.

C45-18. Serving Parties with Notices of Subpoena; Proof of Service.

When a subpoena under Rule 45 is served on any person, and sets up a deposition (as opposed to a production or inspection), Rule 30(b)(1) of the Federal Rules of Civil Procedure requires that notices be served on the parties advising of the subpoena, including a designation of any materials the subpoena may require (as when it also contains a duces tecum clause). Since Rule 30 covers the point for a deposition subpoena, Rule 45 need not address it, and doesn't; the Rule 30 requirement of notice applies whether it is a party or a nonparty who is to be deposed.

But while the discovery rules (of which Rule 30 is part) cover the point for the nonparty witness who is to be deposed, they don't cover it when what is sought of the nonparty is a production of documents or other things, or an inspection of premises, unconnected with a deposition. (Production and inspection in the pretrial discovery segment of the Rules is governed by Rule 34, but, unlike Rule 30, Rule 34 applies only when the production or inspection is sought of a party.) Hence it falls to Rule 45, which now permits pretrial production and discovery from a nonparty witness independent of a deposition (see Commentary C45-6 above), to impose the notice requirement itself. This Rule 45 does in subdivision (b)(1). It requires that the other parties to the action be notified of any pretrial production or inspection subpoena. These notices can be served in the usual manner of within-the-action papers: pursuant to Rule 5(b), with ordinary mail being the most usual method.

Under prior Rule 45(d)(1), proof that these notices were duly served on the other parties had to be filed with the clerk before the clerk would issue the subpoena. Now, of course, the attorney does not have to seek the subpoena from the clerk; the attorney can issue the subpoena with no clerk application at all. Rule 45(a)(3). Hence a preliminary filing of proof of service of the notices is not necessary. And perhaps it will not be necessary to file proof of service of the subpoena at all, as where no issue is ever made of it. For this reason, while the amended Rule 45, in subdivision (b)(3), still provides for proof of service, it speaks of the filing only when the filing becomes "necessary", which may never happen.

Whenever the filing is undertaken, necessary or not, it consists of "a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service". Rule 45(b)(3). A form of proof of service appears as part of the subpoena form distributed by the federal courts when the 1991 amendment of Rule 45 took effect. So does a "declaration" by the person who served the subpoena, in fulfillment of the certification requirement.

Old Rule 45(d)(1), which addressed proof of service, was concerned with proof that the parties were notified of the subpoena process being undertaken, not with the act of subpoena service itself. It is not entirely clear, but the new Rule 45(b)(3) seems to be addressing proof of service of the subpoena. The Advisory Committee note states its belief that the former provision is being retained, and is merely being extended to apply to the trial as well as the pretrial subpoena. The Committee may have confused proof of service of the subpoena with proof of service of the notice that must be served on the parties advising of the subpoena, but the point should rarely prove urgent. Whichever it is, subdivision (b)(3) does not prescribe when proof of service must be filed, but only what it must

consist of if some other provision or exigency requires its filing.

The significant thing about the proof of service requirement under old Rule 45 is that it had to be filed as a condition to the clerk's issuance of the subpoena. Under the new rule no proof of anything need necessarily be given to the clerk prior to the issuance of the subpoena, for the obvious reason that it is now the attorney who can do the issuing under Rule 45(a)(3).

The court "from" which the attorney issues the subpoena, see Rule 45(a)(2), is the one with which a filing of proof of service is made.

C45-19. Fees and Mileage.

If the person served with the subpoena is required to attend somewhere, the fee for one day's attendance plus mileage "allowed by law" must be tendered to that person. Rule 45(b)(1). The tender should be made "concurrently with the subpoena". Tedder v. Odel, 890 F.2d 210 (C.A.9 1989). If the person does attend and is then required to continue in attendance, the party in whose behalf the subpoena issued should make appropriate accommodation with the witness at that time. If the attendance to be continued is attendance at the trial, the court should be in a position to see to the accommodation, if necessary.

No fees or mileage need be tendered if the subpoena is issued in behalf of the United States or its officers or agencies. As the Tedder case shows, this applies only when the government or its agency or official is the issuing party, and not a mere conduit assisting in service of a subpoena being made in behalf of a private person.

Section 1821 of 28 U.S.C.A. provides for fees and mileage. At the present moment the fee for a day's attendance is $40 under subdivision (b) of § 1821. Subdivision (c) addresses mileage, providing that for travel by common carrier the actual expense for transportation "reasonably utilized" is allowed. For travel by private vehicle, the statute leaves the actual figures to be set by the Administrator of General Services, of whom inquiry has to be made if the presently applicable figures are not known.

Failing to tender the applicable sums in advance, with the subpoena, has been held to make the subpoena invalid. See, e.g., CF & I Steel Corp. v. Mitsui & Co., 713 F.2d 494 (C.A.9 1983). As the case also shows, however, the sum tendered for the mileage segment need only be "estimated". The subpoenaed person is on perilous ground, however, who disobeys the subpoena on a close argument about what the sum should be. Lawyers consulted by the witness should not counsel disobedience on such a pretext.

Many lawyers tender the money by check, which should pose no problem if the subpoena is not returnable until the check has had sufficient time to clear. But if time is close, it is probably best to make the tender in cash, lest the witness be heard to argue that the money could not be used for the needed transportation because the check was not allowed enough time to clear. Again, however, a witness is taking a chance on a contempt penalty by playing things too tight on the money issue.

While the mileage computation should be that of the actual approximated distance the witness has to travel on a round trip to the point of testimony, deposition, production, inspection, etc., and that will usually be no more than the routine limits stated on subpoena service in Rule 45--within the district, or within 100 miles, or within the state of the issuing court--it has to be remembered that under the 1991 amendment of Rule 45 distances can more often

exceed what they were before. Travel entirely within a state can be compelled under Rule 45(c)(3)(A)(ii), for example, and apparently from far beyond the state as well under Rule 45(c)(3)(B)(iii). See Commentary C45-16 above. Those increased distances are now part of the "mileage allowed by law" that subdivision (b)(1) of Rule 45 requires, and attorneys issuing subpoenas should be aware of it.

Often--but not always--the situations in which such extra distances are involved will be those in which the court is directing the travel on applications of clause (ii) of subdivision (c)(3)(A) or clause (iii) of subdivision (c)(3)(B). There the court can direct payment of the sums as part of its disposition of the application. But most of those situations also contemplate that a subpoena has already been served, and the issuer should be sure that appropriate mileage went with it. Else the witness may not even show up on the application, and be subject to no penalty for the failure.

Issues of proper witness and mileage fees seem to arise more often on applications to tax costs under 28 U.S.C.A. § 1920 after things are over than on motions that test the subpoena while things are still under way. Attorneys should be aware of that, too. That a case in which a court in its discretion has allowed substantial witness fees as part of a costs award--even actual expenses rather than just those enumerated in § 1821--does not mean that the attorney using that witness can tender anything at all in advance and expect to be able to tax it all as a cost afterwards.

If witness expenditures are expected to be heavy, and any context before the court--such as a motion for a subpoena to be served abroad on a U.S. citizen pursuant to 28 U.S.C.A. § 1783--offers an opportunity to have the court pass on the costs question, it is usually best to secure such preliminary approval before incurring the expense. See, e.g., Fleet Investment Co. v. Rogers, 620 F.2d 792 (C.A.10 1980). There is otherwise no guarantee that the sum actually paid will be recoverable later as part of the taxation of costs. It surely won't be if the court on such a later review finds the expense profligate.

The U.S. Supreme Court has held that a district court does have discretion to allow, as costs, witness expenses exceeding the bare fees and mileage expenses authorized by Rule 45, Farmer v. Arabian American Oil Co., 379 U.S. 227, 85 S.Ct. 411 (1964), but the Court admonished that this discretion should be "sparingly exercised" and in any event applied in light of the limited sums that Rule 45 contemplates.

Subdivision (c)

C45-20. Duty to Avoid "Undue Burden" on Subpoenaed Person; Sanctions for Abuse.

Certain parts of subdivision (c) have already been discussed, often and in detail. These are subparagraphs (A)(ii) and (B)(iii) of paragraph (3), provisions that play a key role in determining whether the witness can be compelled to travel far from the witness's home base (residence or employment) to give testimony or produce documents, etc. They became relevant in earlier discussions of related matters and had necessarily to be treated at those junctures. See Commentaries C45-13 and C45-14 above.

We now examine subdivision (c) in general, treating its other divisions. The whole subdivision is new, designed to protect subpoenaed persons in various ways.

The theme of the new subdivision (c) is sounded in its first paragraph, paragraph (1), which imposes on the attorney, or on a party acting pro se, the obligation of taking "reasonable steps to avoid imposing undue burden or

expense" on the subpoenaed person. The provision then instructs as follows:

"The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee."

With Rule 11 of the Federal Rules of Civil Procedure on the books, authorizing sanctions in a variety of contexts generally, and Rule 26(g), authorizing sanctions specifically for discovery abuses, to which the abuse of a subpoena is even more analogous, the bar needs little reminding about how meaningful the threat of a sanction can be. Here Rules 26(g) and 11 were apparently not deemed sufficient from their own positions to cover sanctions for subpoena abuse, so the sanction power was conferred in Rule 45 explicitly.

Cases on the other rules will serve in some measure as guides to what would qualify as improper conduct under Rule 45. For good measure, however, the Advisory Committee calls attention to the widely and frequently cited New York case of Board of Education v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278, a 1975 decision from the New York Court of Appeals holding that the misuse of the subpoena process for purposes of harassment and the like supports an action for abuse of process.

With all those reminders in place, the issuers of subpoenas must be alert at every juncture to use the subpoena reasonably, with the court to determine what's reasonable on a case by case basis whenever the issue is brought to the court's attention. The matter is a sensitive one, and will be especially so during the early months or years of the new Rule 45's operation, while some of its more ambiguous parts are being tested.

We went through long discourses in Commentaries C45-13 and C45-14, among others, in determining how far a subpoena can go, geographically, to reach a witness. Rule 45 is not exactly lucid on the point, and yet it appears very lucidly to allow the court to impose a "sanction" on the issuer if the court should afterwards find that the subpoena went too far. Only after authoritative case law develops on some of the more ambiguous issues arising under Rule 45 should a court impose a sanction when a position taken by a party is a fair reading of the rule, even if the case law should ultimately resolve the point at issue the other way. The standard of subdivision (c)(1) is that the steps the subpoena user takes must be "reasonable", and only a step taken under a given provision that is so far beside the mark as to be patently unreasonable should invoke a sanction.

Suppose, for example, that the user of the subpoena, well aware of subdivision (c)(3)(A)(ii) and its directive that a witness should not be compelled to travel more than 100 miles from residence or employment to accommodate the subpoena, schedules the deposition for well within that range, but, unable to find the witness within that range at the time service is attempted, serves the subpoena beyond, while the witness is at a convention or on holiday. Is that a breach of the territorial restriction of subdivision (b)(2)? Isn't (b)(2) qualified by (c)(3)(A)(ii)? Or is the latter invocable only upon a motion to quash, so that the initial service of the subpoena beyond the borders listed in subdivision (b)(2) is altogether prohibited? Unless the subpoena is somehow served on the witness, though, how can a motion to quash under (c)(3)(A)(ii) come about in the first place? On the motion of a party before the subpoena is served? Or on the motion of the witness, which would necessarily contemplate that the subpoena has already been served?

All questions about that territorial range, and about yet other things under the new Rule 45, should have definitive answers from decisional law before attorneys who must guess at the answers start getting sanctioned for guessing wrong.

The court that has the sanction power under subdivision (c)(1) parlance is the court "on behalf of" which the subpoena was issued. That would mean, in subdivision (a)(2) parlance, the court "from" which the subpoena issued, or, in subdivision (c)(3)(A) parlance, the court "by which" the subpoena issued. For a rule that has sanctions to apply for a misreading, that's an awful lot of parlances. Perhaps the courts can recognize that the rule is no more perfect than the bar is, and that attorneys should no more be condemned for guessing wrong on an ambiguous matter than the rule should be for making the matter ambiguous.

The attorneys' fees that may be collected under subdivision (c)(1) include not only attorneys' fees incurred in resisting the subpoena, but also attorneys' fees incurred in seeking to collect attorneys' fees, loss of earnings, and whatever else may reasonably accompany the sanctions application. That appears to be the import of the Advisory Committee note, to the effect that "liability may include the cost of fees to collect attorneys' fees" incurred for breach of subdivision (c)(1).

And lest anything contained in Rule 45(c) be found to go in the other direction, cutting back on protections witnesses are entitled to under the disclosure part of the Federal Rules of Civil Procedure (Rules 26-37), the committee offers the statement that Rule 45 "is not intended to diminish rights conferred by Rules 26-37 or any other authority".

C45-21. Complying with Subpoena Duces Tecum; Objections by Subpoenaed Party; Motion to Compel.

It is subdivision (d), not (c), that bears the caption of "Duties in Responding to Subpoena", but the caption applies in equal or even greater measure to subdivision (c) as well. In prescribing "Protection of Persons Subject to Subpoenas", subdivision (c) also necessarily involves the subpoenaed person's duties.

It has already been observed (Commentary C45-6 above) that Rule 45 now allows a duces tecum subpoena to be served on a nonparty independently of a testimonial subpoena. Subdivision (c), while phrased to govern any person served with the subpoena, is especially concerned with the rights of nonparties. To assure, in fact, that the subpoenaed person be aware of these rights, the rule requires that the text of subdivision (c) (as well as of subdivision [d]) be set forth in the subpoena itself. See Rule 45(a)(1)(D).

If the person served with the subpoena has objections to it, the person (we will henceforth call that person the servee) must take some step, promptly, in order to avoid facing contempt for disobedience. One such step would be a motion to quash or modify the subpoena, under subdivision (c)(3), but that would entail the servee's taking the initiative of a court application, which, in the case of the nonparty servee, may make it necessary for the servee to retain an attorney. The servee can contact the other party--the adversary of the one issuing the subpoena--to discuss the matter, and perhaps that party will make the motion to quash or modify, at least where that party has its own basis for doing so. It has been held, for example, with respect to a documents subpoena, that if the party has no "personal right or privilege with respect to the materials subpoenaed", it will not have "standing" to make the motion. See Brown v. Braddick, 595 F.2d 961, 967 (C.A.5 1979).

Paragraph (B) of subdivision (c)(2), also speaking of a documents subpoena, has better news for the servee: The servee can shift the burden of making a court application to the party who issued the subpoena, merely by serving written objections on that party. (This procedure is carried over from what was subdivision (d) of the prior Rule 45, but there it addressed the duces tecum clause added to a testimonial subpoena, while in its present niche in subdivision (c)(2)(B) of Rule 45 it also addresses a duces tecum subpoena drawn independently.)

By serving written objections, the servee suspends its obligation to comply until after the court rules on the seeking party's motion, which would normally be a motion to compel. Drawing objections can also be a sticky business, of course, entailing the skill of an attorney and hence the use of one by the servee.

The time for serving such objections can be tight. If it is not, the servee should have ample time for drawing the objections. When the return time of the subpoena is more than 14 days away, the rule gives the servee 14 days for serving objections, but only 14 days. If the return day is 30 days off, for example, the servee must draw and serve the objections before the 14th day after service of the subpoena, which will give the party issuing the subpoena more time to consider its next step, which will usually be a motion to compel compliance. This is another good reason for the issuer of a subpoena to set a return day amply into the future.

The servee who must respond with objections within 14 days, but fails to, runs the risk of being held to have waived the objections. See, e.g., Deal v. Lutheran Hospitals & Homes, 127 F.R.D. 166 (D.Alaska 1989).

If the return day--the rule calls it the day on which "compliance" is required--is less than 14 days off, the objections, service of which shifts the burden of a motion from the servee to the issuer, can be served at any time before the return day. This may make things so tight for the issuer that the very mechanics of a motion to compel, invoking the time demands of motion practice under Rule 6(d), may automatically put off the return day, which can be bad news indeed if the subpoena is being used for the trial rather than just a pretrial discovery. Hence the lesson to the issuer once again: try to give ample notice of the return time whenever possible.

The motion to compel may be made "at any time" under subdivision (c)(2)(B), and in a pinch the motion can of course be brought on by order to show cause, with the court setting an abbreviated return time. The court may not be happy with the application, however, if it finds that the applicant has created its own tight spot by giving too little notice time, unnecessarily, in the first place. This can take its toll on how the court responds to the application.

The committee notes on subdivision (c)(2)(B) say that the reason that the period for serving objections is set at 14 days after service of the subpoena (it was 10 days under the prior rule) is to make it unnecessary to factor in intermediate weekends and holidays, which must be done (see Rule 6[a]) when the applicable period is less than 11 days.

Subdivision (c)(2)(B) explicitly requires that the motion to compel be made "upon notice to the person commanded to produce". This requirement, also carried over from the prior rule, is designed to assure that a nonparty servee be notified; it does not dispense with service of the notice of motion on the parties as well, which Rule (5)(a) of the Federal Rules of Civil Procedure requires for papers generally.

Attorneys often ask what means of service have to be used for motion papers (such as on a motion to compel compliance) that have to be served on a nonparty, such as the subpoenaed person in our example. Since that person has not been made a party by summons service, which would then easily invoke the usual intra-action methods of service such as ordinary mail under Rule 5(b), need the motion papers be served on the nonparty in the same manner as a summons, i.e., pursuant to Rule 4?

Some attorneys take the precaution of doing that, at least with Rule 4 methods that result in immediate notice and that don't entail any long delays (such as the mail method of Rule 4[c][2][C][ii] does). Unlike some state courts, the federal courts seem more concerned with whether the nonparty had reasonable and adequate notice of the

motion rather than with the specific method used to give the notice. It can be argued that since the subpoena is a jurisdiction-getting paper, and was presumably served by delivery to the servee under Rule 45(b)(1), subsequent proceedings to enforce the subpoena, such as by a motion to compel or a motion to punish for contempt, are really ancillary to the subpoena and ought to enjoy whatever jurisdiction the subpoena service earned; that is, whatever form the application to compel takes (motion within the action, separate proceeding, etc.), the question on the ancillary application should be whether the nonparty has been given adequate notice of it, not whether the court has acquired a new "jurisdiction" of the nonparty distinct from the jurisdiction that was secured when the subpoena was served. As long as the method used to get the motion papers into the hands of the subpoenaed person appears reasonable in the context of the particular case and can in any event be shown to satisfy due process, the service should be held good. See and compare Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (C.A.8 1975).

The attorney in any doubt about this can avoid the problem by seeing to it, if it is possible, that personal delivery of the motion papers is made to the nonparty, which would satisfy Rule 4(d)(1) on summons service and, by analogy, Rule 45 in what it prescribes for service of the subpoena itself. (We have already noted that for service of the subpoena itself, personal delivery is the only recognized method. The reader should keep in mind that in the present discussion the service of the subpoena is not the issue, but rather the service of a motion that seeks to affect the already served subpoena in some way.)

The motion to compel supplied by paragraph (2)(B) of subdivision (c) should, like the motion to quash or modify set forth in paragraph (3)(A), be made to the court from which the subpoena issued. That will presumably be a court in a district convenient to the nonparty, see Rule 45(b)(2), and it is of course the nonparty whose convenience Rule 45 is most concerned about protecting.

If Rule 45 is relied on as the source of the motion, then the motion should of course be labeled as one made under Rule 45. But there is often an overlap between Rule 45 and its subpoenas on the one side and Rules 26-37 and its pretrial discovery devices on the other. This occasionally leads to the mislabeling of a motion, citing one provision when one of the others is technically applicable. If what is meant is clear, and if there is no prejudice to any person, the court can disregard the mislabeling defect, and usually will.

If the court does grant the motion, and makes an order to compel, and the person against whom it is made is not a party, the court is required to ("shall") include in the order a provision for defraying the expenses that the production, inspection, copying, etc., may require. Ordinarily, the order should arrange for the defraying before the nonparty incurs the expense, but the Advisory Committee notes say that this is not a rigid rule; that costs, notably "uncertain" costs, can be left to future ascertainment and payment. Any postponement in payment must in any event consider the financial strength of the nonparty involved.

It has been held that a post-compliance application for costs is permissible, at least when the nonparty has reserved, in the course of the earlier proceedings, the right to make the later application; that to hold otherwise might very well interrupt the parties' discovery proceedings by compelling costs motions before costs can even be reasonably estimated; and that the seeking of costs should therefore not be restricted to the pre-compliance context of a motion to compel or quash. See United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (C.A.9) cert. denied 457 U.S. 1118, 102 S.Ct. 2929 (1982).

C45-22. Motion to Quash or Modify Subpoena.

Paragraph (3)(A) of subdivision (c) authorizes the motion to quash or modify the subpoena, listing diverse grounds. It applies to both the testimonial and the duces tecum subpoenas. And it applies to both parties and nonparties,

except for certain parts that zero in on the nonparty alone, such as clause (ii) of paragraph (3)(A).

The motion to quash is made to the court "by which" the subpoena was issued, which means the court "from" which it issued under the language of subdivision (a)(2). That will not necessarily be the court in which the action is pending.

The first ground listed (clause [i]) is that the subpoena does not allow a "reasonable" amount of time for compliance. This "reasonable" standard is as much as the rule says about the return time that a subpoena can set. The rule prescribes neither a minimum nor a maximum. See Commentary C45-10 above. The exigencies of the case determine. The longer the notice time given, however, the greater the likelihood that a failure to comply will support a contempt citation. It will at least divest the subpoenaed person of the excuse that there was insufficient time to prepare.

The inconvenience of a nonparty that is the subject of clause (ii) was investigated earlier, in Commentaries C45-13 and C45-14. Extensive address to clause (ii) may be found in those earlier treatments. It is clause (ii) that protects a nonparty from having to travel inordinate distances to satisfy the subpoena. Fulfilling the distance limits imposed by clause (ii) is important for the additional reason that it will also keep the contempt punishment on tap as a penalty for the subpoenaed person's disobedience. Exceeding those limits excuses compliance. See subdivision (e)'s last sentence. The limits stated in clause (ii) can be by-passed by the court's invoking of its powers under clause (iii) of subdivision (c)(3)(B), however, an interplay that is also the subject of the cited Commentaries.

Clause (ii) itself, in paragraph (3)(A), without help from clause (iii) of paragraph (3)(B), authorizes the court to compel travel from any place within the state in which the trial court is located to any other place within the same state, even if the 100-mile limit is exceeded, and permits this whether the state law of that state permits it or not. (Under the predecessor provision, subdivision (e)(1) of the prior rule, permission for this stretch had to be found in state law.) Making this power "subject to" clause (iii) just assures that if the 100-mile limit is exceeded even within the state, the court can make a conditional order exacting (among other things) payment of the nonparty's expenses as a condition to upholding the subpoena.

Clauses (iii) and (iv) return to application to parties and nonparties alike.

Clause (iii) in paragraph (3)(A) guards against the disclosure of privileged matter (unless a waiver of the privilege has occurred). The law governing privileges that will apply here is of course that applicable under the rules of evidence and under the disclosure rules.

The fourth ground listed (clause [iv]), is that the subpoena subjects the person to "undue burden", a repetition of the phrase contained in subdivision (c)(1), discussed above in Commentary C45-20. This is a catch-all category that enables the court to grant the motion to quash or modify in any other situation in which it finds, sui generis, what it believes to be an "undue burden" imposed by the subpoena. The Advisory Committee said of subdivision (c)(3) generally that it is designed to track Rule 26(c), the principal protective order provision applicable in federal discovery. The provision that most broadly implements that overall intention is this clause (iv) of subdivision (c)(3)(A). The committee also notes that while the existence of those discovery protections may make their statement here in subdivision (c) repetitious, the repetition is a good way to make the subpoenaed person alert to these protections for the reason that the text of subdivision (c) has to be included in the subpoena itself. See subdivision (a)(1)(D).

The reference to Rule 26(c) in the committee notes is helpful for a number of reasons. One is that several illustrative protections are enumerated in that provision, and clearly all should be available, if relevant, for subpoena protection under Rule 45. The second and perhaps more important reason is that Rule 45 lists only a few specific grounds for quashing a subpoena, with the "undue burden" category added as a kind of general one, while the experience of the cases is that there may be numerous grounds for quashing or modifying, all dependent on the facts of the particular case. The citation to Rule 26(c) in the revisors' notes will make it easy to import for application on a motion to quash or modify under Rule 45 just about everything that would support a vacating, quashing, modifying, conditioning, or other protection under the disclosure segment of the Federal Rules of Civil Procedure (Rules 26-37). Through that open door from the discovery rules to Rule 45 come also the standards of disclosability itself, such as those set forth in Rule 26(b).

The specific example that the committee cites of a protective order that the court can consider under clause (iv) of paragraph (3)(A) is one that insulates even an adverse party from having to attend the trial as a witness, as where that party has no personal knowledge of the facts. That can happen, for example, when the person who is formally the "party" is a decedent's personal representative with no personal knowledge of the matters in dispute, or an assignee with a like disability, etc.

The motion to quash or modify must be made by or in behalf of the subpoenaed person. If the subpoenaed person is a nonparty, that presents some questions. The nonparty must ordinarily be the movant, whether pro se or with a lawyer. What if the adverse party is contacted by the nonparty, as sometimes happens? Can the adverse party make the motion? The answer would be yes if that party has its own rights to assert in suppressing the subpoena, as where the subpoena seeks materials that would fall under one of the privileged categories (involving the party's privilege, of course). But it bears repeating that if the party can't show "any personal right or privilege with respect to the materials subpoenaed", it will not have "standing" to make the motion. See, e.g., Brown v. Braddick, 595 F.2d 961 (C.A.5 1979).

Can a nonparty appeal an order that fails to quash or modify a subpoena as the nonparty requested? The rule of appealability contained in 28 U.S.C.A. § 1291, authorizing appeals only from final dispositions (construed generally to mean the final disposition of the entire case), ordinarily forecloses appeal. See, e.g., Kaufman v. Edelstein, 539 F.2d 811 (C.A.2 1976), which notes with citations that "an order in a civil or criminal case denying a motion by a non-party witness to quash a subpoena is not appealable until the witness has subjected himself to contempt."

The doctrine known as the "collateral order" rule, however, which is an exception to the finality principle, has been held by some courts to make a nonparty's appeal from a subpoena disposition possible in some situations. See, e.g., United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (C.A.9) cert. denied 457 U.S. 1118, 102 S.Ct. 2929 (1982).

C45-23. Conditional Order.

Subparagraphs (A) and (B) of subdivision (c)(3) overlap. Subparagraph (B) authorizes a conditional order explicitly, but the power that subparagraph (A) affords to "modify" the subpoena, especially in view of the broad "undue burden" standard set forth under clause (iv) of subparagraph (A), would authorize much of what subparagraph (B) purports to with a conditional order. We may thus take the particulars set forth in subparagraph (B) to be matters of special consequence to the Advisory Committee--matters the committee deemed important enough to earn individual attention.

This attention is given not only in the rule itself, but in the committee's notes as well, where detail is offered in a measure that other parts of Rule 45 can't boast. The detail in the notes will spare some effort in this Commentary, but several points should be noted about the content of subparagraph (B).

Clause (i) guards against the disclosure of a trade secret or other confidential business data, merely duplicating the content of paragraph (7) of Rule 26(c)'s list of protective order examples applicable in the discovery realm generally.

Clause (ii) addresses the problem, perceived to be an increasing one, of the attempt to extract expert testimony from a nonparty witness. It applies only to a person not retained as an expert by a party. (With a party-retained expert, the extensive provisions of Rule 26(b)(4) are left to govern.) If such an unretained expert is called, clause (ii) seeks to guard against anything that can amount to an expert opinion from that person if no compensation has been arranged for it. The opinion is deemed to fall within the realm of intellectual property, and the revisors were concerned that any effort to coerce an opinion from the expert without compensation would amount to a "taking" of the property in the constitutional sense. One possibility, to avoid the problem, especially when the expert is receptive, is for the court to make an order under clauses (ii) and (iii) of paragraph (3)(B) making reasonable compensation of the witness a condition to the compelling of the expert opinion.

In a different category, however, are facts that the expert knows, as where the expert had previously reviewed the facts on some other occasion, as in conducting a study in some academic channel or in the preparation of expert testimony in some other context, a study or preparation not made at the hiring of any party to the present action. It is primarily to facts rather than opinion that clause (ii) is referring with the language "specific events or occurrences in dispute". Different considerations apply to facts, and testimony and discovery from the nonparty are more readily extractable. It may happen, for example, that much has occurred since the expert studied the facts and prepared an opinion in some other case or situation a long while back, and that no one else is available now who can attest to the facts. Judge Friendly's opinion in Kaufman v. Edelstein, 539 F.2d 811 (C.A.2 1976), treating these and related issues in depth, is cited by the Advisory Committee for its review of the relevant factors that the court must consider.

Clause (iii), a key part of paragraph (3)(B), and, indeed, of Rule 45 in general, applies only to a nonparty. This is the provision that allows the court to direct a nonparty to travel more than 100 miles to attend the trial. The court that can make this direction is the court from which the subpoena issued. Clause (iii), in that and a number of other particulars, was discussed at length earlier, in the course of treating the question of where a subpoena can be served. See Commentaries C45-13 and C45-14, and especially Commentary C45-16, above.

The "substantial need" and "undue hardship" standards set forth in clause (iii) are taken verbatim from their niche in the work product and litigation materials segment of the discovery part of the Federal Rules of Civil Procedure, Rule 26(b)(3). There is extensive case law on that provision to guide the court.

Paragraph (2)(B) of subdivision (c) is the provision that explicitly requires the court, when it compels a nonparty to produce documents or other tangible things, to protect that person from "significant expense" incurred in carrying out the direction. In its notes on paragraph (3)(B), the committee again calls attention to that situation, explicitly referring to paragraph (2)(B)--inadvertently identifying it as in subdivision (b) instead of subdivision (c)--and thus highlighting once again the committee's concern, and perhaps even preoccupation, with protecting nonparties from undue expense connected with carrying out a subpoena duces tecum.

Subdivision (d)

C45-24. Responding to Document Subpoena.

Most of a subpoenaed person's duties are covered in earlier subdivisions, notably subdivision (c), which, in treating protections that a subpoenaed person is entitled to, says just as much, by negative implication, about what a subpoenaed person is not entitled to. Production of the unprotected matters are the subpoenaed person's duties. Subdivision (d), entitled "Duties in Responding to Subpoena", is therefore over-named. With a title like that, one would expect a statement of a variety of things that constitute a subpoenaed person's "duties", but subdivision (d) touches on only two narrow things.

Barring an obvious exceeding of the prescriptions of Rule 45 or the intervention of the court with a protective or conditional order under subdivisions (c) or (e), the subpoenaed person's duties can be summed up in a word: compliance. The risk of non-compliance is contempt, the subject of subdivision (e) (treated in Commentary C45-26 below).

Paragraph (1) of subdivision (d) addresses only the subpoena duces tecum, and is even narrower than that: it addresses only the subpoena duces tecum that seeks documents. It is concerned with the custodian's manner of compliance. The documents sought may be produced just as they are kept, or they can be organized and labeled "to correspond with the categories in the demand" contained in the subpoena. The choice is apparently left to the subpoenaed party, at least in first instance.

The provision comes from its counterpart in Rule 34, the rule on document production sought from a party. (Rule 45 extends document production to apply to nonparties as well.) It was added to Rule 34, where it is presently the last paragraph of Rule 34(b), in 1980, and the Advisory Committee's 1980 note enlightens us on its purpose. Quoting from an American Bar Association study, the note says that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance". Paragraph (1) of subdivision (d) hopes to prevent that mix, but this is of course a difficult thing for a court to monitor. The rule seeks to require the custodian to produce the records exactly as they are kept in the "usual course of business", unblended with anything not usually kept with them, or else to reorganize the records to meet the progression in which they are demanded in the subpoena.

If the court should find an effort on the part of the witness to obfuscate the records in violation of this rule, that can of course be taken into consideration on an application to punish for contempt.

The reference to the usual course of "business" suggests that only business records are aimed at by this provision, although there can of course be occasions when non-business records, even voluminous ones, may be involved. What subdivision (d)(1) seeks to accomplish seems to be clear enough on all fronts, however, and it can reasonably be applied as well to records of other than the strictly "business" category.

C45-25. Withholding Matter on Grounds of Privilege.

Paragraph (2) of subdivision (d), like paragraph (1), also has a narrow mission, but it applies to both the testimonial and duces tecum subpoenas. It is more likely to have bearing on the latter.

Paragraph (2) is designed to require a person who is resisting disclosure based on a claim of privilege, or on a claim that the materials are immunized from disclosure as trial materials (see Rule 26[b][3]), to make the claim "expressly", supplying a sufficient description about it to enable the seeking party to address it and gather up opposing information with which to resist it.

When documents are sought, the rule's requirement is that the "nature of the documents, communications, or things not produced" be described. That may prove unreasonable or impractical to fulfill when the demand in the subpoena is too sweeping. There are remedies contemplated in each of these situations.

There is of course a tension here in exactly how far the resister has to go in explaining the claim of privilege without actually being compelled, in that guise, to surrender the privilege. The notes are clear, however, that the resisting person may not be allowed to "decide the limits of [its] %... ... own entitlement". When the point is disputed, there may be nothing for it but to have the court decide, and the court may have to review the materials in camera. The court will doubtless be alert to evidence of bad faith on the part of the claimant, and the revisors' notes contemplate a variety of cures for that condition.

In the second paragraph of their notes on subdivision (d), the revisors unleash a short barrage of warnings to the resisting party. First, the resister who claims the privilege without offering the requisite elaboration runs the risk of having the court hold that the claim of privilege is waived, and the discovery obligatory. Second, the resister faces a contempt application by the seeking party. And third, the resister faces a sanction under Rule 7 (see Rule 7[b][3]) or 11 (the sanctions rule) of the Federal Rules of Civil Procedure in conjunction with any motion on which the court is required to address the claim of privilege. (Rule 45's own sanction provision, contained in subdivision (c)(1), which is addressed to the party who issued the subpoena, was apparently deemed inapplicable to the person served with the subpoena; hence this reference to outside provisions for imposing sanctions on the person served.)

The Advisory Committee's notes say that paragraph (2) "corresponds to the new Rule 26(b)(5)", which does not exist. A paragraph (5) for addition to Rule 26(b) was submitted to the U.S. Supreme Court as part of the same package as Rule 45, but while Rule 45 got through, the Rule 26 addition did not. It was among several key amendments that the U.S. Supreme Court did not accept and submit to Congress in 1991, and there was hence no paragraph (5) added to Rule 26(b).

In addition to threatening the subpoenaed person with the variety of remedies briefly listed above, the revisors acknowledge the dilemma the subpoenaed person may face when the subpoena's demand is too broad in the first place. The subpoenaed person's remedy in that situation is to serve objections pursuant to Rule 45(c)(2)(B), which then entitles that person to refrain from any further disclosure until a court application is made by the seeking party. See Commentary C45-21 above.

Subdivision (e)

C45-26. Contempt.

It is the contempt remedy that backs a subpoena. There is nothing new about that. When the subpoenaed person is not a party to the action, the threat of contempt is the only remedy, whether the disobedience is of the subpoena itself or of a court order entered somewhere further along the way directing the nonparty to do something. With a party there may be a variety of other sanctions available as well--in the case of a party, more often for the disobedience of a court order than of a subpoena--up to and including the declaration of a default, see Rule

37(b)(2), but these are threats that impact on the party's interests in the action and they therefore hold no terror for a nonparty. Hence the special role that contempt plays in enforcing subpoenas against nonparty witnesses.

Subdivision (e) of Rule 45, the contempt provision, nevertheless applies to parties as well as nonparties when, in its first sentence, it declares it to be contempt to disobey a subpoena "without adequate excuse". Hence, should one of the civil penalties of Rule 37 that would ordinarily work effectively enough against a party be found ineffective for some special reason in a given case, the court can turn to the contempt remedy even against the party. In its second sentence, however, which will be returned to later, subdivision (e) addresses only a nonparty.

No general effort is made in Rule 45 to elaborate what an "adequate excuse" is. The issue must always turn on the facts of the particular case, and any effort to offer a detailed prescription would amount to nothing but an endless progression of illustrations and would cover a tome. The issue is thus left to the case law, and the case law on the matter is abundant. The reader will find a number of illustrative cases, in annotations 201 to 219 set out in Subdivision VI, "Contempt", of the Notes of Decisions following these Commentaries and annotation 395 following Rule 37, reflecting one way or the other on whether a contempt punishment is warranted on particular facts.

The contempt most often associated with the disobedience of a subpoena is the category of "civil" contempt, the purpose of which is to enforce compliance in the particular case, with any penalty imposed designed to further the rights of the party in whose behalf the subpoena issued. When it is still within a person's power to comply, for example, and the person wilfully refuses to, the person can be jailed until compliance is offered. Even the jailing in that case is an aspect of civil, not criminal, contempt. The category of "criminal" contempt is designed to vindicate the courts' authority and to discourage the defiance of judicial process in general, not just for the case at hand but for all litigation generally. Hence, at least in practice if not in theory, only rarely is a disobedience held to reach that level. See, e.g., Blake Associates, Inc. v. Omni Spectra, Inc., 118 F.R.D. 283 (D.Mass.1988). When it does reach it, the penalty may be a fine not measured by the damages suffered by a party, but rather by the punitive standard of what it takes to make the contemnor more sensitive to judicial process in the future and to send a signal out to all others about the disadvantages of noncompliance.

A person's inability to comply with the subpoena is an adequate excuse for disobedience, unless the witness has taken deliberate steps to make its own performance impossible. There, not only will contempt lie; it may well enter the "criminal" category.

The second sentence of subdivision (e) is new, added as part of the 1991 amendment and addressed only to a nonparty who has been subpoenaed. It recites, as an adequate excuse for not appearing in response to a subpoena, that the subpoena "purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A)". The latter is the provision that imposes restrictions on how far the subpoena can require the witness to travel; it is of course calculated to serve the subpoenaed person's convenience. If it were not for the fact, and a healthy fact it is, that witnesses do not lightly disobey federal subpoenas with nice interpretations about their requirements, this provision of subdivision (e) would be a potent source of trouble.

The language in the first sentence of subdivision (e) speaks of the witness having an "adequate excuse". This keeps the witness guessing about whether the court will deem the excuse "adequate", and this is good for judicial process. The witness is not likely to chance contempt by indulging in meticulous calculations. But a meticulous calculation may indeed strike a witness as a viable source of disobedience under the new second sentence of subdivision (e). The rule assures the witness that contempt can't be imposed if the subpoena would have compelled the witness to travel, for example, more than 100 miles from the witness's residence or employment. It would be better for the witness to use a motion in that case, rather than a yardstick. Unless the witness has secured a judicial determination

of whether the subpoena is valid, the witness usually does best to obey it.

The witness who has any doubts on that score, in other words, should move to quash the subpoena rather than just disregard it. Of course the witness can secure the advice of an attorney, but the attorney must also be circumspect in handing out that advice. While the fact that a person has disobeyed a subpoena on the advice of counsel does affect a court's judgment when contempt is moved for, it is not per se an excuse for disobedience. And when an order rather than a mere subpoena has been disobeyed, and that order was made on proper notice to the alleged contemnor, the citation of counsel's advice as a reason for disobedience is likely to avail not at all.

Additional discussion of the second sentence of subdivision (e) may be found in the Commentaries discussing the geographic reach of the summons. See Commentaries C45-13 and C45-14 above.

Recognizing the situation of the nonparty, the Advisory Committee note on subdivision (e) stresses that the court should use the contempt remedy only "sparingly" against a nonparty, especially where the nonparty has been "overborne by a party or attorney". But in its final statement--in which it inadvertently refers to subdivision (e) as subdivision (f) (the amended rule has no subdivision [f])--the committee does seem to put the yardstick measure firmly in place. If the witness is willing to risk disobeying the subpoena based on the witness's own measurement of distances, without any preliminary motion for a court ruling on the matter, and the measurement turns out to be correct, subdivision (e) purports to let the witness off.

The attorney who subpoenaed the witness should be alert to these possibilities and should try to remain in contact with the witness to ascertain in fact what the witness's intentions are. If the witness is cooperating, these issues should not arise, as when the subpoena has been served on the witness as a mere formality, such as for purposes of having the fact of subpoena service in place in conjunction with a potential cross-examination, or to enable the witness to get off work, etc.

Much in the way of protection for an unsophisticated witness without ready access to counsel can be read into the "overborne" phrase contained in the committee's notes. It appears to make the court in some measure the unrepresented witness's guardian, but that role is nothing new to the court. The committee apparently felt that this indulgence may be all the more warranted during the initial stages of the new Rule 45's operation, for the reason that attorneys are now permitted to issue subpoenas on their own. (But does that make so much difference? When the clerks had to be the issuers, did they not issue the subpoenas just for the asking, leaving it to the attorneys to devise their content?)

If the subpoena is a duces tecum subpoena, and the witness objects to it, we have noted that the witness can serve written objections on the seeking party and then do nothing further for the time being; serving the objections throws onto the issuing party the burden of making a court application. See subdivision (c)(2)(B) and Commentary C45-21 above. Presumably the recipient of the duces tecum subpoena who has that option will use it, rather than refrain from responding at all and risk contempt. But the cited provision doesn't apply to the testimonial witness. If that witness has some excuse for not appearing, the witness, for her own protection, does best either to appear or to move to quash before an appearance is due. The party at all queasy on these matters does well to keep in contact with the witness.

While technically there is no automatic stay of compliance upon the mere making of a motion to quash a subpoena, there is a general understanding that compliance may be withheld until the court rules on the motion. Here, too, those involved should be in contact and a specific understanding reached. If time is of the essence, a motion to quash by the subpoenaed person or a motion to compel by the issuer of the subpoena can be brought on by order to

show cause. Issues about the jurisdictional validity of the subpoena, its propriety, scope, etc., should be resolved among parties and witnesses by voluntary contact, and if that doesn't work then by the court on motion. Activity or inactivity based on an ex parte assumption would risk, on the part of the issuer, loss of the benefit of the subpoena, or, on the part of the subpoenaed person, contempt.

Rule 45 does not prescribe any of the procedures for bringing on a contempt application. The body of case law elaborated over the years is applicable here, under Rule 45, just as it is under Rule 37. As a general principle it has been observed that "[a]lthough there are no specific procedural steps to follow in civil contempt proceedings, due process requires that the [alleged contemnor] be given the opportunity to be heard 'at a meaningful time and in a meaningful manner'." See, e.g., Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1343 (C.A.8 1975). A motion within the action should do the job when the alleged contemnor is a party. When the alleged contemnor is not a party, a motion might still do, but some question may arise about how the motion papers have to be served, i.e., whether in the same manner as a summons, under Rule 4, or in the manner of intra-action papers, under Rule 5(b). See the discussion of this matter in Commentary C45-21 above.

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U.S.C., Title 15, § 49 (Federal Trade Commission)

U.S.C., Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

U.S.C., Title 16, §§ 797(g) and 825f (Federal Power Commission)

U.S.C., Title 19, § 1333(b) (Tariff Commission)

U.S.C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U.S.C., Title 26, §§ 614, 619(b) [see 7456] (Board of Tax Appeals)

U.S.C., Title 26, § 1523(a) [see 7608] (Internal Revenue Officers)

U.S.C., Title 29, § 161 (Labor Relations Board)

U.S.C., Title 33, § 506 (Secretary of Army)

U.S.C., Title 35, §§ 54 to 56 [now 24] (Patent Office proceedings)

U.S.C., Title 38, [former] § 133 (Veterans' Administration)

U.S.C., Title 41, § 6507 (Secretary of Labor)

U.S.C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U.S.C., Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

U.S.C., Title 46, § 1124(b) (Maritime Commission)

U.S.C., Title 47, § 409(c) and (d) (Federal Communications Commission)

U.S.C., Title 49, § 12(2) and (3) [now 10321] (Interstate Commerce Commission)

U.S.C., Title 49, § 173a [see 1484] (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U.S.C., Title 28, [former] § 655 (Witnesses; subpoena; form; attendance under); and broaden U.S.C, Title 28, [former] § 636 (Production for books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena duces tecum, compare N.Y.C.P.A. (1937) § 411.

Note to Subdivision (c). This provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§ 220, 404, J.Ct.Act, § 191; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1218. Compare former Equity Rule 15 (Process, by Whom Served).

For statutes governing fees and mileage of witnesses see:

U.S.C., Title 28 former sections:

600a[now 1871] (Per diem; mileage)

600c[now 1821, 1823] (Amount per diem and mileage for witnesses; subsistence)

600d[former] (Fees and mileage in certain states)

601[former] (Witnesses' fees; enumeration)

602[now 1824] (Fees and mileage of jurors and witnesses)

603[see Title 5, §§ 5515, 5537] (No officer of court to have witness fees)

Note to Subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning v. Boyle,* S.D.N.Y.1901, 112 F. 397. The requirement of an order for the issuance of a subpoena duces tecum is in accordance with U.S.C., Title 28, [former] § 647 (Deposition under dedimus potestatem; subpoena duces tecum). The provisions of paragraph (2) are in accordance with common practice. See U.S.C., Title 28, former § 648 (Deposition under dedimus potestatem; witnesses, when required to attend); N.Y.C.P.A. (1937) § 300; 1 N.J.Rev.Stat. (1937) 2:27-174.

Note to Subdivision (e). The first paragraph continues the substance of U.S.C., Title 28, [former] § 654 (Witnesses; subpoenas; may run into another district). Compare U.S.C., Title 11, [former] § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U.S.C., Title 15:

§ 23 (Suits by United States; subpoenas for witnesses) (under antitrust laws).

U.S.C., Title 38:

§ 445[now 784] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans' insurance contracts).

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U.S.C., Title 28, §§ 711 [now 1783] (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and 713 [now 1783] (Service of Subpoena on witness in foreign country).

Note to Subdivision (f). Compare [former] Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

1946 Amendment

Note to Subdivision (b). The added words, "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the

words “or modify” in clause (1) affords desirable flexibility.

Subdivision (d). The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)--to the effect that leave of court should be obtained for the issuance of such a subpoena--has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it had been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 F.Rules Serv. 30b.21. Case 1, 1 F.R.D. 627; *Fox v. House,* Okla.1939, 29 F.Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc. v. J. Slotnik Co.,* Conn.1944, 3 F.R.D. 408.

The changes in subdivisions (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

1948 Amendment

The amendment effective October 1949, substituted the reference to “Title 28, U.S.C., § 1783” at the end of subdivision (e)(2) for the reference to “the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U.S.C., Title 28, § 713.”

1970 Amendment

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the subpoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.

1980 Amendment

Subdivision (d)(1). The amendment defines the term “proof of service” as used in the first sentence of the present subdivision. For want of a definition, the district court clerks have been obliged to fashion their own, with results that vary from district to district. All that seems required is a simple certification on a copy of the notice to take a deposition that the notice has been served on every other party to the action. That is the proof of service required by Rule 25(d) of both the Federal Rules of Appellate Procedure and the Supreme Court Rules.

Subdivision (e)(1). The amendment makes the reach of a subpoena of a district court at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held. Under the present rule the reach of a district court subpoena is often greater, since it extends throughout the district. No reason appears why it should be less, as it sometimes is because of the accident of district lines. Restrictions upon the reach of subpoenas are imposed to prevent undue inconvenience to witnesses. State statutes and rules of court are quite likely to reflect the varying degrees of difficulty and expense attendant upon local travel.

1985 Amendment

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the *county* wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, *or* within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and nonresidents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

Purposes of Revision. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a). This subdivision is amended in seven significant respects.

First, Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. This revision perhaps culminates an evolution. Subpoenas were long issued by specific order of the court. As this became a burden to the court, general orders were made authorizing clerks

to issue subpoenas on request. Since 1948, they have been issued in blank by the clerk of any federal court to any lawyer, the clerk serving as stationer to the bar. In allowing counsel to issue the subpoena, the rule is merely a recognition of present reality.

Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions. In *ICC v. Brimson,* 154 U.S. 447 (1894), the Court upheld a statute directing federal courts to issue subpoenas to compel testimony before the ICC. In *CAB v. Hermann,* 353 U.S. 322 (1957), the Court approved as established practice the issuance of administrative subpoenas as a matter of absolute agency right. And in *NLRB v. Warren Co.,* 350 U.S. 107 (1955), the Court held that the lower court had no discretion to withhold sanctions against a contemnor who violated such subpoenas. The 1948 revision of Rule 45 put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute. Two courts of appeals have touched on the issue and have described lawyer-issued subpoenas as mandates of the court. *Waste Conversion, Inc. v. Rollins Environmental Services (NJ), Inc.,* 893 F.2d 605 (3d Cir., 1990); *Fisher v. Marubent Cotton Corp.,* 526 F.2d 1338, 1340 (8th Cir., 1975). Cf. *Young v. United States ex rel Vuitton et Fils S.A.,* 481 U.S. 787, 821 (1987) (Scalia, J., concurring). This revision makes the rule explicit that the attorney acts as an officer of the court in issuing and signing subpoenas.

Necessarily accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power. The latter development is reflected in the provisions of subdivision (c) of this rule, and also in the requirement imposed by paragraph (3) of this subdivision that the attorney issuing a subpoena must sign it.

Second, Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted pro haec vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks' offices some distance from the place at which the action proceeds. This change does not enlarge the burden on the witness.

Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished by the provisions of Paragraph (a)(1).

Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

Fifth, Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to

whom a request is addressed pursuant to Rule 34.

Sixth, Paragraph (a)(1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Subdivision (b). Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes.

The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

Paragraph (b)(3) retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

Subdivision (c). This provision is new and states the rights of witnesses. It is not intended to diminish rights conferred by Rules 26-37 or any other authority.

Paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. No change in existing law is thereby effected. Abuse of a subpoena is an actionable tort, *Board of Ed. v. Farmingdale Classroom Teach. Ass'n,* 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is also embodied in Model Rule of Professional Conduct 4.4. The liability of the attorney is correlative to the expanded power of the attorney to issue subpoenas. The liability may include the cost of fees to collect attorneys' fees owed as a result of a breach of this duty.

Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short time periods under Rule 6 and to allow a bit more time for such objections to be made.

A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, *e.g., United States v. Columbia Broadcasting Systems, Inc.,* 666 F.2d 364 (9th Cir.1982).

Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power. It replaces and enlarges on the former subdivision (b) of this rule and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the witness who may read it on the subpoena, where it is required to be printed by the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed or modified. It restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1), with one important change. Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides. This extension is subject to the qualification provided in the next paragraph, which authorizes the court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial. The traveling non-party witness may be entitled to reasonable compensation for the time and effort entailed.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness. An additional circumstance in which such action is required is a request for costly production of documents; that situation is expressly governed by subparagraph (b)(2)(B)[1].

Clause (c)(3)(B)(i) authorizes the court to quash, modify, or condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information. It corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4). A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, *e.g., Carter-Wallace, Inc. v. Otte,* 474 F.2d 529 (2d Cir.1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure,* 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts,* 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting Systems Inc.,* 666 F.2d 364 (9th Cir.1982). See also *Wright v. Jeep Corporation,* 547 F.Supp. 871 (E.D.Mich.1982).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

As stated in *Kaufman v. Edelstein,* 539 F.2d 811, 822 (2d Cir.1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify...."

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d). This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5) [paragraph (5) in Rule 26(b) was a proposed paragraph which was withdrawn by the Supreme Court]. Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The person claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e). This provision retains most of the language of the former subdivision (f).

"Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g., Walker v. City of Birmingham,* 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

2005 Amendments

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

2006 Amendments

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be

justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

2007 Amendment

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

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

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

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

2013 Amendment

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. The amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending on consent of the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them. The party serving the subpoena should in any event make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court can condition enforcement of the subpoena on such payment.

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing parties and party officers. *Compare In re Vioxx Products Liability Litigation*, 438 F.Supp. 2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), *with Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to

Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements.

Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c).

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for that court to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c). But transfer to the court where the action is pending is sometimes warranted. If the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

If the motion is transferred, judges are encouraged to permit telecommunications methods to minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified,

that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Notes of Decisions (776)

Footnotes

1 So in original. Probably should be "subparagraph (c)(2)(B)".

Fed. Rules Civ. Proc. Rule 45, 28 U.S.C.A., FRCP Rule 45
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 46

Rule 46. Objecting to a Ruling or Order

Currentness

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, § 204; Neb.Comp.Stat. (1929) § 20-1139; N.M.Stat.Ann. (Courtright, 1929) § 105-830; 2 N.D.Comp.Laws Ann. (1913) § 7653; Ohio Code Ann. (Throckmorton, 1936) § 11560; 1 S.D.Comp.Laws (1929) § 2542; Utah Rev.Stat.Ann. (1933) §§ 104-39-2, 104-24-18; Va.Rules of Court, Rule 22, 163 Va. v. xii (1935); Wis.Stat. (1935) § 270.39. Compare N.Y.C.P.A. (1937) §§ 583, 445, and 446, all as amended by L.1936, ch. 915. Rule 51 deals with objections to the court's instructions to the jury.

U.S.C., Title 28, [former] § 776 (Bill of exceptions; authentication; signing of by judge) and [former] § 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

Notes of Decisions (95)

Fed. Rules Civ. Proc. Rule 46, 28 U.S.C.A., FRCP Rule 46
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 47

Rule 47. Selecting Jurors

Currentness

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, Supp.1936) Appendix 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) § 2330(a); Ohio Gen.Code Ann. (Page, Supp.1926-1935) § 11419-47; Pa.Stat.Ann. (Purdon, Supp.1936) Title 17, § 1153; compare U.S.C., Title 28, [former] § 417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28:

§ 411 [now 1861] (Qualifications and exemptions)

§ 412 [now 1864] (Manner of drawing)

§ 413 [now 1865] (Apportioned in district)

§ 415 [see 1862] (Not disqualified because of race or color)

§ 416 [now 1867] (Venire; service and return)

§ 417 [now 1866] (Talesmen for petit jurors)

§ 418 [now 1866] (Special juries)

§ 423 [now 1869] (Jurors not to serve more than once a year)

§ 424 [now 1870] (Challenges)

and D.C.Code (1930) Title 18, §§ 341 to 360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

1966 Amendment

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of this Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number to a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

1991 Amendment

Subdivision (b). The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c). This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

2007 Amendments

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

Notes of Decisions (15)

Fed. Rules Civ. Proc. Rule 47, 28 U.S.C.A., FRCP Rule 47
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 48

Rule 48. Number of Jurors; Verdict; Polling

Currentness

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

CREDIT(S)

(Amended April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

For provisions in state codes, compare Utah Rev.Stat.Ann. (1933) § 48-0-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

1991 Amendment

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. *Cf. Ballew v. Georgia*, 435 U.S.

223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. *Ray v. Parkside Surgery Center*, 13 F.R.Serv. 585 (6th Cir.1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in *Ballew v. Georgia*, supra.

2007 Amendments

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

2009 Amendments

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Notes of Decisions (4)

Fed. Rules Civ. Proc. Rule 48, 28 U.S.C.A., FRCP Rule 48
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 49

Rule 49. Special Verdict; General Verdict and Questions

Currentness

(a) Special Verdict.

(1) ***In General.*** The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) ***Instructions.*** The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) ***Issues Not Submitted.*** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) ***In General.*** The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) ***Answers Inconsistent with the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) ***Answers Inconsistent with Each Other and the Verdict.*** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co. v. Peccarich,* 209 Fed. 568 (C.C.A.8th, 1913), cert. den. 232 U.S. 727, 34 S.Ct. 603, 58 L.Ed. 817 (1914); *Spokane and I.E.R. Co. v. Campbell,* 217 Fed. 518 (C.C.A.9th, 1914), affd. 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916); Simkins, *Federal Practice* (1934) § 186. The power of a territory to adopt by statute the practice under Subdivision (b) has been sustained. *Walker v. New Mexico and Southern Pacific R.R.,* 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897); *Southwestern Brewery and Ice Co. v. Schmidt,* 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 (1912).

Compare Wis.Stat. (1935) §§ 270.27, 270.28 and 270.30; Green, *A New Development in Jury Trial* (1927), 13 A.B.A.J. 715; *Morgan, A Brief History of Special Verdicts and Special Interrogatories,* 1923, 32 Yale L.J. 575.

The provisions of U.S.C., Title 28, [former] § 400(3) (now §§ 2201, 2202) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

1963 Amendment

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

Notes of Decisions (665)

Fed. Rules Civ. Proc. Rule 49, 28 U.S.C.A., FRCP Rule 49
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Currentness

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.,* 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240 (1920); *Union Indemnity Co. v. United States,* 74 F.2d 645 (C.C.A. 6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, *Federal Practice* (1934) § 189.

Note to Subdivision (b). For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line v. Redman,* 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636 (1935); compare *Slocum v. New York Life Ins. Co.,* 33 S.Ct. 523, 228 U.S. 364, 57 L.Ed. 879, Ann.Cas.1914D, 1029 (1913).

See *Northern Ry. Co. v. Page,* 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts,* 26 Harv.L.Rev. 732 (1913). See also Thayer, *Judicial Administration,* 63 U. of Pa.L.Rev. 585, 600-601, and note 32 (1915); Scott, *Trial by Jury and the Reform of Civil Procedure,* 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

1963 Amendment

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, *Federal Practice & Procedure* § 1072, at 367 (Wright ed. 1961); Blume, *Origin and Development of the Directed Verdict,* 48 Mich.L.Rev. 555, 582-85, 589-90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29(a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc. v. San Roman,* 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain v. Filson,* 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson v. New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, subdivision (c)(1) requires that the court make a "conditional" ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey v. Slentz,* 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters v. Smith,* 221 F.2d 721 (3d Cir. 1955); *Dailey v. Timmer,* 292 F.2d 824 (3d Cir. 1961), explaining *Lind v. Schenley Industries,*

Inc., 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox v. Pennsylvania R.R.,* 120 A.2d 214 (D.C.Mun.Ct.App.1956); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1302.1 at 346-47 (Wright ed. 1958); 6 *Moore's Federal Practice* ¶59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson v. Pennsylvania R.R.,* 238 F.2d 645, 650 (6th Cir. 1956); *Hughes v. St. Louis Nat. L. Baseball Club, Inc.,* 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone v. West Virginia Pulp & Paper Co.,* supra, 330 U.S. at 217, 218, 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble v. Bruin,* 279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade v. Dichmann, Wright & Pugh, Inc.,* 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

Subdivision (a). The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. *Cf. Galloway v. United States,* 319 U.S. 372 (1943).

The revision abandons the familiar terminology of *direction of verdict* for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. *See generally* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts,* 55 MINN.L.REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. Cf. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342 (9th Cir.1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal,

the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury"); *Benson v. Allphin,* 786 F.2d 268 (7th Cir.1986) ("the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case ...); *McLaughlin v. The Fellows Gear Shaper Co.,* 4 F.R.Serv.3d 607 (3d Cir.1986) (per Adams, J., dissenting: "This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury"). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. *Slocum v. New York Insurance Co.,* 228 U.S. 364 (1913). But cf. *Baltimore & Carolina Line v. Redman,* 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., *Benson v. Allphin,* 788 F.2d 268 (7th Cir.1986) ("this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict"). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.,* 848 F.2d 614 (3d Cir.1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this

requirement is to meet the requirements of F.R.App.P. 4(a)(4).

Subdivision (c). Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d). Revision of this subdivision conforms the language to that of the previous subdivisions.

1993 Amendments

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

1995 Amendments

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule--no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

2006 Amendment

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

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers

continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

2007 Amendments

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

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

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

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Notes of Decisions (1614)

Fed. Rules Civ. Proc. Rule 50, 28 U.S.C.A., FRCP Rule 50
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

Currentness

(a) Requests.

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) ***When to Make.*** An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) ***Assigning Error.*** A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of

Appeals.

1987 Amendment

Although Rule 51 in its present form specifies that the court shall instruct the jury only after the arguments of the parties are completed, in some districts (typically those in states where the practice is otherwise) it is common for the parties to stipulate to instruction before the arguments. The purpose of the amendment is to give the court discretion to instruct the jury either before or after argument. Thus, the rule as revised will permit resort to the long-standing federal practice or to an alternative procedure, which has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. See generally Raymond, *Merits and Demerits of the Missouri System of Instructing Juries,* 5 St. Louis U.L.J. 317 (1959). Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court's instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

2003 Amendments

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these instructions are preliminary instructions to a venire, and cautionary or limiting instructions delivered in immediate response to events at trial.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case--the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under

subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. Johnson v. U.S., 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, U.S. v. Atkinson, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

2007 Amendments

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

Notes of Decisions (810)

Fed. Rules Civ. Proc. Rule 51, 28 U.S.C.A., FRCP Rule 51
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

Currentness

(a) Findings and Conclusions.

(1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may

accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 28, 1983, effective August 1, 1983; April 29, 1985, effective August 1, 1985; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See [former] Equity Rule 70 ½, as amended Nov. 25, 1935, (Findings of Fact and Conclusions of Law) and U.S.C., Title 28, [former] § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, [former] §§ 773 (Trial of issues of fact; by court) and [former] 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.,* C.C.A.8, 1913, 204 F. 166, certiorari denied 33 S.Ct. 1051, 229 U.S. 624, 57 L.Ed. 1356; *Warren v. Keep,* 1894, 15 S.Ct. 83, 155 U.S. 265, 39 L.Ed. 144; *Furrer v. Ferris,* 1892, 12 S.Ct. 821, 145 U.S. 132, 36 L.Ed. 649; *Tilghman v. Proctor,* 1888, 8 S.Ct. 894, 125 U.S. 136, 149, 31 L.Ed. 664; *Kimberly v. Arms,* 1889, 9 S.Ct. 355, 129 U.S. 512, 524, 32 L.Ed. 764. Compare *Kaeser & Blair Inc. v. Merchants' Ass'n,* C.C.A.6, 1933, 64 F.2d 575, 576; *Dunn v. Trefry,* C.C.A.1, 1919, 260 F. 147.

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §§ 8783-8784; New Jersey, Sup.Ct.Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §§ 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) §§ 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) §§ 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Derring, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson v. Kountze,* 1895, 43 P. 445, 21 Colo. 486, semble; Illinois, *Baker v. Hinricks,* 1934, 194 N.E. 284, 359 Ill. 138; *Weininger v. Metropolitan Fire Ins. Co.,* 1935, 195 N.E. 420, 359 Ill. 584, 98

A.L.R. 169; Minnesota, *State Bank of Gibbon v. Walter,* 1926, 208 N.W. 423, 167 Minn. 37; *Waldron v. Page,* 1934, 253 N.W. 894, 191 Minn. 302; New Jersey N.J.S.A. 2:27-241, 2:27-363, as interpreted in *Bussy v. Hatch,* 1920, 111 A. 546, 95 N.J.L. 56; New York, *York Mortgage Corporation v. Clotar Const. Corp.,* 1930, 172 N.E. 265, 254 N.Y. 128; North Dakota, Comp.Laws Ann. (1913) § 7846, as amended by N.D.Laws 1933, c. 208; *Milnor Holding Co. v. Holt,* 1933, 248 N.W. 315, 63 N.D. 362, 370; Oklahoma, *Wichita Mining and Improvement Co. v. Hale,* 1908, 94 P. 530, 20 Okl. 159; South Dakota, *Randall v. Burk Township,* 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard v. Flowers,* 1929, 14 S.W.2d 109; Utah, Rev.Stat.Ann. (1933) § 104-41-5; Vermont, *Roberge v. Troy,* 1933, 163 A. 770, 105 Vt. 134; Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§ 309-316; *McCullough v. Puget Sound Realty Associates,* 1913, 136 Pac. 1146, 76 Wash. 700, but see *Cornwall v. Anderson,* 1915, 148 P. 1, 85 Wash. 369; West Virginia, *Kinsey v. Carr,* 1906, 55 S.E. 1004, 60 W.Va. 449, semble; Wisconsin, Stat. (1935) § 251.09; *Campbell v. Sutliff,* 1927, 214 N.W. 374, 193 Wis. 370; *Gessler v. Erwin Co.,* 1924, 193 N.W. 303, 182 Wis. 315.

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, *Review of Findings of Fact,* 4 U. of Chi.L.Rev. 190, 215 (1937).

1946 Amendment

Note to Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 *Moore's Federal Practice,* 1938, 3119. *Hurwitz v. Hurwitz,* 1943, 136 F.2d 796, 78 U.S.App.D.C. 66.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, e.g., *United States v. One 1941 Ford Sedan,* S.D.Tex.1946, 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc. v. Bruns Publications,* S.D.N.Y.1939, 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L.E.R. Co.,* S.D.Ohio 1941, 43 F.Supp. 5; *United States v. Aluminum Co. of America,* S.D.N.Y.1941, 2 F.R.D. 224, 5 Fed. Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman v. United States,* D.Mass.1938, 25 F.Supp. 868; *Cook v. United States,* D.Mass.1939, 26 F.Supp. 253; *Proctor v. White,* D.Mass.1939, 28 F.Supp. 161; *Green Valley Creamery, Inc. v. United States,* C.C.A.1, 1939, 108 F.2d 342. See also *Matton Oil Transfer Corp. v. The Dynamic,* C.C.A.2, 1941, 123 F.2d 999; *Carter Coal Co. v. Litz,* C.C.A.4, 1944, 140 F.2d 934; *Woodruff v. Heiser,* C.C.A.10, 1945, 150 F.2d 869; *Coca Cola Co. v. Busch,* Pa.1943, 7 Fed. Rules Serv. 59b.2, Case 4; Oglebay, *Some Developments in Bankruptcy Law,* 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, *Hurwitz v. Hurwitz,* App.D.C.1943, 136 F.2d 796, 78 U.S.App.D.C. 66, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law,* 1 F.R.D. 25, 26-27; *United States v. Forness,* C.C.A.2, 1942, 125 F.2d 928, certiorari denied 1942, 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States v. Forness,* supra; *United States v. Crescent Amusement Co.,* 1944, 1945, 65 S.Ct. 254, 323 U.S. 173, 89 L.Ed. 160. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp. v. The Dynamic,* supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States v. Forness,* supra; *United States v. Crescent Amusement Co.,* supra. See also *Petterson Lighterage & Towing Corp. v. New York Central R. Co.,* C.C.A.2, 1942, 126 F.2d 992; *Brown Paper Mill Co., Inc. v. Irwin,* C.C.A.8, 1943, 134 F.2d 337; *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.,* C.C.A.2, 1944, 145 F.2d 215, reversed on other grounds 65 S.Ct. 1533, 325 U.S. 797; *Young v. Murphy, Ohio* 1946, 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas v. Peyser,* App.D.C.1941, 118 F.2d 369; *Schad v. Twentieth Century-Fox Corp.,* C.C.A.3, 1943, 136 F.2d 991; *Prudential Ins. Co. of America v. Goldstein,* N.Y.1942, 43 F.Supp. 767; *Somers Coal Co. v. United States,* N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.,* E.D.Ky.1942, 2 F.R.D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact,* 1941, 4 Fed. Rules Serv. 936.

1963 Amendment

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

1983 Amendment

Rule 52(a) has been amended to revise its penultimate sentence to provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally. Nothing in the prior text of the rule forbids this practice, which is widely utilized by district judges. See Christensen, *A Modest Proposal for Immeasurable Improvement,* 64 A.B.A.J. 693 (1978). The objective is to lighten the burden on the trial court in preparing findings in nonjury cases. In addition, the amendment should reduce the number of published district court opinions that embrace written findings.

1985 Amendment

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence,* 49 Va.L.Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., *Marcum v. United States,* 621 F.2d 142, 144-45 (5th Cir.1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, *e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); *Lydle v. United States,* 635 F.2d 763, 765 n. 1 (6th Cir.1981); *Swanson v. Baker Indus., Inc.,* 615 F.2d 479, 483 (8th Cir.1980); *Taylor v. Lombard,* 606 F.2d 371, 372 (2d Cir.1979), cert. denied, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.,* 604 F.2d 755, 758 (2d Cir.1979); *John R. Thompson Co. v. United States,* 477 F.2d 164, 167 (7th Cir.1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, *e.g., Maxwell v. Sumner,* 673 F.2d 1031, 1036 (9th Cir.), *cert. denied,* 459 U.S. 976 (1982); *United States v. Texas Education Agency,* 647 F.2d 504, 506-07 (5th Cir.1981), *cert. denied,* 454 U.S. 1143 (1982); *Constructora Maza, Inc. v. Banco de Ponce,* 616 F.2d 573, 576 (1st Cir.1980); *In re Sierra Trading Corp.,* 482 F.2d 333, 337 (10th Cir.1973); *Case v. Morrisette,* 475 F.2d 1300, 1306-07 (D.C.Cir.1973).

The commentators also disagree as to the proper interpretation of the Rule. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn.L.Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), *and* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 2587,* at 740

(1971) (language of the Rule is clear), *with* 5A J. Moore, *Federal Practice* ¶ 52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 1958 (1984); *Pullman Standard v. Swint,* 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.,* 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

1991 Amendment

Subdivision (c) is added. It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.

As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law as provided in Rule 56(a) and are not shielded by the "clear error" standard of review.

1993 Amendments

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

1995 Amendments

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the

wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

2007 Amendments

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

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

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

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

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Notes of Decisions (3203)

Fed. Rules Civ. Proc. Rule 52, 28 U.S.C.A., FRCP Rule 52

Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 53

Rule 53. Masters

Currentness

(a) Appointment.

(1) ***Scope.*** Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) ***Disqualification.*** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) ***Possible Expense or Delay.*** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) ***Contents.*** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) ***Issuing.*** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority.

(1) ***In General.*** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Master's Order, Report, or Recommendations.

(1) ***Opportunity for a Hearing; Action in General.*** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(4) ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) ***Payment.*** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

Note to Subdivision (b). This is substantially the first sentence of [former] Equity Rule 59 (Reference to Master--Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson,* 1920, 40 S.Ct. 543, 253 U.S. 300, 64 L.Ed. 919.

Note to Subdivision (c). This is [former] Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare [former] Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Note to Subdivision (d). (1) This is substantially a combination of the second sentence of [former] Equity Rule 59 (Reference to Master--Exceptional, Not Usual) and [former] Equity Rule 60 (Proceedings Before Master). Compare [former] Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially [former] Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially [former] Equity Rule 63 (Form of Accounts Before Master).

Note to Subdivision (e). This contains the substance of [former] Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 ½ (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare [former] Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v. Stuart,* 144 U.S. 104, 12 S.Ct. 585, 36 L.Ed. 363 (1892); *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

1966 Amendment

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

1983 Amendment

Subdivision (a). The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. § 636(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., *Gautreaux v. Chicago Housing Authority,* 384 F.Supp. 37 (N.D.Ill.1974), mandamus denied *sub nom., Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir.1975); *Avco Corp. v. American Tel. & Tel. Co.,* 68 F.R.D. 532 (S.D.Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b). The provisions of 28 U.S.C. § 636(b)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when *private masters* who are not magistrates are appointed with the consent of the parties. See Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U.L.Rev. 1297, 1354 (1975).

Subdivision (c). The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f). The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under 28 U.S.C. § 636(b)(1)(A) and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

1993 Amendments

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

2003 Amendments

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1)

District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint--and to regulate the use of--pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2) and (3)

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances--and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety--consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer-master, and perhaps on the master's firm as well.

Subdivision (b)

The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex part e communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, or

recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as import ant as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d)

The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e)

Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review

record against public access--a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to--or seeking adoption or modification of--a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or--with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters--that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h)

The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important--parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i)

Rule 53(i) carries forward unchanged former Rule 53(f).

2007 Amendments

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

2009 Amendments

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Notes of Decisions (642)

Fed. Rules Civ. Proc. Rule 53, 28 U.S.C.A., FRCP Rule 53
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294048.1

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 54

Rule 54. Judgment; Costs

Currentness

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; April 17, 1961, effective July 19, 1961; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Note to Subdivision (b). This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54;

Compare N.Y.C.P.A. (1937) § 476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in forma pauperis contained in U.S.C., Title 28, former §§ 832-836 [now 1915] are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: [former] §§ 815 (Costs; plaintiff not entitled to, when), 821 [now 1928] (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 [now 1927] (Costs; attorney liable for, when), and 830 [now 1920] (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission)

U.S.C., Title 16, § 825p (Federal Power Commission)

U.S.C., Title 26, [former] §§ 3679(d) and 3745(d) (Internal revenue actions)

U.S.C., Title 26, [former] § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)

U.S.C., Title 28, [former] § 817 (Internal revenue actions)

U.S.C., Title 28, § 836 [now 1915] (United States--actions in *forma pauperis*)

U.S.C., Title 28, § 842 [now 2006] (Actions against revenue officers)

U.S.C., Title 28, § 870 [now 2408] (United States--in certain cases)

U.S.C., Title 28, [former] § 906 (United States--foreclosure actions)

U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)

U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)

U.S.C., Title 8, [former] § 45 (Action against district attorneys in certain cases)

U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)

U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)

U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)

U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)

U.S.C., Title 15, § 78r (Similar to 78i(e))

U.S.C., Title 15, § 96 (Infringement of trade-mark--damages)

U.S.C., Title 15, § 99 (Infringement of trade-mark--injunctions)

U.S.C., Title 15, § 124 (Infringement of trade-mark--damages)

U.S.C., Title 19, § 274 (Certain actions under customs law)

U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)

U.S.C., Title 31, §§ 232 [now 3730] and 234 [former] (Action for making false claims upon United States)

U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)

U.S.C., Title 35, § 67 [now 281, 284] (Infringement of patent--damages)

U.S.C., Title 35, § 69 [now 282] (Infringement of patent--pleading and proof)

U.S.C., Title 35, § 71 [now 288] (Infringement of patent--when specification too broad)

U.S.C., Title 45, § 153p (Actions for non-compliance with an order of National R.R. Adjustment Board for payment of money)

U.S.C., Title 46, [former] § 38 (Action for penalty for failure to register vessel)

U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)

U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)

U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)

U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)

U.S.C., Title 49, § 16(2) [now 11705] (Action based on non-compliance with an order of I.C.C. for payment of money)

1946 Amendment

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst v. Hamburg--American Packet Co.,* 1893, 13 S.Ct. 590, 148 U.S. 262, 37 L.Ed. 443; *Rexford v. Brunswick-Balke-Collender Co.,* 1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864; *Collins v. Miller,* 1920, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911. See also *United States v. Florian,* 1941, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105; *Reeves v. Beardall,* 1942, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater v. North American Coal Corp.,* C.C.A.2, 1940, 111 F.2d 125; *Rosenblum v. Dingfelder,* C.C.A.2, 1940, 111 F.2d 406; *Audi-Vision, Inc. v. RCA Mfg. Co., Inc.,* C.C.A.2, 1943, 136 F.2d 621; *Zalkind v. Scheinman,* C.C.A.2, 1943, 139 F.2d 895; *Oppenheimer v. F. J. Young & Co., Inc.,* C.C.A.2, 1944, 144 F.2d 387; *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.,* C.C.A.2, 1946, 154 F.2d 814, certiorari denied 1946, 66 S.Ct. 1353, 328 U.S. 859, 90 L.Ed. 1630; *Zarati Steamship Co. v. Park Bridge Corp.,* C.C.A.2, 1946, 154 F.2d 377; *Baltimore and Ohio R. Co. v. United Fuel Gas Co.,*

C.C.A.4, 1946, 154 F.2d 545; *Jefferson Electric Co. v. Sola Electric Co.,* C.C.A.7, 1941, 122 F.2d 124; *Leonard v. Socony-Vacuum Oil Co.,* C.C.A.7, 1942, 130 F.2d 535; *Markham v. Kasper,* C.C.A.7, 1945, 152 F.2d 270; *Hanney v. Franklin Fire Ins. Co. of Philadelphia,* C.C.A.9, 1944, 142 F.2d 864; *Toomey v. Toomey,* App.D.C.1945, 149 F.2d 19, 80 U.S.App.D.C. 77.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.,* supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

1961 Amendment

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall,* 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See *Mull v. Ackerman,* 279 F.2d 25 (2d Cir. 1960); *Richards v. Smith,* 276 F.2d 652 (5th Cir. 1960); *Hardy v. Bankers Life & Cas. Co.,* 222 F.2d 827 (7th Cir. 1955); *Steiner v. 20th Century-Fox Film Corp.,* 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf. *United Artists Corp. v. Masterpiece Productions, Inc.,* 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc. v. First Nat. Bank,* 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon v. Grace Line, Inc.,* 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan v. Traders & General Ins. Co.,* 255 F.2d 845 (5th Cir. 1958); *Meadows v. Greyhound Corp.,* 235 F.2d 233 (5th Cir. 1956); *Steiner v. 20th Century-Fox Film Corp.,* supra; 6 Moore's Federal Practice ¶54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1193.2 (Wright ed. 1958); *Developments in the Law--Multiparty Litigation,* 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaftex Corp. v. Randolph Mills, Inc.,* 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc., v. H. Muehlstein & Co., Inc.,* 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine the fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. *Cf. West Virginia Univ. Hosp. v. Casey,* 499 U.S. 83 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are agreed to. *E.g.,* Rule 5 of United States District Court for the Eastern District of New York; *cf. In re "Agent Orange" Product Liability Litigation (MDL 381),* 611 F.Supp. 1452, 1464 (E.D.N.Y.1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. *Compare* Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. *See* Note, *Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records,* 64 *B.U.L.Rev.* 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Connor in *Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. 711, 733 (1987) (O'Connor, J., concurring) (how particular markets compensate for contingency). *Cf. Thompson v. Kennickell,* 710 F.Supp. 1 (D.D.C.1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that

in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

2002 Amendments

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

2003 Amendments

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

2007 Amendments

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

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

2009 Amendments

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to

review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Notes of Decisions (3303)

Fed. Rules Civ. Proc. Rule 54, 28 U.S.C.A., FRCP Rule 54
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 55

Rule 55. Default; Default Judgment

Currentness

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This represents the joining of the equity decree *pro confesso* (former Equity Rules 12 (Issue of Subpoena--Time for Answer), 16 (Defendant to Answer--Default--Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree--Setting Aside Default), 29 (Defenses--How Presented), 31 (Reply--When Required--When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, [former] § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41(b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) § 9256.

Note to Subdivision (b). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) § 485, in Calif.Code Civ.Proc. (Deering, 1937) § 585(1), and in Conn.Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, § 585(2); N.Y.C.P.A. (1937) § 490; 2 Minn.Stat. (Mason, 1927) § 9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 411(2). U.S.C., Title 28, § 1874, formerly § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e). This restates substantially the last clause of U.S.C., Title 28, [former] § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, [former] § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified insofar as they contain anything inconsistent therewith.

Supplementary Note

Note. The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. Section 200 of the Act [50 U.S.C. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e.g., *Ledwith v. Storkan,* D.Neb.1942, 6 Fed.Rules Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed.Rules Serv. 725; 3 *Moore's Federal Practice,* 1938, Cum.Supplement § 55.02.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

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

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

2009 Amendments

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

Notes of Decisions (1399)

Fed. Rules Civ. Proc. Rule 55, 28 U.S.C.A., FRCP Rule 55
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII through XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions*****.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence*****.** A party may object that the material cited to support

or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice

in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

1946 Amendment

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* N.D.Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.,* C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.,* 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 1945, 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.,* C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works,* C.C.A.7, 1946, 154 F.2d 214; 3 *Moore's Federal Practice,* 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.,* supra. See also *Audi Vision Inc. v. RCA Mfg. Co.,* C.C.A.2, 1943, 136 F.2d 621; *Toomey v. Toomey,* 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works,* supra; *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 Amendment

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice & Procedure* 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.,* 191 F.Supp. 383 (D.Del.1961); *Jamison v. Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D.Pa.1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries,* 139 F.Supp. 542 (E.D.Pa.1956); *Levy v. Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D.Pa.1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

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

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

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

2009 Amendments

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages--including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

2010 Amendments

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions--"must" or "should"--is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)"), with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment

motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to

properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Notes of Decisions (1619)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions VII to XXV are contained in this document. For text and Notes of Decisions for subdivisions I to VI, see the first document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

Notes of Decisions (7546)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions XXVI to end are contained in this document. For text and Notes of Decisions for subdivisions I to VI, see the first document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions VII to XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

Notes of Decisions (2575)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 57

Rule 57. Declaratory Judgment

Currentness

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ.Proc. (Deering, 1937) § 1062a), Michigan (3 Comp.Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ.Pract. § 639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander v. Tennessee Valley Authority,* 1936, 56 S.Ct. 466, 473, 297 U.S. 288, 80 L.Ed. 688. The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable, or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke,* 1933, 248 N.W. 869, 263 Mich. 466, 93 A.L.R. 1170. Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Aetna Life Insurance Co. v. Haworth,* 1937, 57

S.Ct. 461, 300 U.S. 227, 81 L.Ed. 617, 108 A.L.R. 1000; *Nashville, Chattanooga & St. Louis Ry. v. Wallace,* 1933, 53 S.Ct. 345, 288 U.S. 249, 77 L.Ed. 730, 87 A.L.R. 1191; *Gully, Tax Collector v. Interstate Natural Gas Co.,* 82 F.2d 145 (C.C.A.5, 1936); *Ohio Casualty Ins. Co. v. Plummer,* Tex.1935, 13 F.Supp. 169; Borchard, Declaratory Judgments (1934), *passim*.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 2201" in the first sentence for the reference to "Section 274(d) of the Judicial Code, as amended, U.S.C., Title 28, § 400".

2007 Amendments

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

Notes of Decisions (216)

Fed. Rules Civ. Proc. Rule 57, 28 U.S.C.A., FRCP Rule 57
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 58

Rule 58. Entering Judgment

Currentness

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See Wis.Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont.Rev.Codes Ann. (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn.Practice Book (1934), § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev.Stat.Ann. (Remington, 1932), § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid*.), provides that all judgments shall be entered by the clerk, subject to the court's direction.

1946 Amendment

Note. The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York--until its annulment Oct. 1, 1945, for conflict with this rule--and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler v. Hamill,* 1891, 11 S.Ct. 663, 139 U.S. 549, 35 L.Ed. 266; *Craig v. The Hartford,* C.C.Cal.1856, Fed.Cas. No. 3,333; *Tuttle v. Claflin,* C.C.A.2, 1895, 60 F. 7, certiorari denied 1897; 17 S.Ct. 992, 166 U.S. 721, 41 L.Ed. 1188; *Prescott & A.C. Ry. Co. v. Atchison, T. & S.F.R. Co.,* C.C.A.2, 1897, 84 F. 213; *Stallo v. Wagner,* C.C.A.2, 1917, 245 F. 636, 639-40; *Brown v. Parker,* C.C.A.8, 1899, 97 F. 446; *Allis-Chalmers v. United States,* C.C.A.7, 1908, 162 F. 679. And this applies even though state law is to the contrary. *United States v. Nordbye,* C.C.A.8, 1935, 75 F.2d 744, certiorari denied 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404. Inasmuch as it has been held that failure of the clerk thus to enter judgment is a "misprision" "not to be excused", *The Washington,* C.C.A.2, 1926, 16 F.2d 206, such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue v. Bedford's Estate,* 1945, 65 S.Ct. 1157, 325 U.S. 283, 91 L.Ed. 1611.

1963 Amendment

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only

money"), and requires the clerk to prepare, sign and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; cf. *Gilbertson v. United States,* 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson v. United States,* 240 F.2d 517, 518-19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v. F. & M. Schaefer Brewing Co.,* 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See id.; and compare *Blanchard v. Commonwealth Oil Co.,* 294 F.2d 834 (5th Cir. 1961); *United States v. Higginson,* 238 F.2d 439 (1st Cir. 1956); *Danzig v. Virgin Isle Hotel, Inc.,* 278 F.2d 580 (3d Cir. 1960); *Sears v. Austin,* 282 F.2d 340 (9th Cir. 1960), with *Matteson v. United States,* supra; *Erstling v. Southern Bell Tel. & Tel. Co.,* 255 F.2d 93 (5th Cir. 1958); *Barta v. Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958) cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd.,* 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v. Paramount Film D. Corp.,* 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment. That judgment shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram v. Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

1993 Amendments

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed.R.App.P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

2002 Amendments

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B)--designed to integrate the time for post-judgment motions with appeal time--serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document--there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum

to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786*. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Changes Made After Publication and Comment Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version--Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

2007 Amendments

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

Notes of Decisions (297)

Fed. Rules Civ. Proc. Rule 58, 28 U.S.C.A., FRCP Rule 58
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 59

Rule 59. New Trial; Altering or Amending a Judgment

Currentness

(a) In General.

(1) ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; February 28, 1966, effective July 1, 1966; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule represents an amalgamation of the petition for rehearing of [former] Equity Rule 69 (Petition for Rehearing) and the motion for new trial of 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc., Deering, 1937, §§ 656 to 663a, 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, [former] § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with Subdivision (b). For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States,* 1926, 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518; *Aspen Mining and Smelting Co. v. Billings,* 1893, 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.

For partial new trials which are permissible under Subdivision (a), see *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 1931, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188; *Schuerholz v. Roach,* C.C.A.4, 1932, 58 F.2d 32; *Simmons v. Fish,* 1912, 97 N.E. 102, 210 Mass. 563, Ann.Cas.1912D, 588 (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen States and contra from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann., Struckmeyer, 1928, § 3852; Calif.Code Civ.Proc., Deering, 1937, §§ 657, 662; Smith-Hurd Ill.Stats., 1937, c. 110, § 216 (Par. (f)); Md.Ann.Code, Bagby, 1924, Art. 5, §§ 25, 26; Mich.Court Rules Ann., Searl, 1933, Rule 47, § 2; Miss.Sup.Ct.Rule 12, 161 Miss. 903, 905, 1931; N.J.Sup.Ct.Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246-1251, 1255, 1924; 2 N.D.Comp.Laws Ann., 1913, § 7844, as amended by N.D.Laws 1927, ch. 214.

1946 Amendment

Note. Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Note to Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York,* C.C.A.8, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original

judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

1966 Amendment

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid v. McGrath,* 133 F.2d 350 (D.C.Cir. 1942); *National Farmers Union Auto. & Cas. Co. v. Wood,* 207 F.2d 659 (10th Cir. 1953); *Bailey v. Slentz,* 189 F.2d 406 (10th Cir. 1951); *Marshall's U.S. Auto Supply, Inc. v. Cashman,* 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg v. Indemnity Ins. Co.,* 36 F.R.D. 253 (E.D.La.1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 *Moore's Federal Practice,* par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck v. William A. Jarvis Co.,* 250 F.2d 285 (3d Cir. 1957); *Tsai v. Rosenthal,* 297 F.2d 614 (8th Cir. 1961); *General Motors Corp. v. Perry,* 303 F.2d 544 (7th Cir. 1962); cf. *Grimm v. California Spray-Chemical Corp.,* 264 F.2d 145 (9th Cir. 1959); *Cooper v. Midwest Feed Products Co.,* 271 F.2d 177 (8th Cir. 1959).

1995 Amendments

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing periods less than 8 days.

2007 Amendments

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Notes of Decisions (3859)

Fed. Rules Civ. Proc. Rule 59, 28 U.S.C.A., FRCP Rule 59
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order

Currentness

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). See [former] Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich.Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 464(3); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va.Code Ann. (Michie, 1936) §§ 6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn.Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, *Federal Procedure,* pages 760 to 765, compare 639; and Simkins, *Federal Practice,* ch. CXXI (pp. 820 to 830) and ch. CXXII (pp. 831 to 834), compare § 214.

1946 Amendment

Note. Subdivision (a). The amendment incorporates the view expressed in *Perlman v. 322 West Seventy-Second Street, Co., Inc.,* C.C.A.2d, 1942, 127 F.2d 716; 3 *Moore's Federal Practice,* 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram v. Safety Investment Co.,* E.D.Mich.1942, 45 F.Supp. 636; also *Miller v. United States,* C.C.A.7th, 1940, 114 F.2d 267.

Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623. See also 3 *Moore's Federal Practice,* 1938, 3254 et seq.; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* 1941, 4 Fed.Rules Serv. 942, 945; *Wallace v. United States,* C.C.A.2d, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 659 to 682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace v. United States,* C.C.A.2d, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573; *Fraser v. Doing,* App.D.C.1942, 130 F.2d 617; *Jones v. Watts,* C.C.A.5th, 1944, 142 F.2d 575; *Preveden v. Hahn,* S.D.N.Y.1941, 36 F.Supp. 952; *Cavallo v. Agwilines, Inc.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn v. United States,* D.C.Mass.1942, 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis v. Oliver,* W.D.Okl.1945, 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 631 to 653; 3 *Moore's Federal Practice,* 1938, 3254 et seq.; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* op. cit. supra. Cf. *Norris v. Camp,* C.C.A.10th, 1944, 144 F.2d 1; *Reed v. South Atlantic Steamship Co. of Delaware,* D.Del.1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin v. Berens,* D.D.C.1945, 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske v. Buder,* C.C.A.8th, 1942, 125 F.2d 841; see also inferentially *Bucy v. Nevada Construction Co.,* C.C.A.9th, 1942, 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 653 to 659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, § 501 et seq. [§ 520(4)] of the Appendix to Title 50, a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

1948 Amendment

The amendment effective October, 1949 substituted the reference to "Title 28, U.S.C. § 1655," in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, U.S.C., Title 28, § 118".

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendments

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

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

Notes of Decisions (5424)

Fed. Rules Civ. Proc. Rule 60, 28 U.S.C.A., FRCP Rule 60
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 61

Rule 61. Harmless Error

Currentness

Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

A combination of U.S.C., Title 28, § 2111, [former] § 391 (New trials; harmless error) and [former] § 777 (Defects of form; amendments) with modifications. See *McCandless v. United States,* 1936, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205. Compare [former] Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of [former] Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). For the last sentence see the last sentence of [former] Equity Rule 19 (Amendments Generally).

2007 Amendments

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

Notes of Decisions (1076)

Fed. Rules Civ. Proc. Rule 61, 28 U.S.C.A., FRCP Rule 61
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 62

Rule 62. Stay of Proceedings to Enforce a Judgment

Currentness

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; April 17, 1961, effective July 19, 1961; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The first sentence states the substance of the last sentence of U.S.C., Title 28, [former] § 874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of U.S.C., Title 28, § 1292, [formerly] § 227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of §§ 1292, 2107, [formerly] § 227a (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

Note to Subdivision (b). This modifies U.S.C., Title 28, [former] § 840 (Executions; stay on conditions).

Note to Subdivision (c). Compare [former] Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission,* 1922, 43 S.Ct. 75, 260 U.S. 212, 67 L.Ed. 217. See Simkins, Federal Practice (1934), § 916, in regard to the effect of appeal on injunctions and the giving of bonds. See U.S.C., [former] Title 6 (Official and Penal Bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

U.S.C., Title 7:

§ 217 (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)--by reference.

§ 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)--by reference.

U.S.C., Title 15:

§ 28 (Antitrust laws; suits against monopolies expedited)

U.S.C., Title 28, former:

§ 47 [now 2325 (repealed)] (Injunctions as to orders of Interstate Commerce Commission, etc.)

§ 380 [now 2284] (Injunctions; alleged unconstitutionality of State statutes)

§ 380a [now 2284] (Same; constitutionality of federal statute)

U.S.C., Title 49:

§ 44 [former] (Suits in equity under interstate commerce laws; expedition of suits)

Note to Subdivision (d). This modifies U.S.C., Title 28, [former] § 874 (Supersedeas). See Rule 36(2), Rules of the Supreme

Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73(d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

Note to Subdivision (e). This states the substance of U.S.C., Title 28, § 2408, formerly § 870 (Bond; not required of the United States).

Note to Subdivision (f). This states the substance of U.S.C., Title 28, [former] § 841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6(c) as to terms of court.

1946 Amendment

Note. Subdivision (a). [This subdivision not amended]. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C., Appendix, § 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of execution of any judgment or order entered against a person in military service. See *Bowsman v. Peterson,* D.Neb.1942, 45 F.Supp. 741. Section 201 of the Act [50 U.S.C. App. § 521] permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also note to Rule 64 herein.

Subdivision (b). This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

Subdivision (h). In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

1948 Amendment

The amendment effective October 1949 deleted at the end of subdivision (g) the following language which originally appeared after the word "entered": "and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U.S.C., Title 28, [former] § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

1961 Amendment

The amendment adopted Apr. 17, 1961, effective July 19, 1961, eliminated words "on some but not all of the claims presented in the action" which followed "final judgment".

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendments

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

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

2009 Amendments

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (558)

Fed. Rules Civ. Proc. Rule 62, 28 U.S.C.A., FRCP Rule 62
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 62.1

Rule 62.1. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

Currentness

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

CREDIT(S)

(Added March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

2009 Adoption

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands

for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Notes of Decisions (3)

Fed. Rules Civ. Proc. Rule 62.1, 28 U.S.C.A., FRCP Rule 62.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 63

Rule 63. Judge's Inability to Proceed

Currentness

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule adapts and extends the provisions of U.S.C., Title 28, [former] § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. *United States v. Lane,* 708 F.2d 1394, 1395-1397 (9th Cir.1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points

described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. *E.g., Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir.1982, en banc) *cert. denied*, 459 U.S. 910 (1982) (jury trial); *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir.1977) (non-jury trial). *See generally* Comment, *The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co.*, 67 MINN.L.REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to Fed. R. Evid. 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. *Anderson v. City of Bessemer City NC*, 470 U.S. 564, 575 (1985); *Marshall v. Jerrico Inc.,* 446 U.S. 238, 242 (1980). See also *United States v. Radatz*, 447 U.S. 667 (1980).

2007 Amendments

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

Notes of Decisions (38)

Fed. Rules Civ. Proc. Rule 63, 28 U.S.C.A., FRCP Rule 63
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294049.1

Federal Rules of Civil Procedure T. VIII, Refs & Annos

Currentness

ADVISORY COMMITTEE NOTES

1991 Amendment

The purpose of the revision is to divide this chapter of the Rules into two. No substantive change is effected.

Fed. Rules Civ. Proc. T. VIII, Refs & Annos, 28 U.S.C.A., FRCP T. VIII, Refs & Annos
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 64

Rule 64. Seizing a Person or Property

Currentness

(a) Remedies Under State Law--In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following--however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the

remedy is sought. Under U.S.C., Title 28, [former] § 726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Lis pendens. No rule concerning lis pendens is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal actions, the commencement of a Federal action is notice to all persons affected. *King v. Davis,* 137 F. 198 (W.D.Va., 1903). It has been held, however, that when a state statute does so provide expressly, its provisions are binding. *United States v. Calcasieu Timber Co.,* 236 F. 196 (C.C.A.5th, 1916).

For statutes of the United States on attachment, see, e.g.:

U.S.C., Title 28 former:

§ 737 [now 2710] (Attachment in postal suits)

§ 738 [now 2711] (Attachment; application for warrant)

§ 739 [now 2712] (Attachment; issue of warrant)

§ 740 [now 2713] (Attachment; trial of ownership of property)

§ 741 [now 2714] (Attachment; investment of proceeds of attached property)

§ 742 [now 2715] (Attachment; publication of attachment)

§ 743 [now 2716] (Attachment; personal notice of attachment)

§ 744 [now 2717] (Attachment; discharge; bond)

§ 745 [former] (Attachment; accrued rights not affected)

§ 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see, e.g.:

U.S.C., Title 28, former:

§ 748 [now 2405] (Garnishees in suits by United States against a corporation)

§ 749 [now 2405] (Same; issue tendered on denial of indebtedness)

§ 750 [now 2405] (Same; garnishee failing to appear)

For statutes of the United States on arrest, see, e.g.:

U.S.C., Title 28 former:

§ 376 [now 1651] (Writs of ne exeat)

§ 755 [former] (Special bail in suits for duties and penalties)

§ 756 [former] (Defendant giving bail in one district and committed in another)

§ 757 [former] (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)

§ 758 [former] (Bail and affidavits; taking by commissioners)

§ 759 [former] (Calling of bail in Kentucky)

§ 760 [former] (Clerks may take bail de bene esse)

§ 843 [now 2007] (Imprisonment for debt)

§ 844 [now 2007] (Imprisonment for debt; discharge according to State laws)

§ 845 [now 2007] (Imprisonment for debt; jail limits)

For statutes of the United States on replevin, see, e.g.:

U.S.C., Title 28:

§ 2463, formerly § 747 (Replevy of property taken under revenue laws).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Supplementary Note

Note. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.Appendix, § 501 et seq. [§§ 523 and 524], provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

2007 Amendments

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

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

Notes of Decisions (141)

Fed. Rules Civ. Proc. Rule 64, 28 U.S.C.A., FRCP Rule 64
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 65

Rule 65. Injunctions and Restraining Orders

Currentness

(a) Preliminary Injunction.

(1) ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party.

(2) ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice--or on shorter notice set by the court--the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) ***Contents.*** Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

(2) ***Persons Bound.*** The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 23, 2001, effective December 1, 2001; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivisions (a) and (b). These are taken from U.S.C., Title 28, [former] § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c). Except for the last sentence, this is substantially U.S.C., Title 28, [former] § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements: U.S.C. Title 15, §§ 77t(b), 78u(e), and 79r(f) (Securities and Exchange Commission). It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U.S.C., [former] Title 6 (Official and Penal Bonds) for bonds by surety companies.

Note to Subdivision (d). This is substantially U.S.C., Title 28, [former] § 383 (Injunctions; requisites of order; binding effect).

Note to Subdivision (e). The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare [former] Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

U.S.C., Title 28 former:

§ 46 [now 2324] (Suits to enjoin orders of Interstate Commerce Commission to be against United States)

§ 47 [now 2325] (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)

§ 378 [former] (Injunctions; when granted)

§ 379 [now 2283] (Injunctions; stay in State courts)

§ 380 [now 1253, 2101, 2281, 2284] (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)

§ 380a [now 1253, 2101, 2281, 2284] (Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court)

U.S.C., Title 7:

§ 216 (Court proceedings to enforce orders; injunction)

§ 217 (Proceedings for suspension of orders)

U.S.C., Title 15:

§ 4 (Jurisdiction of courts; duty of district attorney; procedure)

§ 25 (Restraining violations; procedure)

§ 26 (Injunctive relief for private parties; exceptions)

§ 77t(b) (Injunctions and prosecution of offenses)

1946 Amendment

Note. It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell v. Farley,* 1881, 105 U.S. 433, 466. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub. n of the Bankruptcy Act, 11 U.S.C. § 78, sub. n, under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 *Collier on Bankruptcy,* 14th ed. by Moore and Oglebay, 1853-1854.

1948 Amendment

The amendment effective October 1949, changed subdivision (e) in the following respects: in the first clause the amendment substituted the words "any statute of the United States" for the words "the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U.S.C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U.S.C., Title 29, c. 6"; in the second clause of subdivision (e) the amendment substituted the reference to "Title 28, U.S.C., § 2361" for the reference to "Section 24(26) of the Judicial Code as amended, U.S.C., Title 28, § 41(26)"; and the third clause was amended to read "Title 28, U.S.C., § 2284," etc., as at present, instead of "the Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress."

1966 Amendment

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co. v. Transport Workers Union,* 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman,* 259 F.2d 428, 429 (2d Cir. 1958); *Lummus Co. v. Commonwealth Oil Ref. Co., Inc.,* 297 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (c). Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

1987 Amendment

The amendments are technical. No substantive change is intended.

2001 Amendments

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat

the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

2007 Amendments

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

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

2009 Amendments

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (5416)

Fed. Rules Civ. Proc. Rule 65, 28 U.S.C.A., FRCP Rule 65
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 65.1

Rule 65.1. Proceedings Against a Surety

Currentness

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

CREDIT(S)

(Adopted February 28, 1966, effective July 1, 1966; amended March 2, 1987, effective August 1, 1987; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1966 Addition

See Note to Rule 65.

1987 Amendment

The amendments are technical. No substantive change is intended.

2006 Amendment

Rule 65.1 is amended to conform to the changed title of the Supplemental Rules.

2007 Amendments

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

Notes of Decisions (7)

Fed. Rules Civ. Proc. Rule 65.1, 28 U.S.C.A., FRCP Rule 65.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Federal Rules of Civil Procedure Rule 66

Rule 66. Receivers

Currentness

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1946 Amendment

Note. The title of Rule 66 has been expanded to make clear the subject of the rule, i.e., federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31(e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious and less expensive judicial administration. 2 *Moore's Federal Practice,* 1938, 2088-2091. For the rule necessitating ancillary appointment, see *Sterrett v. Second Nat. Bank,* 1918, 39 S.Ct. 27, 248 U.S. 73, 63 L.Ed. 135; *Kelley v. Queeney,* W.D.N.Y.1941, 41 F.Supp. 1015; see also *McCandless v. Furlaud,* 1934, 55 S.Ct. 42, 293 U.S. 67, 79 L.Ed. 202. This rule has been extensively criticized. First, *Extraterritorial Powers of Receivers,* 1932, 27 Ill.L.Rev. 271; Rose, *Extraterritorial Actions by Receivers,* 1933, 17 Minn.L.Rev. 704; Laughlin, *The Extraterritorial Powers of Receivers,* 1932, 45 Harv.L.Rev. 429; Clark and Moore, *A New Federal Civil Procedure--II, Pleadings and Parties,* 1935, 44 Yale L.J. 1291, 1312-1315; Note, 1932, 30 Mich.L.Rev. 1322. See also comment in *Bicknell v. Lloyd-Smith,* C.C.A.2d, 1940, 109 F.2d 527, certiorari denied 61 S.Ct. 15, 311 U.S. 650, 85 L.Ed. 416. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton v. Barbour,* 1881, 104 U.S. 126. See also 1 *Clark on Receivers,* 2d ed., § 549. Under [§ 959 of this title, formerly] 28 U.S.C. § 125 leave of court is unnecessary when a receiver is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in Federal court is governed by Rule 17(b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been stricken as superfluous. Under Rule 81(a)(1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 [see Appendix II following Rules of Bankruptcy Procedure, Title 11] only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See 1 *Collier on Bankruptcy,* 14th ed. by Moore and Oglebay, ¶¶2.23-2.36.

1948 Amendment

The amendment effective October 1949 deleted a sentence which formerly appeared immediately following the first sentence and which read as follows: "A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

2007 Amendments

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

Notes of Decisions (37)

Fed. Rules Civ. Proc. Rule 66, 28 U.S.C.A., FRCP Rule 66
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 67

Rule 67. Deposit Into Court

Currentness

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party--on notice to every other party and by leave of court--may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; April 28, 1983, effective August 1, 1983; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as U.S.C., Title 28, [§§ 1335, 1397, 2361, formerly] § 41(26) (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally *Howard v. United States,* 1902, 22 S.Ct. 543, 184 U.S. 676, 46 L.Ed. 754; United States Supreme Court Admiralty Rules (1920), Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry). With the first sentence, compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 22, r. 1(1).

1948 Amendment

The amendment effective October 1949 substituted the reference to "Title 28, U.S.C.A., §§ 2041, and 2042" for the reference to "Sections 995 and 996, Revised Statutes, as amended, U.S.C.A., Title 28, §§ 851, 852." The amendment also added the words "as amended" following the citation of the Act of June 26, 1934, c. 756, § 23, and, in the parenthetical citation immediately following, added the reference to "58 Stat. 845".

1983 Amendment

Rule 67 has been amended in three ways. The first change is the addition of the clause in the first sentence. Some courts have construed the present rule to permit deposit only when the party making it claims no interest in the fund or thing deposited. E.g., *Blasin-Stern v. Beech-Nut Life Savers Corp.,* 429 F.Supp. 533 (D. Puerto Rico 1975); *Dinkins v. General Aniline & Film Corp.,* 214 F.Supp. 281 (S.D.N.Y.1963). However, there are situations in which a litigant may wish to be relieved of responsibility for a sum or thing, but continue to claim an interest in all or part of it. In these cases the deposit-in-court procedure should be available; in addition to the advantages to the party making the deposit, the procedure gives other litigants assurance that any judgment will be collectable. The amendment is intended to accomplish that.

The second change is the addition of a requirement that the order of deposit be served on the clerk of the court in which the sum or thing is to be deposited. This is simply to assure that the clerk knows what is being deposited and what his responsibilities are with respect to the deposit. The latter point is particularly important since the rule as amended contemplates that deposits will be placed in interest-bearing accounts; the clerk must know what treatment has been ordered for the particular deposit.

The third change is to require that any money be deposited in an interest-bearing account or instrument approved by the court.

2007 Amendments

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

Notes of Decisions (42)

Fed. Rules Civ. Proc. Rule 67, 28 U.S.C.A., FRCP Rule 67
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Federal Rules of Civil Procedure Rule 68

Rule 68. Offer of Judgment

Currentness

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See 2 Minn.Stat. (Mason, 1927) § 9323; 4 Mont.Rev.Codes Ann. (1935) § 9770; N.Y.C.P.A. (1937) § 177.

For the recovery of costs against the United States, see Rule 54(d).

1946 Amendment

Note. The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits--as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues--whether there be a first, second or third trial--and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase "before the trial begins", in the first sentence of the rule, has been construed in *Cover v. Chicago Eye Shield Co.,* C.C.A.7th, 1943, 136 F.2d 374, certiorari denied 64 S.Ct. 53, 320 U.S. 749, 88 L.Ed. 445.

1966 Amendment

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

2009 Amendments

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or--if liability has been determined--at least 10 days before a hearing to determine the extent of liability. It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

Notes of Decisions (319)

Fed. Rules Civ. Proc. Rule 68, 28 U.S.C.A., FRCP Rule 68
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Federal Rules of Civil Procedure Rule 69

Rule 69. Execution

Currentness

(a) In General.

(1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; March 2, 1987 effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This follows in substance U.S.C. Title 28, [former] §§ 727 (Executions as provided by State laws) and [former 729] [now Title 42, § 1988] (Proceedings in vindication of civil rights), except that, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable state law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

U.S.C., Title 12:

§ 91 (Transfers by bank and other acts in contemplation of insolvency)

§ 632 (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party)

U.S.C., Title 19:

§ 199 (Judgments for customs duties, how payable)

U.S.C., Title 26 [I.R.C.1939]:

§ 1610(a) [former] (Surrender of property subject to distraint)

U.S.C., Title 28 former:

§ 122 [now 1656] (Creation of new district or transfer of territory; lien)

§ 350 [now 2101] (Time for making application for appeal or certiorari; stay pending application for certiorari)

§ 489 [now 547] (District Attorneys; reports to Department of Justice)

§ 574 [now 1921] (Marshals, fees enumerated)

§ 786 [former] (Judgments for duties; collected in coin)

§ 811 [now 1961] (Interest on judgments)

§ 838 [former] (Executions; run in all districts of State)

§ 839 [now 2413] (Executions; run in every State and Territory)

§ 840 [former] (Executions; stay on conditions), as modified by Rule 62(b)

§ 841 [former] (Executions; stay of one term), as modified by Rule 62(f)

§ 842 [now 2006] (Executions; against officers of revenue in cases of probable cause), as incorporated in Subdivision (b) of this rule

§ 843 [now 2007] (Imprisonment for debt)

§ 844 [now 2007] (Imprisonment for debt; discharge according to State laws)

§ 845 [now 2007] (Imprisonment for debt; jail limits)

§ 846 [now 2005] (Fieri Facias; appraisal of goods; appraisers)

§ 847 [now 2001] (Sales; real property under order or decree)

§ 848 [now 2004] (Sales; personal property under order or decree)

§ 849 [now 2002] (Sales; necessity of notice)

§ 850 [now 2003] (Sales; death of marshall after levy or after sale)

§ 869 [former] (Bond in former error and on appeal), as incorporated in Rule 73(c)

§ 874 [former] (Supersedeas), as modified by Rules 62(d) and 73(d)

U.S.C., Title 31:

§ 195 [now 3715] (Purchase on execution)

U.S.C., Title 33:

§ 918 (Collection of defaulted payments)

U.S.C., Title 49:

§ 74(g) [former] (Causes of action arising out of Federal control of railroads; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

U.S.C., Title 2:

§ 118 (Actions against officers of Congress for official acts)

U.S.C., Title 5 former:

§ 729 [see 8346, 8470] (Federal employees retirement annuities not subject to assignment, execution, levy or other legal process)

U.S.C., Title 10 former:

§ 610 [now 3690, 8690] (Exemption of enlisted men from arrest on civil process)

U.S.C., Title 22 former:

§ 21(h) [see 4060] (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

U.S.C., Title 33:

§ 916 (Assignment and exemption from claims of creditors) (Longshoremen's and Harborworkers' Compensation Act)

U.S.C., Title 38 former:

§ 54 [see 3101] (Attachment, levy or seizure of moneys due pensioners prohibited)

§ 393 [former] (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare [former] Title 34, § 365(c) (Medal of Honor Roll; special pension to persons enrolled)

§ 618 [see 3101] (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)

U.S.C., Title 43:

§ 175 (Exemption from execution of homestead land)

U.S.C., Title 48 former:

§ 1371*o* (Panama canal and railroad retirement annuities, exemption from execution and so forth.)

Supplementary Note

Note. With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq., see notes to Rules 62 and 64 herein.

1948 Amendment

The amendment effective October 1949, substituted the citation of "Title 28, U.S.C., § 2006" in subdivision (b) in place of the citation to "Section 989, Revised Statutes, U.S.C., Title 28, § 842".

1970 Amendment

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court had held that Rule 34 discovery is unavailable to the judgment creditor. *M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co.,* 11 F.R.D. 172 (E.D.Pa.1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. *United States v. McWhirter,* 376 F.2d 102 (5th Cir. 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26-33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 *Moore's Federal Practice* ¶69.05[1] (2d ed. 1966), but another believes that a rules amendment is needed. 3 Barron & Holtzoff, *Federal Practice and Procedure* 1484 (Wright ed. 1958). Both commentators and the court in *McWhirter* are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Notes of Decisions (211)

Fed. Rules Civ. Proc. Rule 69, 28 U.S.C.A., FRCP Rule 69
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 70

Rule 70. Enforcing a Judgment for a Specific Act

Currentness

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done--at the disobedient party's expense--by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court--instead of ordering a conveyance--may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Compare [former] Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn.Ann.Code (Williams,

1934), § 10594; 2 Conn.Gen.Stat. (1930), § 5455; N.M.Stat.Ann. (Courtright, 1929), § 117-117; 2 Ohio Gen.Code Ann. (Page, 1926), § 11590; and England, Supreme Court of Judicature Act (1925), § 47.

2007 Amendments

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

Notes of Decisions (55)

Fed. Rules Civ. Proc. Rule 70, 28 U.S.C.A., FRCP Rule 70
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VIII. Provisional and Final Remedies (Refs & Annos)

Federal Rules of Civil Procedure Rule 71

Rule 71. Enforcing Relief for or Against a Nonparty

Currentness

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Compare [former] Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell v. Allison,* 1875, 21 Wall. 289, 22 L.Ed. 634; *Farmers' Loan and Trust Co. v. Chicago and A. Ry. Co.*, C.C.Ind.1890, 44 F. 653; *Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp.,* E.D.N.Y.1923, 288 F. 80; *Thompson v. Smith,* C.C.Minn.1870, Fed.Cas. No. 13,977.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendments

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

Notes of Decisions (21)

Fed. Rules Civ. Proc. Rule 71, 28 U.S.C.A., FRCP Rule 71

Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294050.1

Federal Rules of Civil Procedure Rule 71.1

Rule 71.1. Condemning Real or Personal Property

Currentness

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) ***Caption.*** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property--designated generally by kind, quantity, and location--and at least one owner of some part of or interest in the property.

(2) ***Contents.*** The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) ***Parties.*** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) ***Procedure.*** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) ***Filing; Additional Copies.*** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) ***Delivering Notice to the Clerk.*** On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

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

(A) *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

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

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) *Conclusion.* The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) ***Serving the Notice.***

(A) *Personal Service.* When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) *Service by Publication.*

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice--once a week for at least 3 successive weeks--in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) ***Effect of Delivery and Service.*** Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) ***Amending the Notice; Proof of Service and Amending the Proof.*** Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) Appearance or Answer.

(1) ***Notice of Appearance.*** A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) ***Waiver of Other Objections and Defenses; Evidence on Compensation.*** A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant--whether or not it has previously appeared or answered--may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may--as often as it wants--amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

(h) Trial of the Issues.

(1) ***Issues Other Than Compensation; Compensation.*** In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) ***Appointing a Commission; Commission's Powers and Report.***

(A) *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) *Commission's Powers and Report.* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) ***Dismissing the Action.***

(A) *By the Plaintiff.* If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) *By Stipulation.* Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) *By Court Order.* At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) ***Dismissing a Defendant.*** The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) ***Effect.*** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) ***Deposit.*** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) ***Distribution; Adjusting Distribution.*** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury--or for trying the issue of compensation by jury or commission or both--that law governs.

(l) Costs. Costs are not subject to Rule 54(d).

CREDIT(S)

(Adopted April 30, 1951, effective August 1, 1951; amended January 21, 1963, effective July 1, 1963; April 29, 1985, effective August 1, 1985; March 2, 1987, effective August 1, 1987; April 25, 1988, effective August 1, 1988; amended by

Pub.L. 100-690, Title VII, § 7050, November 18, 1988, 102 Stat. 4401 (although amendment by Pub.L. 100-690 could not be executed due to prior amendment by Court order which made the same change effective August 1, 1988); amended April 22, 1993, effective December 1, 1993; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1951 Addition

Supplementary Report

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (* * *), the particular question being whether the tribunal to award compensation should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia ([former] §§ 361 to 386 of Title 40 [now D.C. Code, Title 16, § 1301 et seq.]) where a rather unique system exists under which the court is required in all cases to order the selection of a "jury" of five from among not less than twenty names drawn from "the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (section 831x of Title 16) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred. Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation cases. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three judge district court. The Advisory Committee has not considered abolition of the three judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (* * *):

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal especially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed the Committee that the Court was particularly interested in the views expressed by Judge John Paul, Judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is as follows:

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be

determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul's objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations--either the Administrative Office or some other interested department of the government--should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommend the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous "Manual on Federal Eminent Domain," the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes--statutes which sometimes conflict with one another--but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful "double" system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as "United States District Courts" instead of "District Courts of the United States," and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, * * * which provided that the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity "in light of the type and value of the property involved," the phrase in quotation marks was changed to read "in the light of the character and value of the property involved and the interests to be acquired."

The Department of Justice made a counter proposal * * * that there be substituted the words "reasonably diligent search of the records, considering the type." When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objection to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word "character" instead of the word "type."

The Department of Justice also suggested that in subdivision (d)(3)(ii) relating to service by publication, the search for a

defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a "condition" attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows:

> **(k) Condemnation Under a State's Power of Eminent Domain.** The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

The other is as follows:

> **(k) Condemnation Under a State's Power of Eminent Domain.** The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in *Erie R. Co. v. Tompkins* and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in *Erie R. Co. v. Tompkins* and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision * * * of the 1948 draft * * * prescribing the effective date of the rule was drafted before the recent

amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

> **Effective Date.** This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

[Par. 3 of Supreme Court Order adopted Apr. 30, 1951, setting out this rule and providing for the abrogation of par. (7) of Rule 81(a), and providing for the Effective Date, as stated herein, was transmitted to Congress on May 1, 1951 by the Chief Justice of the United States (House Document No. 121, May 1, 1951, 82nd Cong., 1st Sess.), in conformity with § 2072 of this title. As no action was taken by Congress within the 90-day period required by that section, this rule and the abrogation of par. (7) of Rule 81(a) took effect on Aug. 1, 1951, as provided in said order.]

> **5.** We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft * * *. The existence of this right is taken into account in the rule. In subdivision (c)(2), * * * it is stated: "Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known." That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaining the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i), subdivisions (1), (2), and (3), * * *); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property,

probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law, and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice on the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has vigorously objected to the substitution of juries for commissions in TVA cases. We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in an cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the "double" trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

Original Report

General Statement. 1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state's power reach the United States District Courts. The Committee's reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act (former § 258 of Title 40), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act where the Acts of Congress do not prescribe the practice; that it preferred to work under the Conformity Act without a uniform rule of procedure. The profession generally showed little interest in the proposed uniform rule. For these reasons the Advisory Committee in its Final Report to the Court in November 1937 proposed that all of Rule 74 be stricken and that the Federal Rules be made applicable only to appeals in condemnation cases. See note to Rule 74 of the Final Report.

Some of six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand

grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign's power to condemn and the property owner's right to compensation could be promoted by a simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Preliminary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944. To avoid unduly delaying the proposed amendments to existing rules the Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions, specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under former § 258 of Title 40. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, § 46, pp. 55 to 56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, *Proposed Amendments to Federal Rules for Civil Procedure,* 1944, 4 F.R.D. 124, 134; id., *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments,* 1946, 5 F.R.D. 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U.S.C., Title 16:

§ 404c-11 (Mammoth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior).

§ 426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army).

§ 450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior).

§ 517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture).

U.S.C., Title 42:

§§ 1805(b)(5), 1813(b) [now §§ 2061 and 2112, and §§ 2221 to 2224, respectively, of Title 42] (Atomic Energy Act).

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform what that of similar actions in state courts:

U.S.C., Title 16:

§ 423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior).

§ 814 (Exercise by water power licensee of power of eminent domain).

U.S.C., Title 24:

§ 78 [Repealed] (Condemnation of land for the former National Home for Disabled Volunteer Soldiers).

U.S.C., Title 33:

§ 591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army).

U.S.C., Title 40:

§ 257 [now § 3113] (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized).

§ 258 [Omitted as superseded by this rule] (Same procedure).

U.S.C., Title 50:

§ 171 [Repealed and is now covered by § 2663 of Title 10] (Acquisition of land by the Secretary of the Army for national defense).

§ 172 [Repealed and is now covered by §§ 2664 and 2665 of Title 10] (Acquisition of property by the Secretary of the Army, etc., for production of lumber).

§ 632 App. [Omitted as terminated by § 645 of the Appendix to Title 50] (Second War Powers Act, 1942; acquisition of

real property for war purposes by the Secretary of Army, the Secretary of the Navy and others).

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U.S.C., Title 16:

§ 831x (Condemnation by Tennessee Valley Authority).

U.S.C., Title 40:

§ 361-386 [Repealed] [now D.C.Code, Title 16, § 1301 et seq.] (Acquisition of lands in District of Columbia for use of United States; condemnation).

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the initial award of the commissioners. This procedure has worked to the satisfaction of the property owners and the TVA. A full statement of the TVA position and experience is set forth in Preliminary Draft of Proposed Rule to Govern Condemnation Cases (June, 1947) 15-19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners' awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. *Stratton v. St. Louis, Southwestern Ry. Co.,* 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; *Ayrshire Collieries Corp. v. United States,* 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases. It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and

expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a land owner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and land owner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), infra.

Note to Subdivision (a). As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, supra. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rulemaking power. The Enabling Act [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), former §§ 723b, 723c, now § 2072, of this title] gives the Supreme Court "the power to prescribe, by general rules * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In *Kohl v. United States,* 1875, 91 U.S. 367, 23 L.Ed. 449, a proceeding instituted by the United States to appropriate land for a postoffice site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is * * * a suit at common law, when initiated in a court." See, also, *Madisonville Traction Co. v. Saint Bernard Mining Co.,* 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462, infra, under subdivision (k). And the Conformity Act [former § 258 of Title 40], which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *United States v. 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y.,* D.C.N.Y.1942, 43 F.Supp. 561, affirmed 129 F.2d 678, certiorari denied 63 S.Ct. 441, 317 U.S. 698, 87 L.Ed. 558.

Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or required by statute. See former § 438j [now § 5001] of Title 38 (World War Veterans' Relief Act); former §§ 1805, 1811, and 1813 of Title 42 (Atomic Energy Act); former § 79 [now § 100] of Title 50 (Nitrates Act); former §§ 161 to 165 and § 166, of Title 50 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see former § 1813 [now §§ 2221 to 2224] of Title 42, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Act of February 26, 1931, c. 307, §§ 1 to 5 (46 Stat. 1421), §§ 258a to 258e of Title 40, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See *United States v. 76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga.,* D.C.Ga.1942, 44 F.Supp. 653; *United States v. 17,280 Acres of Land, More or Less, Situated in Saunders County, Neb.,* D.C.Neb.1942, 47 F.Supp. 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

U.S.C., Title 33:

§ 594 (When immediate possession of land may be taken; for a work of river and harbor improvements.)

U.S.C., Title 42:

§ 1813(b) [now §§ 2221 to 2224 of Title 42] (When immediate possession may be taken under Atomic Energy Act).

U.S.C., Title 50:

§ 171 [Repealed and is now covered by § 2663 of Title 10] (Acquisition of land by the Secretary of the Army for national defense).

§ 632 App. [Omitted as terminated by § 645 of the Appendix to Title 50] (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others).

Note to Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

Note to Subdivision (c). Since a condemnation proceeding is in rem and since a great many property owners are often involved, paragraph (1) requires the property to be named and only one of the owners. In other respects and caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, c. 307, §§ 1 to 5 (46 Stat. 1421), §§ 258a to 258e of Title 40; and § 594 of Title 33, former § 1813(b) of Title 42, former § 171 of Title 50, former § 632 of the Appendix to Title 50, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This is no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searches of title in the vicinity in light of the type and value of the property involved" both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There

is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 Colo.Stat.Ann., 1935, c. 61, § 2; Ill.Ann.Stat. (Smith-Hurd) c. 47, § 2; 1 Iowa Code, 1946, § 472.3; Kans.Stat.Ann., 1935, § 26-101; 2 Mass.Laws Ann., 1932, c. 80A, § 4; 7 Mich.Stat.Ann., 1936, § 8.2; 2 Minn.Stat., Mason 1927, § 6541; 20 N.J.Stat.Ann., 1939, § 1-2; 3 Wash.Revised Stat., Remington, 1932, Title 6, § 891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of "unknown owner", see Hawaii Revised Laws, 1945, c. 8, § 310 ("such [unknown] defendant may be joined in the petition under a fictitious name."); Ill.Ann.Stat. (Smith-Hurd) c. 47, § 2 ("Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; * * *"); Maryland Code Ann., 1939, Art. 33A, § 1 ("In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner."); 2 Mass.Laws Ann., 1932, c. 80A, § 4 ("Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, * * *"); New Mex.Stat.Ann., 1941, § 25-901 ("the owners * * * shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown."); Utah Code Ann., 1943, § 104-61-7 ("The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants").

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

Note to Subdivision (d). In lieu of a summons, which is the initial process in other civil actions under Rule 4(a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice. Rule 4(a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A(d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by § 118 [now § 1655] of this title.

Note to Subdivision (e). Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all

proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

Note to Subdivision (f). Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

Note to Subdivision (g). A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut-off and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

Note to Subdivision (h). This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, supra. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, § 831x of Title 16 requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question de novo; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation "without regard to the awards of findings theretofore made by the commissioners or the district judges." The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in former §§ 361 to 386 of Title 40. Under former § 371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn "from the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. *Bauman v. Ross,* 1897, 17 S.Ct. 966, 167 U.S. 548, 42 L.Ed. 270. See, also, Hines, *Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings?,* 1925, 11 Va.L.Rev. 505; Blair, *Federal Condemnation Proceedings and the Seventh Amendment,* 1927, 41 Harv.L.Rev. 29; 3 *Moore's Federal Practice,* 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, former § 258 of Title 40, in states which provided for jury trial. See generally, 2 Lewis, *Eminent Domain,* 3d ed. 1909, §§ 509, 510; 3 Moore, op. cit. supra. Since the general conformity statute is superseded by Rule 71A, see supra under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

Note to Subdivision (i). Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, viz., any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

Note to Subdivision (j). Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see § 258a of [former] Title 40; § 594 of Title 33; acquisition of title and possession statutes referred to in note to subdivision (a), supra. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§ 209 to 216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States v. Miller,* 1943, 63 S.Ct. 276, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55, rehearing denied 63 S.Ct. 557, 318 U.S. 798, 87 L.Ed. 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

Note to Subdivision (k). While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See *Boom Co. v. Patterson,* 1878, 98 U.S. 403, 25 L.Ed. 206; *Searl v. School District No. 2,* 1888, 8 S.Ct. 460, 124 U.S. 197, 31 L.Ed. 415; *Madisonville Traction Co. v. Saint Bernard Mining Co.,* 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See, also, *Franzen v. Chicago, M. & St. P. Ry. Co.,* C.C.A.7th, 1921, 278 F. 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

Note to Subdivision (l). Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: "Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a matter in which the United States has no legal interest. Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as amici curiae." Lands Division

Manual 861. For other discussion and citation, see *Grand River Dam Authority v. Jarvis,* C.C.A.10th, 1942, 124 F.2d 914. Costs may not be taxed against the United States except to the extent permitted by law. *United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa.,* D.C.Pa.1944, 54 F.Supp. 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

1963 Amendment

This amendment conforms to the amendment of Rule 4(f).

1985 Amendment

Rule 71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be available, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission's deliberations.

Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court then may authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective commissioners and by recognizing the right of each party to object to the appointment of any person for cause.

1987 Amendment

The amendments are technical. No substantive change is intended.

1988 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

2003 Amendments

The references to specific subdivisions of Rule 53 are deleted or revised to reflect amendments of Rule 53.

2007 Amendments

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

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

Rule 71.1(e) allows a defendant to appear without answering. Former form 28 (now form 60) includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

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

2009 Amendments

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Notes of Decisions (1353)

Fed. Rules Civ. Proc. Rule 71.1, 28 U.S.C.A., FRCP Rule 71.1
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 72

Rule 72. Magistrate Judges: Pretrial Order

Currentness

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) ***Findings and Recommendations.*** A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) ***Objections.*** Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) ***Resolving Objections.*** The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

CREDIT(S)

(Former Rule 72 abrogated December 4, 1967, effective July 1, 1968; new Rule 72 adopted April 28, 1983, effective August 1, 1983; amended April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1983 Addition

Subdivision (a). This subdivision addresses court-ordered referrals of nondispositive matters under 28 U.S.C. § 636(b)(1)(A). The rule calls for a written order of the magistrate's disposition to preserve the record and facilitate review. An oral order read into the record by the magistrate will satisfy this requirement.

No specific procedures or timetables for raising objections to the magistrate's rulings on nondispositive matters are set forth in the Magistrates Act. The rule fixes a 10-day period in order to avoid uncertainty and provide uniformity that will eliminate the confusion that might arise if different periods were prescribed by local rule in different districts. It also is contemplated that a party who is successful before the magistrate will be afforded an opportunity to respond to objections raised to the magistrate's ruling.

The last sentence of subdivision (a) specifies that reconsideration of a magistrate's order, as provided for in the Magistrates Act, shall be by the district judge to whom the case is assigned. This rule does not restrict experimentation by the district courts under 28 U.S.C. § 636(b)(3) involving references of matters other than pretrial matters, such as appointment of counsel, taking of default judgments, and acceptance of jury verdicts when the judge is unavailable.

Subdivision (b). This subdivision governs court-ordered referrals of dispositive pretrial matters and prisoner petitions challenging conditions of confinement, pursuant to statutory authorization in 28 U.S.C. § 636(b)(1)(B). This rule does not extend to habeas corpus petitions, which are covered by the specific rules relating to proceedings under Sections 2254 and 2255 of Title 28.

This rule implements the statutory procedures for making objections to the magistrate's proposed findings and recommendations. The 10-day period, as specified in the statute, is subject to Rule 6(e) which provides for an additional 3-day period when service is made by mail. Although no specific provision appears in the Magistrates Act, the rule specifies a 10-day period for a party to respond to objections to the magistrate's recommendation.

Implementing the statutory requirements, the rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report, findings, or recommendations to which timely objection is made. The term "de novo" signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required. See *United States v. Raddatz,* 417 [447] U.S. 667 (1980). See also Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U. L.Rev. 1297, 1367 (1975). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. See *Campbell v. United States Dist. Court,* 501 F.2d 196, 206 (9th Cir.1974), cert. denied, 419 U.S. 879, quoted in House Report No. 94-1609, 94th Cong.2d Sess. (1976) at 3. Compare *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F.2d 603 (1st Cir.1980). Failure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order. *See United States v. Walters,* 638 F.2d 947 (6th Cir.1981).

1991 Amendment

This amendment is intended to eliminate a discrepancy in measuring the 10 days for serving and filing objections to a magistrate's action under subdivisions (a) and (b) of this Rule. The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed within 10 days of entry of the order, but required objections to dispositive motions to be made within 10 days of being served with a copy of the recommended disposition.

Subdivision (a) is here amended to conform to subdivision (b) to avoid any confusion or technical defaults, particularly in connection with magistrate orders that rule on both dispositive and nondispositive matters.

The amendment is also intended to assure that objections to magistrate's orders that are not timely made shall not be considered. *Compare* Rule 51.

1993 Amendments

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

2007 Amendments

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

2009 Amendments

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (251)

Fed. Rules Civ. Proc. Rule 72, 28 U.S.C.A., FRCP Rule 72
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IX. Special Proceedings

Federal Rules of Civil Procedure Rule 73

Rule 73. Magistrate Judges: Trial by Consent; Appeal

Currentness

(a) Trial by Consent. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).

(b) Consent Procedure.

(1) ***In General.*** When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) ***Reminding the Parties About Consenting.*** A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(3) ***Vacating a Referral.*** On its own for good cause--or when a party shows extraordinary circumstances--the district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

CREDIT(S)

(Former Rule 73 abrogated December 4, 1967, effective July 1, 1968; new Rule 73 adopted April 28, 1983, effective August 1, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 11, 1997, effective December 1, 1997; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1983 Addition

Subdivision (a). This subdivision implements the broad authority of the 1979 amendments to the Magistrates Act, 28 U.S.C. § 636(c), which permit a magistrate to sit in lieu of a district judge and exercise civil jurisdiction over a case, when the parties consent. See McCabe, *The Federal Magistrate Act of 1979,* 16 Harv.J.Legis. 343, 364-79 (1979). In order to exercise this jurisdiction, a magistrate must be specially designated under 28 U.S.C. § 636(c)(1) by the district court or courts he serves. The only exception to a magistrate's exercise of civil jurisdiction, which includes the power to conduct jury and nonjury trials and decide dispositive motions, is the contempt power. A hearing on contempt is to be conducted by the district judge upon certification of the facts and an order to show cause by the magistrate. See 28 U.S.C. § 639(e). In view of 28 U.S.C. § 636(c)(1) and this rule, it is unnecessary to amend Rule 58 to provide that the decision of a magistrate is a "decision by the court" for the purposes of that rule and a "final decision of the district court" for purposes of 28 U.S.C. § 1291 governing appeals.

Subdivision (b). This subdivision implements the blind consent provision of 28 U.S.C. § 636(c)(2) and is designed to ensure that neither the judge nor the magistrate attempts to induce a party to consent to reference of a civil matter under this rule to a magistrate. See House Rep. No. 96-444, 96th Cong. 1st Sess. 8 (1979).

The rule opts for a uniform approach in implementing the consent provision by directing the clerk to notify the parties of their opportunity to elect to proceed before a magistrate and by requiring the execution and filing of a consent form or forms setting forth the election. However, flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made.

The last paragraph of subdivision (b) reiterates the provision in 28 U.S.C. § 636(c)(6) for vacating a reference to the magistrate.

Subdivision (c). Under 28 U.S.C. § 636(c)(3), the normal route of appeal from the judgment of a magistrate--the only route that will be available unless the parties otherwise agree in advance--is an appeal by the aggrieved party "directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." The quoted statutory language indicates Congress' intent that the same procedures and standards of appealability that govern appeals from district court judgments govern appeals from magistrates' judgments.

Subdivision (d). 28 U.S.C. § 636(c)(4) offers parties who consent to the exercise of civil jurisdiction by a magistrate an alternative appeal route to that provided in subdivision (c) of this rule. This optional appellate route was provided by Congress in recognition of the fact that not all civil cases warrant the same appellate treatment. In cases where the amount in controversy is not great and there are no difficult questions of law to be resolved, the parties may desire to avoid the expense and delay of appeal to the court of appeals by electing an appeal to the district judge. See McCabe, *The Federal Magistrate Act of 1979,* 16 Harv.J.Legis, 343, 388 (1979). This subdivision provides that the parties may elect the optional appeal route at the time of reference to a magistrate. To this end, the notice by the clerk under subdivision (b) of this rule shall explain the appeal option and the corollary restriction on review by the court of appeals. This approach will avoid later claims of lack of consent to the avenue of appeal. The choice of the alternative appeal route to the judge of the district court should be made by the parties in their forms of consent. Special appellate rules to govern appeals from a magistrate to a district judge appear in new Rules 74 through 76.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990. The Act requires that, when being reminded of the availability of a magistrate judge, the parties be advised that withholding of consent will have no "adverse substantive consequences." They may, however, be advised if the withholding of consent will have the adverse procedural consequence of a potential delay in trial.

1997 Amendments

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

2007 Amendments

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

Notes of Decisions (8)

Fed. Rules Civ. Proc. Rule 73, 28 U.S.C.A., FRCP Rule 73
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IX. Special Proceedings

Federal Rules of Civil Procedure Rule 74

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

Currentness

CREDIT(S)

(Former Rule 74 abrogated December 4, 1967, effective July 1, 1968; new Rule 74 adopted April 28, 1983, effective August 1, 1983; amended April 22, 1993, effective December 1, 1993; abrogated April 11, 1997, effective December 1, 1997; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1997 Amendment

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

2007 Amendment

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

Fed. Rules Civ. Proc. Rule 74, 28 U.S.C.A., FRCP Rule 74
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IX. Special Proceedings

Federal Rules of Civil Procedure Rule 75

Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d) [Abrogated]

Currentness

CREDIT(S)

(Former Rule 75 abrogated December 4, 1967, effective July 1, 1968; new Rule 75 adopted April 28, 1983, effective August 1, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; abrogated April 11, 1997, effective December 1, 1997; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1997 Amendment

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

2007 Amendment

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

Fed. Rules Civ. Proc. Rule 75, 28 U.S.C.A., FRCP Rule 75
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IX. Special Proceedings

Federal Rules of Civil Procedure Rule 76

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

Currentness

CREDIT(S)

(Former Rule 76 abrogated December 4, 1967, effective July 1, 1968; new Rule 76 adopted April 28, 1983, effective August 1, 1983; amended April 22, 1993, effective December 1, 1993; abrogated April 11, 1997, effective December 1, 1997; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1997 Amendment

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

2007 Amendment

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

Fed. Rules Civ. Proc. Rule 76, 28 U.S.C.A., FRCP Rule 76
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294052.1

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title X. District Courts and Clerks: Conducting Business; Issuing Orders

Federal Rules of Civil Procedure Rule 77

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

Currentness

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing--other than one ex parte--may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) ***Hours.*** The clerk's office--with a clerk or deputy on duty--must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(6)(A).

(2) ***Orders.*** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) ***Service.*** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) ***Time to Appeal Not Affected by Lack of Notice.*** Lack of notice of the entry does not affect the time for appeal or relieve--or authorize the court to relieve--a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; December 4, 1967, effective July 1, 1968; March 1, 1971, effective July 1, 1971; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 23, 2001, effective December 1, 2001; April 30, 2007, effective December 1, 2007; April 25, 2014, effective December 1, 2014.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule states the substance of U.S.C., Title 28, § 452, formerly § 13 (Courts open as courts of admiralty and equity). Compare [former] Equity Rules 1 (District Court Always Open For Certain Purposes--Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

1946 Amendment

Note. Rule 77(d) has been amended to avoid such situations as the one arising in *Hill v. Hawes,* 1944, 64 S.Ct. 334, 320 U.S. 520, 88 L.Ed. 283. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then re-entered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although rule 77(d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill v. Hawes* is to give the district court power, in its discretion and without time limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

1963 Amendment

Subdivision (c). The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d). This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

1968 Amendment

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

1971 Amendment

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 6(a).

1987 Amendment

The amendments are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 77.

1991 Amendment

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir.1986); *Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates*, 780 F.2d 1043

(D.C.Cir.1986); *In re OPM Leasing Services, Inc.*, 769 F.2d 911 (2d Cir.1985); *Spika v. Village of Lombard, Ill.,* 763 F.2d 282 (7th Cir.1985); *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3d Cir.1985); *Wilson v. Atwood v. Stark*, 725 F.2d 255 (5th Cir. en banc), cert. dismissed, 105 S.Ct. 17 (1984); *Case v. BASF Wyandotte,* 727 F.2d 1034 (Fed.Cir.1984), cert. denied, 105 S.Ct. 386 (1984); *Hensley v. Chesapeake & Ohio R.R. Co.*, 651 F.2d 226 (4th Cir.1981); *Buckeye Cellulose Corp. v. Electric Construction Co.*, 569 F.2d 1036 (8th Cir.1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

2001 Amendments

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Changes Made After Publication and Comments

Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note "service," not "mailing," on the docket.

2007 Amendments

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

2014 Amendments

The amendment corrects an inadvertent failure to revise the cross-reference to Rule 6(a) when what was Rule 6(a)(4)(A) became Rule 6(a)(6)(A).

Notes of Decisions (48)

Fed. Rules Civ. Proc. Rule 77, 28 U.S.C.A., FRCP Rule 77
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 78

Rule 78. Hearing Motions; Submission on Briefs

Currentness

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Compare [former] Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See Rule 43(e) of these rules dealing with evidence on motions. Compare *Civil Practice Rules of the Municipal Court of Chicago* (1935), Rules 269, 270, 271.

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendments

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

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

Notes of Decisions (23)

Fed. Rules Civ. Proc. Rule 78, 28 U.S.C.A., FRCP Rule 78
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 79

Rule 79. Records Kept by the Clerk

Currentness

(a) Civil Docket.

(1) ***In General.*** The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) ***Items to be Entered.*** The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) ***Contents of Entries; Jury Trial Demanded.*** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; January 21, 1963, effective July 1, 1963; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Compare [former] Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

U.S.C., Title 5 former:

§ 301 [See Title 28, § 526] (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees)

§ 318 [former] (Accounts of district attorneys)

U.S.C., Title 28 former:

§ 556 [former] (Clerks of district courts; books open to inspection)

§ 567 [now 751] (Same; accounts)

§ 568 [now 751] (Same; reports and accounts of moneys received; dockets)

§ 813 [former] (Indices of judgment debtors to be kept by clerks)

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

1946 Amendment

Note. Subdivision (a). The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, c. 501, §§ 1 to 7, 53 Stat. 1223, 28 U.S.C.A. §§ 601 to 610, formerly §§ 444 to 450.

Subdivision (b). The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography. See *Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts,* prepared by the Bureau of the Budget, 1941, 38-42. See also Rule 55, Federal Rules of Criminal Procedure.

Subdivision (c). The words "Separate and" have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

Subdivision (d). Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), supra.

1948 Amendment

The amendment effective October 1949, substituted the name, "Judicial Conference of the United States," for "Judicial Conference of Senior Circuit Judges," in the first sentence of subdivision (a), and in subdivisions (b) and (d).

1963 Amendment

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

2007 Amendments

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

only.

Notes of Decisions (41)

Fed. Rules Civ. Proc. Rule 79, 28 U.S.C.A., FRCP Rule 79
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title X. District Courts and Clerks: Conducting Business; Issuing Orders

Federal Rules of Civil Procedure Rule 80

Rule 80. Stenographic Transcript as Evidence

Currentness

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This follows substantially [former] Equity Rule 50 (Stenographer-- Appointment-- Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (b). See *Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States* (1936), 22 A.B.A.J. 818, 819; (1937), 24 A.B.A.J. 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

1946 Amendment

Note. Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., c. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. §§ 550, 604, 753, 1915, 1920, formerly § 9a, providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs, and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

2007 Amendments

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

Notes of Decisions (1)

Fed. Rules Civ. Proc. Rule 80, 28 U.S.C.A., FRCP Rule 80
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294053.1

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title XI. General Provisions

Federal Rules of Civil Procedure Rule 81

Rule 81. Applicability of the Rules in General; Removed Actions

Currentness

(a) Applicability to Particular Proceedings.

(1) ***Prize Proceedings.*** These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651-7681.

(2) ***Bankruptcy.*** These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) ***Citizenship.*** These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) ***Special Writs.*** These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

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

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

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

laws provide other procedures:

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

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

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

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

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

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

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

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

(2) ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) ***Demand for a Jury Trial.***

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) ***"State Law" Defined.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(3) ***"Federal Statute" Defined in the District of Columbia.*** In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

CREDIT(S)

(Amended December 28, 1939, effective April 3, 1941; December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; April 30, 1951, effective August 1, 1951; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 1, 1971, effective July 1, 1971; March 2, 1987, effective August 1, 1987; April 23, 2001, effective December 1, 2001; April 29, 2002, effective December 1, 2002;

April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). Paragraph (1): Compare the enabling act, Act of June 19, 1934, U.S.C., Title 28, § 2072, formerly § 723b (Rules in actions at law; Supreme Court authorized to make) and § 2072, formerly § 723c (Union of equity and action at law rules; power of Supreme Court). For the application of these rules in bankruptcy and copyright proceedings, see Orders xxxvi and xxxvii in Bankruptcy and Rule 1 of Rules of Practice and Procedure under § 25 of the copyright act, Act of March 4, 1909, U.S.C., Title 17, former § 25 [see 412, 501 et seq.] (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: U.S.C., Title 8, [former] ch. 9 (Naturalization); Title 28, former ch. 14 [now 153] (Habeas corpus); Title 28, former §§ 377a to 377c [now D.C.Code, Title 16 § 3501 et seq.] (Quo warranto); and such forfeiture statutes as U.S.C., Title 7, former § 116 (Misbranded seeds, confiscation), and Title 21, § 334(b), formerly § 14 (Pure Food and Drug Act--condemnation of adulterated or misbranded Food; procedure). See also *443 Cans of Frozen Eggs Product v. U.S.,* 1912, 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174.

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see U.S.C. [former] Title 40, [former] § 258 (Condemnation of realty for sites for public building, etc., procedure); U.S.C., Title 16, § 831x (Condemnation by Tennessee Valley Authority); U.S.C., [former] Title 40, § 120 (Acquisition of lands for public use in District of Columbia); [former] Title 40, ch. 7 [now D.C.Code, Title 16, § 1301 et seq.] (Acquisition of lands in District of Columbia for use of United States; condemnation).

Note to Subdivision (b). Some statutes which will be affected by this subdivision are;

U.S.C., Title 7:

§ 222 (Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49)

U.S.C., Title 15:

§ 49 (Enforcement of Federal Trade Commission orders and antitrust laws)

§ 77t(c) (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)

§ 78u(f) (Same; Securities Exchange Act of 1934)

§ 79r(g) (Same; Public Utility Holding Company Act of 1935)

U.S.C., Title 16:

§ 820 (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)

§ 825m(b) (Mandamus to compel compliance with Federal Water Power Act, etc.)

U.S.C., Title 19:

§ 1333(c) (Mandamus to compel compliance with orders of Tariff Commission, etc.)

U.S.C., Title 28, former:

§ 377 [now 1651] (Power to issue writs)

§ 572 [now 1923] (Fees, attorneys, solicitors and proctors)

§ 778 [former] (Death of parties; substitution of executor or administrator). Compare Rule 25(a) (Substitution of parties; death), and the note thereto.

U.S.C., Title 33:

§ 495 (Removal of bridges over navigable waters)

U.S.C., Title 45:

§ 88 (Mandamus against Union Pacific Railroad Company)

§ 153(p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)

§ 185 (Same; National Air Transport Adjustment Board) (By reference to § 153)

U.S.C., Title 47:

§ 11 (Powers of Federal Communications Commission)

§ 401(a) (Enforcement of Federal Communications Act and orders of Commission)

§ 406 (Same; Compelling furnishing of facilities; mandamus)

U.S.C., Title 49:

§ 19a(l) [now 11703] (Mandamus to compel compliance with Interstate Commerce Act)

§ 20(9) [now 11703] (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

For comparable provisions in state practice see Smith-Hurd Ill.Stats.c. 110, § 179 (1937); Calif.Code Civ.Proc. (Deering, 1937) § 802.

Note to Subdivision (c). Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

U.S.C., Title 28 former:

§ 71 [now 1441, 1445, 1447] (Removal of suits from state courts)

§ 72 [now 1446, 1447] (Same; procedure)

§ 73 [former] (Same; suits under grants of land from different states)

§ 74 [now 1443, 1446, 1447] (Same; causes against persons denied civil rights)

§ 75 [now 1446] (Same; petitioner in actual custody of state court)

§ 76 [now 1442, 1446, 1447] (Same; suits and prosecutions against revenue officers)

§ 77 [now 1442] (Same; suits by aliens)

§ 78 [now 1449] (Same; copies of records refused by clerk of state court)

§ 79 [now 1450] (Same; previous attachment bonds or orders)

§ 80 [now 1359, 1447, 1919] (Same; dismissal or remand)

§ 81 [now 1447] (Same; proceedings in suits removed)

§ 82 [former] (Same; record; filing and return)

§ 83 [now 1447, 1448] (Service of process after removal)

U.S.C., Title 28, §§ 1446, 1447, formerly § 72, supra, however, is modified by shortening the time for pleading in removed actions.

Note to Subdivision (e). The last sentence of this subdivision modifies U.S.C., Title 28, § 1652, formerly § 725 (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

1946 Amendment

Note to Subdivision (a). Despite certain dicta to the contrary, *Lynn v. United States,* C.C.A.5th, 1940, 110 F.2d 586; *Mount Tivy Winery, Inc. v. Lewis,* N.D.Cal.1942, 42 F.Supp. 636, it is manifest that the rules apply to actions against the United States under the Tucker Act [28 U.S.C., §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761-765 [now 791, 1346, 1401, 1402, 1491, 1493, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501, 2506, 2509, 2510]]. See United States to use of *Foster Wheeler Corp. v. American Surety Co. of New York,* E.D.N.Y.1939, 25 F.Supp. 700; *Boerner v. United States,* E.D.N.Y.1939, 26 F.Supp. 769; *United States v. Gallagher,* C.C.A.9th, 1945, 151 F.2d 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term "civil action" [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4(d)(4), 12(a), 13(d), 25(d), 37(f), 39(c), 45(c), 54(d), 55(e), 62(e), and 65(c). In *United States v. Sherwood,* 1941, 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: "The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act." (Brief for the United States, p. 31). Regarding *Lynn v. United States,* supra, the Solicitor General said: "In *Lynn v. United States* . . . the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4(d), 12(a), 39(c), and 55(e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat. 1064, 28 U.S.C. §§ 723b, 723c [see 2072]) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 761 [see 2071, 2072])." (Brief for the United States, p. 31, n. 17.)

United States v. Sherwood, supra, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the Sherwood case, the New York Supreme Court, acting under § 795 of the New York Civil Practice Act, made an order, authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by

the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

Subdivision (a)(2). The added sentence makes it clear that the rules have not superseded the requirements of U.S.C., Title 28, § 2253, formerly § 466. *Schenk v. Plummer,* C.C.A.9, 1940, 113 F.2d 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under U.S.C., Title 22, § 405 (seizure of war materials intended for unlawful export) or U.S.C., Title 21, § 334(b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, U.S.C. § 14, Pure Food and Drug Act), see *Reynal v. United States,* C.C.A.5, 1945, 153 F.2d 929; *United States v. 108 Boxes of Cheddar Cheese,* S.D.Iowa 1943, 3 F.R.D. 40.

Subdivision (a)(3). The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas. See *Perkins v. Endicott Johnson Corp.,* C.C.A.2d 1942, 128 F.2d 208, affirmed on other grounds 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424; *Walling v. News Printing Inc.,* C.C.A.3, 1945, 148 F.2d 57; *McCrone v. United States,* 1939, 59 S.Ct. 685, 307 U.S. 61, 83 L.Ed. 1108. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired, *Goodyear Tire & Rubber Co. v. National Relations Board,* C.C.A.6, 1941, 122 F.2d 450; *Cudahy Packing Co. v. National Labor Relations Board,* C.C.A.10, 1941, 117 F.2d 692, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, e.g., *Peoples Natural Gas Co. v. Federal Power Commission,* App.D.C.1942, 127 F.2d 153, certiorari denied 62 S.Ct. 1298, 316 U.S. 700, 86 L.Ed. 1769; *Martin v. Chandis Securities Co.,* C.C.A.9th, 1942, 128 F.2d 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 *Collier on Bankruptcy,* 14th ed. by Moore and Oglebay, 326-327; 2 Collier, op.cit.supra, 1401-1402; 3 Collier, op.cit.supra, 228-231; 4 Collier, op.cit.supra, 1199-1202.

Subdivision (a)(6). Section 405 of U.S.C., Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and § 738 [now 1451], U.S.C., Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a)(6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 901 et seq.] was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

Subdivision (c). The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81(c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

Subdivision (f). The use of the phrase "the United States or an officer or agency thereof" in the rules (as e.g., in Rule 12(a) and amended Rule 73(a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. *Sage v. United States,* 1919, 39 S.Ct. 415, 250 U.S. 33, 63 L.Ed. 828; *Smietanka v. Indiana Steel Co.,* 1921, 42 S.Ct. 1, 257 U.S. 1, 66 L.Ed. 99; *United States v. Nunnally Investment Co.,* 1942, 62 S.Ct. 1064, 316 U.S. 258, 86 L.Ed. 1455. The

addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

1948 Amendment

The amendment effective October 1949, substituted the words "United States District Court" for the words "District Court of the United States" in the last sentence of subdivision (a)(1) and in the first and third sentences of subdivision (e). The amendment substituted the words "United States district courts" in lieu of "district courts of the United States" in subdivision (a)(4) and (5) and in the first sentence of subdivision (c).

The amendment effective October 20, 1949, also made the following changes:

In subdivision (a)(1), the reference to "Title 17, U.S.C." was substituted for the reference to "the Act of March 4, 1909, c. 320, § 25 (35 Stat. 1081), as amended, U.S.C., Title 17, § 25."

In subdivision (a)(2), the reference to "Title 28, U.S.C., § 2253" was substituted for "U.S.C., Title 28, § 466."

In subdivision (a)(3), the reference in the first sentence to "Title 9, U.S.C.," was substituted for "the Act of February 12, 1925, c. 213 (43 Stat. 883), U.S.C., Title 9".

In subdivision (a)(5), the words "as amended" were inserted after the parenthetical citation of "(49 Stat. 453)," and after the citations of "Title 29, §§ 159 and 160," former references to subdivisions "(e), (g), and (i)" were deleted.

In subdivision (a)(6), after the words "These rules" at the beginning of the first sentence, the following words were deleted: "do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U.S.C., Title 8, [former] § 282, relating to deportation of Chinese; they". Also in the first sentence, after the parenthetical citation of "(44 Stat. 1434, 1436)," the words "as amended" were added. In the last sentence, the words "October 14, 1940, c. 876, § 338 (54 Stat. 1158)" were inserted in lieu of the words "June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended."

In subdivision (c), the word "all" originally appearing in the first sentence between the words "govern" and "procedure" was deleted. In the third sentence, the portion beginning with the words "20 days after the receipt" and including all the remainder of that sentence was substituted for the following language: "the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript". In the fourth or last sentence, after the words at the beginning of the sentence, "If at the time of removal all necessary pleadings have been," the word "served" was inserted in lieu of the word "filed," and the concluding words of the sentence, "petition for removal is filed if he is the petitioner," together with the final clause immediately following, were substituted for the words "record of the action is filed in the district court of the United States."

1963 Amendment

Subdivision (a)(4). This change reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II, § 4(e), 53 Stat. 1433.

Subdivision (a)(6). The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c). Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. *Zakoscielny v. Waterman Steamship Corp.,* 16 F.R.D. 314 (D.Md.1954); *Talley v. American Bakeries Co.,* 15 F.R.D. 391 (E.D.Tenn.1954); *Rehrer v. Service Trucking Co.,* 15 F.R.D. 113 (D.Del.1953); 5 *Moore's Federal Practice* ¶38.39[3] (2d ed. 1951); 1 Barron & Holtzoff, *Federal Practice & Procedure* § 132 (Wright ed. 1960). But there is some authority to the contrary. *Petsel v. Chicago, B. & Q.R. Co.,* 101 F.Supp. 1006 (S.D.Iowa 1951); *Nelson v. American Nat. Bank & Trust Co.,* 9 F.R.D. 680 (E.D.Tenn.1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f). The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150-26(2), 18 Fed.Reg. 3499 (1953).

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 *Moore's Federal Practice* ¶25.09 at 531 (2d ed. 1950).

1966 Amendment

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, formerly governed by the admiralty rules, will be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, the Federal Rules of Civil Procedure are made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words "mental health" are substituted for "lunacy" to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause "unless a shorter time is provided by law." The 10 day period fixed for an appeal under 45 U.S.C. § 159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it is eliminated because its retention would preserve the 15 day period heretofore allowed by 28 U.S.C. § 2107 for appeals from interlocutory decrees in admiralty, it being one of the purposes of the amendment to make the time for appeals in civil and admiralty cases uniform under the unified rules. See Advisory Committee's Note to subdivision (a) of Rule 73.

1968 Amendment

The amendments eliminate inappropriate references to appellate procedure.

1971 Amendment

Title 28, U.S.C., § 2243 now requires that the custodian of a person detained must respond to an application for a writ of habeas corpus "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The amendment increases to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause.

While the time allowed in such a case for the return of the writ may not exceed forty days, this does not mean that the state must necessarily be limited to that period of time to provide for the federal court the transcript of the proceedings of a state trial or plenary hearing if the transcript must be prepared after the habeas corpus proceeding has begun in the federal court.

1987 Amendment

The amendments are technical. No substantive change is intended.

2001 Amendments

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Changes Made After Publication and Comments

The Committee Note was amended to correct the inadvertent omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

2002 Amendments

This amendment brings Rule 81(a)(2) into accord with the Rules Governing § 2254 and § 2255 proceedings. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the civil rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 rules and Rule 12 of the § 2255 rules.

Changes Made After Publication and Comment The only change since publication is deletion of an inadvertent reference to § 2241 proceedings.

2007 Amendments

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

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

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

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

2009 Amendments

[Subdivision (c)] The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See the Note to Rule 6.

[Subdivision (d)] Several Rules incorporate local state practice. Rule 81(d) now provides that "the term 'state' includes, where appropriate, the District of Columbia." The definition is expanded to include any commonwealth or territory of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths and territories in these and other rules avoids the gaps that otherwise

would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest.

Notes of Decisions (229)

Fed. Rules Civ. Proc. Rule 81, 28 U.S.C.A., FRCP Rule 81
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 82

Rule 82. Jurisdiction and Venue Unaffected

Currentness

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; April 23, 2001, effective December 1, 2001; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the [former] Federal Equity Rules with regard to such provisions as [former] Equity Rule 26 on Joinder of Causes of Action and [former] Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 Yale L.J. 393 (1936).

1948 Amendment

The amendment effective October 1949, substituted the words "United States district courts" for "district courts of the United States."

1966 Amendment

Title 28, U.S.C., § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what were formerly suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action": i.e., a suit in admiralty is not a "civil action" within the statute. By virtue of the amendment to Rule 1, the provisions of Rule 2 convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law with respect to venue.

2001 Amendments

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made. Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." That sentence is a flat lie if "jurisdiction" includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

2007 Amendments

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

Notes of Decisions (104)

Fed. Rules Civ. Proc. Rule 82, 28 U.S.C.A., FRCP Rule 82
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 83

Rule 83. Rules by District Courts; Judge's Directives

Currentness

(a) Local Rules.

(1) ***In General.*** After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with--but not duplicate--federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) ***Requirement of Form.*** A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

CREDIT(S)

(Amended April 29, 1985, effective August 1, 1985; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule substantially continues U.S.C., Title 28, § 2071, formerly § 731 (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See [former] Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court

Admiralty Rules, 1920, Rule 44 (Right of Trial Courts to Make Rules of Practice) (originally promulgated in 1842).

1985 Amendment

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, permits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

The widespread adoption of local rules and the modest procedural prerequisites for their promulgation have led many commentators to question the soundness of the process as well as the validity of some rules. See 12 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 3152, at 217 (1973); Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?,* 24 Fed.Bar News 325 (1977). Although the desirability of local rules for promoting uniform practice within a district is widely accepted, several commentators also have suggested reforms to increase the quality, simplicity, and uniformity of the local rules. See Note, *Rule 83 and the Local Federal Rules,* 67 Colum.L.Rev. 1251 (1967), and Comment, *The Local Rules of Civil Procedure in the Federal District Courts--A Survey,* 1966 Duke L.J. 1011.

The amended Rule attempts, without impairing the procedural validity of existing local rules, to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. Although some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other. See 12 C. Wright & A. Miller, *supra,* § 3152, at 217; Blair, *The New Local Rules for Federal Practice in Iowa,* 23 Drake L.Rev. 517 (1974). The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated. See Weinstein, *Reform of Court Rule-Making Procedures* 84-87, 127-37, 151 (1977).

The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations. See generally, Weinstein, *supra,* at 117-37, 151. The new Rule does not foreclose any other form of consultation. For example, it can be accomplished through the mechanism of an "Advisory Committee" similar to that employed by the Supreme Court in connection with the Federal Rules themselves.

The amended Rule provides that a local rule will take effect upon the date specified by the district court and will remain in effect unless amended by the district court or abrogated by the judicial council. The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. § 332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules.

The amended Rule requires copies of local rules to be sent upon their promulgation to the judicial council and the Administrative Office of the United States Courts rather than to the Supreme Court. The Supreme Court was the appropriate filing place in 1938, when Rule 83 originally was promulgated, but the establishment of the Administrative Office makes it a more logical place to develop a centralized file of local rules. This procedure is consistent with both the Criminal and the Appellate Rules. See Fed.R.Crim.P. 57(a); Fed.R.App.P. 47. The Administrative Office also will be able to provide improved

utilization of the file because of its recent development of a Local Rules Index.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

1995 Amendments

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat Acts of Congress or national rules.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of--or forgetting--a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn--covering only violations attributable to nonwillful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form--for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with the district local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished actual notice of the requirement in a particular case.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

2007 Amendments

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

Notes of Decisions (273)

Fed. Rules Civ. Proc. Rule 83, 28 U.S.C.A., FRCP Rule 83
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Federal Rules of Civil Procedure Rule 85

Rule 85. Title

Currentness

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

CREDIT(S)

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2007 Amendments

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

Fed. Rules Civ. Proc. Rule 85, 28 U.S.C.A., FRCP Rule 85
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title XI. General Provisions

Federal Rules of Civil Procedure Rule 86

Rule 86. Effective Dates

Currentness

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; April 17, 1961, effective July 19, 1961; January 21, 1963, and March 18, 1963, effective July 1, 1963; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See former Equity Rule 81 (These Rules Effective February 1, 1913--Old Rules Abrogated).

2007 Amendments

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

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

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[ ] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.

Notes of Decisions (48)

Fed. Rules Civ. Proc. Rule 86, 28 U.S.C.A., FRCP Rule 86
Including Amendments Received Through 12-1-14

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

ADMIN31294054.1