PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

A public hearing on these
proposed amendments will be
held on November 21, 1991,
in Los Angeles, California

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

AUGUST 1991

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

TO THE BENCH AND BAR:

The Judicial Conference Advisory Committee on Civil Rules has proposed various amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence and has requested that the proposals be circulated to the bench and bar and to the public generally for comment. These proposals, included herein, are explained in the Notes prepared by the Advisory Committee.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has not approved these proposals but submits them herewith for public comment. We request that all comments and suggestions with respect to them be placed in the hands of the Secretary as soon as convenient and, in any event, no later than February 15, 1992.

All communications with respect to the proposals should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

In order that persons and organizations wishing to do so may comment orally on the proposed amendments, a hearing will be held by the Advisory Committee on Civil Rules at the United States Courthouse in Los Angeles, California, on November 21, 1991. Those wishing to testify should contact the Secretary of the Committee at the above address at least 30 days before the hearing.

These proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Robert E. Keeton
Chairman

Joseph F. Spaniol, Jr.
Secretary

August 15, 1991

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

Scope

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

Part I - Advisory Committees

1. Functions

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

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

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

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

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal

publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

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

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

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

Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

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

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

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

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States

Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

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

Part II - Standing Committee

7. Functions

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

8. Procedures

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

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

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

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

9. Records

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

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

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

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

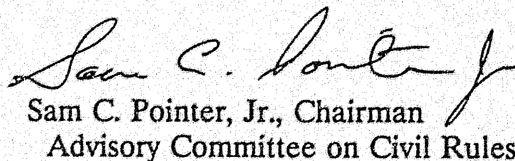
June 13, 1991
(Revised)[1]

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed are proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures. Although most of these proposals have been circulated informally to various groups and individuals for suggestions, none has been formally published in its present format. A summary of the proposals, briefly explaining the need for amendment and highlighting the more significant changes, is attached.

We request that the Standing Committee authorize publication of these proposals, affording the bench, bar, and public an opportunity to comment on the proposed amendments. The Advisory Committee intends to hold a public hearing in Los Angeles, California, on November 21, 1991. If needed, an additional hearing will be scheduled for early 1992.

Sincerely,



Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Members, Reporter, and Secretary
of Advisory Committee
Chairmen, other Advisory Committees

1. To avoid confusion, this letter and the attached summary have been revised in the light of action taken by the Standing Committee at its meeting on July 18-20, 1991.

Proposed Amendments.

The various proposals have a common theme and purpose; namely, to change current practices to achieve more effectively the objective stated in Rule 1--the "just, speedy, and inexpensive determination of every [civil] action." Amendments to the rules can and should be made to reduce, if not totally eliminate, the excessive delays and expense involved in many civil cases, particularly in the conduct of discovery, and changes are also needed to make accommodation for the court plans mandated under the Civil Justice Reform Act of 1990. Curtailment and prompt elimination of frivolous claims and defenses serves not only to reduce the burden on litigants, but also to preserve scarce judicial resources for litigants with disputes requiring more extensive court time and attention.

In the course of drafting these proposals, the Advisory Committee received many helpful suggestions from the bench and bar. In considering Rule 11--a subject that has attracted extensive interest--the Committee was greatly assisted by written suggestions received after a call for comments, by discussions during a special public hearing, and by extensive studies conducted by the Federal Judicial Center. The Committee is requesting that these proposals now be formally published, affording a broader opportunity for public comment and hearings.

Fed. R. Civ. P. 1.

In calling for the rules to be construed "and administered" to secure the just, speedy, and inexpensive determination of every civil action, the simple revision highlights the central theme and purpose of the other proposed amendments. Judges and attorneys share the responsibility to see that the rules are utilized to achieve this objective.

Fed. R. Civ. P. 11.

After extensive consideration of practice under current Rule 11, the Committee has concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, are not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should be retained. Many of the initial difficulties have been resolved through case law over the past eight years. Nevertheless, there is support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after

determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The revision is designed to increase the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while at the same time actually reducing the frequency of Rule 11 motions. It does not adopt the suggestions made by many that sanctions be imposed only for willful violations, or be made permissive rather than mandatory. Such changes would be inappropriate in view of modifications in the wording of the obligations--in effect permitting a party, if candid in its papers, to advance innovative theories of law and to make allegations based on information and belief--and in view of the provisions affording a "safe harbor" from Rule 11 motions through the opportunity, after notice, to withdraw voluntarily from unsupportable positions. In light of these changes, violations of the rule would rarely involve conduct that is not either willful or deceptive, and hence some form of sanction should be imposed.

A detailed explanation of the revision is contained in the Committee Notes and will not be repeated here. A brief summary of some of the more significant changes may, however, be useful. The revision not only restates the obligations that a litigant owes to the court before initially signing and filing a pleading, motion, or other document, but also provides that these obligations are of a continuing nature, imposing a duty to withdraw allegations and positions once they become no longer tenable. It briefly indicates the types of sanctions that may be imposed, calling attention to the potential for nonmonetary sanctions, and provides that sanctions should not be more severe than needed to deter comparable improper conduct on the part of similarly situated persons. Sanctions may, under the revision, be imposed on a person or firm responsible for the improper presentation, rather than only on the individual signing a paper. It provides, however, that monetary sanctions may not be imposed on a represented party except when responsible for presentations made for an improper purpose, such as to harass or cause unnecessary delay or expense.

As requested by the Standing Committee, consideration will be given, following receipt of comments, to the question whether Rule 11 should be amended so that it does not apply to discovery motions, requests, responses, and objections in view of the special sanctions provisions applicable to such documents under Rules 26 and 37.

Fed. R. Civ. P. 16.

Most of the proposed amendments to this rule involve technical changes (e.g., using the new title of "magistrate judge" under the Judicial Improvements Act of 1990, and

providing that the date a scheduling order should be entered is measured from the date of appearance of a defendant rather than from the filing of a complaint) or are additions designed to highlight subjects that in particular cases should be considered at pretrial conferences (e.g., schedules for disclosure and discovery, ordering of separate trials under Rule 42(b), and opportunities to utilize new Rules 50 and 52 at trial). In an effort to capture the theme of the various amendments being proposed, the catch-all paragraph of subdivision (c) would be amended by providing that consideration be given at conferences to "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action."

In subdivision (c)(4) the revision lists as a proper subject for consideration "limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence." Courts are encouraged to inquire at conferences into the potential use of expert testimony and impose fair restrictions on the number of expert witnesses, and subject matters of such testimony, before time and expense is wasted by the litigants on marginally helpful, and often redundant and expensive, expert testimony.

In subdivision (c)(9) the revision amplifies the power of the court with respect to various ADR techniques. The additional sentence at the end of subdivision (c) provides that parties, or their representatives or insurers, can be required to attend settlement conferences or participate in ADR proceedings. While the court should be reluctant to order unwilling litigants to participate in such settlement efforts and proceedings, it is important that this power be recognized.

In subdivision (c)(15) the revision explicitly authorizes the court in appropriate cases to impose in advance of trial "a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." Such orders should be entered only when justified by, and tailored to, the needs and circumstances of a particular case. Nevertheless, the goals of Rule 1 involve more than constraints on pretrial procedures, and require that consideration be given in appropriate cases to reasonable limitations affecting the length of trial. When the need for such limits can be determined before trial, unnecessary pretrial expenses can be eliminated and the parties will have a better opportunity to exercise judgment in selecting the evidence to be presented.

Fed. R. Civ. P. 26.

Revised Rule 26 requires litigants to disclose, without any request, three types of basic information that at present are almost invariably obtained through discovery requests or as a result of standard pretrial provisions and local rules. Failure to make the required disclosures can lead not only to imposition of traditional sanctions, but also to preclusion of the use of evidence and notification to the jury that evidence was not disclosed as

required, much as in the situation of spoliation of evidence. The parties are required to update these disclosures on the basis of information learned during the litigation.

Early in the case--within 30 days after a defendant has answered, unless the court sets another time--the parties must identify the persons likely to have significant information about the claims and defenses, must describe the documents likely to bear significantly on these issues, must provide information concerning any damages they claim, and provide insurance information. Formal discovery ordinarily will not commence until after these disclosures have been made. The rule permits the time for disclosure to be accelerated when, for example, answers are being delayed for an extensive period of time awaiting a ruling on a Rule 12 motion.

Later--30 days before trial, unless the court sets another time--the parties must specifically identify the witnesses and the particular documents they may present at trial (except solely for impeachment purposes). Objections to admissibility of listed documents, other than under Fed. R. Evid. 402 and 403, will be waived unless made within 14 days after the list is provided.

A third type of required disclosure relates to expert testimony. At an appropriate point during pretrial proceedings, a party expecting to use expert testimony must, unless excused by the court, provide other litigants with a written report from its expert. The report must be detailed and complete--in essence, a preview of the direct testimony from such person, including any exhibits to be used to summarize or support the person's opinions. After the report has been provided, the expert can be deposed, though it is expected that, given the detailed nature of the report, there will often be little need for such a deposition. Before trial, litigants must disclose any changes in such information, and the direct examination of the expert at trial will be limited to that which has been so disclosed.

The court has wide discretion to alter these disclosure requirements, or the times disclosures are to be made, as well as to change the presumptive limits on depositions and interrogatories contained in the proposed revisions of Rules 30, 31, and 33. These powers are particularly needed in view of the mandate of the Civil Justice Reform Act of 1990 that courts adopt local plans to reduce costs and delays in civil litigation. The court can exempt from the disclosure requirements those cases in which little or no discovery is typically needed (e.g., reviews of administrative records, bankruptcy appeals, government collection cases, etc.).

Under the proposed amendments to Rule 26 and the other discovery rules, scheduling conferences under Rule 16(b) will have increased importance, affording the court the opportunity to tailor the timing and limitations of discovery to the circumstances of the particular case. It is anticipated that ordinarily the initial disclosures will be made before the scheduling conference, and thus provide the court and parties with information needed to structure further pretrial proceedings and discovery. These disclosures should ordinarily

be exchanged in a preliminary meeting of the attorneys, at which time they would clarify the information provided and discuss the discovery needs in the case. For this reason, the Advisory Committee concluded that, absent another directive from the court, the initial disclosures should be due from the parties simultaneously rather than in a sequential manner.

The revision of Rule 26 provides that a person not file a motion for a protective order unless the movant "in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court order." Similar changes are proposed with respect to motions under Rule 37. Experience by many courts demonstrates that such a requirement is workable and serves to reduce unnecessary motion practice.

The provisions of Rule 26(f), relating to "discovery conferences," are deleted in view of other changes made in Rule 16 and to the discovery rules.

Fed. R. Civ. P. 29.

The revision eliminates the need for court approval of agreements to extend the time for responding to discovery requests under Rules 33, 34, and 36 if the extension would not interfere with the time set by the court for completion of discovery, for hearing a motion, or for trial.

Fed. R. Civ. P. 30.

The most significant changes in this revision involve the setting of presumptive limits on the number and length of depositions. Absent some other directive from the court, as in a scheduling order, no more than 10 depositions may be taken by the plaintiffs, no more than 10 by the defendants, no more than 10 by third-parties, and the actual examination of the deponent is to be limited to 6 hours, meaning that it could be accomplished in a single day. Experience by courts that have adopted similar rules indicates that, notwithstanding the obvious potential for dispute, the parties have usually been able to agree on which persons to depose and on how to divide the examination time. The parties are authorized--and, when really needed, expected--to agree on additional or longer depositions.

The revision adds provisions designed to deter improper conduct during depositions, such as coaching the deponent through objections and inappropriate directions not to answer.

Another change is to facilitate the procedures for taking depositions by video or audio recording by eliminating the need to obtain court approval for such depositions. A party can notice a deposition to be taken by any of the three standard methods--

stenographic, video recording, or tape recording.

The revision eliminates the principal objections that were received after publication of an earlier proposal to modify the provisions of Rule 30 relating to nonstenographic depositions. The current revision prescribes basic safeguards to assure the fairness and integrity of nonstenographic recordings. It provides that, if a deposition is noticed to be taken by a nonstenographic method, other parties can, at their own expense, have the deposition taken by the stenographic method. In addition, changes in Rules 26 and 32 require that a party using a nonstenographic deposition at a trial or on a motion must provide the court and other parties with a transcript of the portions to be played.

The revision should not operate to discourage litigants from having depositions stenographically recorded when that method will produce a more useful or less expensive record. It, moreover, contains provisions designed to alleviate the problems that sometime arise with stenographically-recorded depositions in attempting to obtain the signature of a deponent.

Fed. R. Civ. P. 31.

The revision provides that depositions upon written questions are to be counted along with those taken under Rule 30 in applying the presumptive limit of ten per side. It also reduces the time for developing additional questions from 50 days to 28 days.

Fed. R. Civ. P. 32.

The revision authorizes the use at trial of depositions of expert witnesses without having to account for their unavailability. This is particularly useful with respect to depositions of treating physicians, but is also appropriate as a cost-saving measure for other experts, who under the changes in Rules 26 and 30 will be deposed only after a detailed report has been provided to other parties.

Another change is to eliminate the risk of nonattendance at a deposition when a party that has received little advance notice of a deposition--prescribed by the revision as being less than 11 days' advance notice--is unable to obtain a court ruling on its motion for a protective order before the deposition. Under current law the party has had little option but to attend the deposition lest the court subsequently rule that the notice was reasonable and that the deposition therefore is usable at trial.

Complementing the increased opportunity to record depositions by nonstenographic means, the revision provides that, when such depositions are offered at trial or on a motion, the offering party shall provide the court with a transcript of the portions to be played. The

revision of Rule 26(a)(3) requires that a copy of the transcript also be provided to other parties in advance of trial.

Fed. R. Civ. P. 33.

The revision provides that, absent leave of court or the agreement of the parties, no more than 15 interrogatories may be served by one party upon another. Subparts are counted in determining the number of interrogatories permitted.

This number is less than prescribed in several of the local rules that many courts have already adopted to limit interrogatories. However, given the disclosures required by Rule 26(a), interrogatories will no longer be needed to obtain much of the information that has typically been sought in such discovery requests. Indeed, as with other formal discovery, interrogatories are not to be served until after the requesting party has made its initial disclosures under revised Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. The parties are authorized to extend the time to answer interrogatories when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 34.

The revision provides that documentary requests may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. These disclosures should facilitate the drafting of requests that will reduce the objections frequently raised to documentary requests. The parties are authorized to extend the time to provide access to the documents when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 36.

The revision provides that requests for admission may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. The parties are authorized to extend the time to respond to such requests when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 37.

The revision makes various changes to complement the provisions for disclosures contained in Rule 26(a). As a sanction for nondisclosure of required information, a party

will ordinarily be precluded from offering such evidence on a motion under Rule 56 or at trial, and the jury can be informed of such failure.

Motions for sanctions under Rule 37(a) are not to be made unless the movant in good faith conferred (or attempted to confer) with the other party in an effort to obtain the information without need for court action. In view of the abrogation of Rule 26(f) relating to discovery conferences, the sanctions provisions of Rule 37(g) are deleted.

Fed. R. Civ. P. 43.

In nonjury cases, particularly with respect to the testimony of experts or of lay witnesses concerning historical matters not in substantial dispute, it can both expedite trial and make the testimony more understandable if all or portions of the direct testimony are presented in the form of a written report prepared in advance by the witness. The revision specifically authorizes this practice, subject, however, to the right of cross-examination in the traditional manner.

Fed. R. Civ. P. 54.

The revision establishes a procedure for resolving claims for attorneys' fees, and provides a time limit within which motions for such fees must be filed. It authorizes adoption of local rules for expediting the resolution of factual disputes respecting such claims and permits courts to refer fee claims to magistrate judges and special masters without the constraints of Rule 53(b).

As suggested by the Supreme Court, it recognizes the power of courts to adopt local rules establishing rates of compensation by which the value of legal services performed in the district will ordinarily be measured. Many have urged that the standard normally applied in fee awards--reasonable hourly rates for the hours reasonably spent--be replaced by one permitting percentage fee awards. The Advisory Committee, however, doubts that such a change, even if desirable, could be effected through an amendment to the rules and accordingly leaves such questions open under the rule for further case-law development or possible statutory changes.

Fed. R. Civ. P. 56.

The revision, which takes account of various comments received when an earlier proposal was published, is intended to enhance the utility of the summary judgment procedure without changing the basic standards or most of the terms with which courts and litigants have become familiar. It eliminates ambiguities and inconsistencies in the current

language; sets a single, understandable standard for determining when summary adjudication is proper; establishes national procedures to facilitate fair consideration of Rule 56 motions; and addresses gaps in the rule that have sometimes frustrated its intended purposes.

The only basic change in terminology arises from the fact that the rule permits orders that do not resolve an entire claim. Such an order is more properly described as a "summary determination" rather than as a "summary judgment." The words "summary adjudication" are used to cover both types of orders.

The rule provides that motions for summary adjudication should not be filed until adverse parties have had a reasonable opportunity to discover any relevant evidence pertinent to the decision that is not in their possession or under their control, and it ordinarily affords such parties 30 days to respond to such motions. Motions must specifically identify the facts asserted to be without genuine dispute, and the evidentiary materials on the basis of which a party claims that a fact is or is not in genuine dispute must be specifically identified in the motion or response. The court is not required to consider materials not so identified, and is to consider materials only to the extent they would be admissible if the deponent, affiant, or person answering the interrogatory were testifying at trial. Arguments as to legal contentions or concerning the evidence are to be presented by memorandums separate from the motions and responses.

Fed. R. Civ. P. 58.

Under current law, pendency of a request for attorney's fees at the time a case is otherwise closed does not delay the appealability of the underlying judgment and, when ruled upon, can give rise to a second appeal. The revision provides another option to the district court in such circumstances. Before an appeal from the underlying judgment has been taken and become effective, the district court is permitted by the revised rule to enter an order that gives the same effect to a timely-filed motion for attorneys' fees that a timely-filed motion under Rule 59 would have--in effect, allowing the court to delay the time for appealing from the underlying judgment until it has ruled on the request for fees. This option will provide a mechanism by which review of the underlying judgment can be combined in a single appeal with any review of the fee award.

Fed. R. Civ. P. 83.

In response to the mandate of the Civil Justice Reform Act of 1990 that courts adopt local plans to reduce excessive delays and costs, this revision permits a district court--with the approval of the Judicial Conference--to adopt experimental rules inconsistent with the national rules. Such rules may not, however, be inconsistent with any statutes and must be limited in duration to a period of five years or less.

The revision provides that parties should not lose substantial rights because of negligent failures to comply with a requirement of form imposed by a local rule or standing order.

Fed. R. Civ. P. 84.

The revision provides that future changes in the Forms contained in the Appendix to the rules--which are illustrative and not mandatory--may be made by the Judicial Conference, without burdening the Supreme Court or Congress with such changes.

Fed. R. Evid. 702.

The revision contemplates two changes in this evidence rule that governs the admissibility of expert testimony.

The first provides that expert testimony should be limited to information that is "reasonably reliable" and that will "substantially assist" the trier of fact. These standards, together with the determination whether the witness has the necessary qualifications to provide such information, are matters to be decided by the judge under Rule 104(a). The Advisory Committee is persuaded that excessive use of expert testimony, often lacking even marginal acceptance within the scientific community, has frequently resulted in litigation costs--both in time and expense, both in pretrial proceedings and at trial--that were not justified by the ultimate benefits from such testimony. This change applies to both civil and criminal cases.

The second proposed change affects only civil cases. It complements the proposed provisions of Rules 26(a)(2) and 26(e)(1) by providing that expert information not disclosed in advance of trial as required by those provisions cannot be shown on direct examination without leave of court for good cause.

Fed. R. Evid. 705.

The revision is a technical change, clarifying that the rule is one affecting the manner of presentation of expert testimony at trial, and does not relieve a party from any obligation to disclose to the court or to other parties the facts or data upon which expert testimony is based.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules

1 These rules govern the procedure in the United States district courts in all suits
2 of a civil nature whether cognizable as cases at law or in equity or in admiralty, with
3 the exceptions stated in Rule 81. They shall be construed and administered to secure
4 the just, speedy, and inexpensive determination of every action.

COMMITTEE NOTES

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 assure 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.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

1 (a) Signature. Every pleading, written motion, and other paper ~~of a party~~
2 ~~represented by an attorney~~ shall be signed by at least one attorney of record in the
3 attorney's individual name, or, if the party is not represented by an attorney, shall be
4 signed by the party. ~~, whose address shall be stated. A party who is not represented~~
5 ~~by an attorney shall sign the party's pleading, motion, or other paper and state the~~
6 ~~party's address.~~ It shall state such person's address and telephone number, if any.
7 Except when otherwise specifically provided by rule or statute, pleadings need not be
8 verified or accompanied by affidavit. ~~The rule in equity that the averments of an~~

9 ~~answer under oath must be overcome by the testimony of two witnesses or of one~~
10 ~~witness sustained by corroborating circumstances is abolished. The signature of an~~
11 ~~attorney or party constitutes a certificate by the signer that the signer has read the~~
12 ~~pleading, motion, or other paper; that to the best of the signer's knowledge,~~
13 ~~information, and belief formed after reasonable inquiry it is well grounded in fact and~~
14 ~~is warranted by existing law or a good faith argument for the extension, modification,~~
15 ~~or reversal of existing law, and that it is not interposed for any improper purpose, such~~
16 ~~as to harass or to cause unnecessary delay or needless increase in the cost of litigation.~~
17 ~~If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken
18 unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly
19 after being called to the attention of the ~~pleader or movant~~ attorney or party.
20 **(b) Representations to Court.** ~~If a pleading, motion, or other paper is signed~~
21 ~~in violation of this rule, the court, upon motion or upon its own initiative, shall impose~~
22 ~~upon the person who signed it, a represented party, or both, an appropriate sanction,~~
23 ~~which may include an order to pay to the other party or parties the amount of the~~
24 ~~reasonable expenses incurred because of the filing of the pleading, motion, or other~~
25 ~~paper, including a reasonable attorney's fee.~~ By presenting or maintaining a claim,
26 defense, request, demand, objection, contention, or argument in a pleading, written
27 motion, or other paper filed with or submitted to the court, an attorney or
28 unrepresented party is certifying, until it is withdrawn, that to the best of the person's
29 knowledge, information, and belief formed after an inquiry reasonable under the
30 circumstances--
31 (1) it is not being presented or maintained for any improper purpose,

32 such as to harass or to cause unnecessary delay or needless increase in the cost
33 of litigation;
34 (2) it is warranted by e[illegible] law or by a nonfrivolous argument for the
35 extension, modification, or reversal of existing law or the establishment of new
36 law; and
37 (3) any allegations or denials of facts have evidentiary support or, if
38 specifically so identified, are likely to have evidentiary support after a reasonable
39 opportunity for further investigation or discovery.
40 (c) **Sanctions.** Subject to the conditions stated below, the court shall impose
41 an appropriate sanction upon the attorneys, law firms, or parties determined, after
42 notice and a reasonable opportunity to respond, to be responsible for a violation of
43 subdivision (b).
44 (1) **How Initiated.**
45 (A) **By Motion.** A motion for sanctions under this rule shall be
46 served separately from other motions or requests, and shall describe the
47 specific conduct alleged to violate subdivision (b). It shall not be filed
48 with, or presented to, the court unless the challenged claim, defense,
49 request, demand, objection, contention, or argument is not withdrawn or
50 corrected within 21 days (or such other time as the court may prescribe)
51 after service of the motion. If warranted, the court may award to the party
52 prevailing on the motion the reasonable expenses and attorney's fees
53 incurred in presenting or opposing the motion.
54 (B) **On Court's Initiative.** On its own initiative, the court may enter

55 an order describing the specific conduct that appears to violate subdivision
56 (b) and directing an attorney, law firm, or party to show cause why it has
57 not violated subdivision (b) with respect thereto.
58 (2) **Nature of Sanction; Limitations.** A sanction imposed for violation
59 of this rule shall be limited to what is sufficient to deter comparable conduct by
60 persons similarly situated. Subject to the limitations in subparagraphs (A) and
61 (B), the sanction may consist of, or include, directives of a nonmonetary nature,
62 an order to pay a monetary penalty into court, or, if imposed on motion, an
63 order directing payment to the movant of some or all of the reasonable
64 attorneys' fees and other costs incurred as a direct result of the violation.
65 (A) Monetary sanctions may not be awarded, either on motion or
66 on the court's initiative, against a represented party unless it is determined
67 to be responsible for a violation of subdivision (b)(1).
68 (B) Monetary sanctions may not be awarded on the court's initiative
69 unless the court's order to show cause is issued before a voluntary dismissal
70 or settlement of the claims made by or against the party to be sanctioned.
71 (3) **Order.** If requested, the court, when imposing sanctions, shall recite
72 the conduct or circumstances determined to constitute a violation of this rule and
73 explain the basis for the sanction imposed.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11

Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center, 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. 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 both broadens the scope of this obligation and calls for greater restraint in considering the imposition of sanctions.

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.

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)-(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 mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. Although continuing to require litigants to "stop-and-think" before initially making legal or factual contentions, the revised rule places equal emphasis on the duty of candor and on the obligation to withdraw from positions when they no longer are tenable.

First, the obligations are not measured solely as of the time a paper is filed with the court, but include the failure to withdraw or abandon a position after learning that it ceases to have any merit. The wording is sufficiently broad to cover the continued maintenance in federal court of totally meritless claims or defenses that were raised in state court before removal.

Second, the certification with respect to factual allegations and denials 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 evidentiary support for the allegation or denial. 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 and 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 to withdraw the allegation or denial.

This change will serve to equalize the burden of the rule upon plaintiffs and defendants, who are permitted under Rule 8 to include denials in their answers based on lack of information obtained in their initial investigation. If, after further investigation or discovery, a denial is no longer warranted, the defendant will have a duty under revised Rule 11 to abandon its denial through an amended answer or at a pretrial conference.

The certification is that there is (or likely will be) "evidentiary support" for the allegation or denial--and 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 sufficient evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have had sufficient "evidentiary support" for purposes of Rule 11.

Third, the power of the court, when requested in a motion, to award attorney's fees for a violation of the rule is retained. A monetary award may be the most effective deterrent in some circumstances, and particularly for violations of subdivision (b)(1) payment to other parties to reduce the injury caused them may be more appropriate than a fine paid to the court. 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, in a multi-count complaint a plaintiff were to make allegations in one count in violation of the rule, an award of expenses should be limited to those directly caused by inclusion of the improper allegations, and not from the filing of the case 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, ordering partial reimbursement of fees may constitute a sufficient deterrent regarding 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 Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1987).

The court has available a variety of possible sanctions, 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; 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 order a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that sanctions 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 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 in other litigation: all of these may in a particular case be proper considerations. In general, the court should select sanctions that are not more severe than are needed to deter such improper conduct by similarly situated persons.

Fourth, the court may impose the sanction on the persons--whether attorneys, law firms, or parties--responsible for the violation. As under the former rule, the person signing a document has a nondelegable responsibility to the court and in most situations will be the one who should be sanctioned for a violation. However, sometimes it may be appropriate to impose a sanction on the attorney's firm, another member of the firm, or co-counsel, either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. The amendment is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Gp., ___ U.S. ___ (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may be imposed on a represented party only if it is responsible for presenting or maintaining contentions for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. So limited, the rule avoids possible problems under the Rules Enabling Act. See Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Last, explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed on them for violation of the rule. 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, on request, 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 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., ___ U.S. ___ (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 filed. Ordinarily the motion should be made 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 filing its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be filed as a discovery device, to emphasize the merits of a party's position, to extract an unjust settlement, 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, if a sanction is requested before conclusion of the case, 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 reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or as to the identity of the person responsible for conduct violative of this rule.

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 some allegation or contention, the motion should not be presented to 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.

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. The revision also provides that 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 conditions that this be done through a show cause order, thereby providing the person with notice and an opportunity to respond, and that any monetary sanction--which, when the court is acting on its own initiative, is limited to a penalty payable to the court--may be imposed in such circumstances only if the show cause order is issued before any voluntary dismissal or settlement of 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.

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, but such an action should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

By its terms Rule 11 covers only matters presented to the court. It does not apply to certain disclosures and discovery papers under Rules 26-36 that may be served on other parties but not filed with or presented to the court. However, Rules 26(g) and 37 contain special provisions that impose similar obligations on litigants regarding such documents and conduct. Although discovery motions, requests, responses and objections are, if filed with the court, potentially subject to sanctions both under Rule 11 and under the discovery rules, it is anticipated that ordinarily sanctions with respect to such papers should be considered in accordance with the provisions of the discovery rules, rather than under Rule 11.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, requests, objections, or arguments. 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 exercising its contempt powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. Finally, it does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

[Special Note for Publication: As drafted and as the proposed Notes indicate, discovery motions and other discovery documents filed with the court are potentially subject to sanctions provisions both under the discovery rules and under Rule 11. The Advisory Committee expects to give further consideration, after receiving comments, to possible amendments--without further publication--to eliminate this "overlap" and make the sanctions provisions in Rules 26 and 37 the exclusive basis for sanctions involving discovery motions and papers. Accordingly, the Advisory Committee welcomes comments on this question.]

Rule 16. Pretrial Conferences; Scheduling; Management

1 * * * *

2 **(b) Scheduling and Planning.** Except in categories of actions exempted by

3 district court rule as inappropriate, the district judge, or a magistrate judge when

4 authorized by district court rule, shall, after consulting with the attorneys for the

5 parties and any unrepresented parties, by a scheduling conference, telephone, mail, or

6 other suitable means, enter a scheduling order that limits the time

7 (1) to join other parties and to amend the pleadings;

8 (2) to file~~ and hear~~ motions; and

9 (3) to complete discovery.

10 The scheduling order may also include

11 (4) modifications of the times for disclosures under Rules 26(a) and

12 26(e)(1) and of the extent of discovery to be permitted;

13 (~~4~~5) the date or dates for conferences before trial, a final pretrial

14 conference, and trial; and

15 (~~5~~6) any other matters appropriate in the circumstances of the case.

16 The order shall issue as soon as practicable but in no event more than ~~120~~60 days

17 after~~ filing of the complaint~~ the appearance of a defendant. A schedule shall not be

18 modified except upon a showing of good cause and by leave of the district judge or a

19 magistrate judge when authorized by district court rule~~ upon a showing of good cause~~.

20 **(c) Subjects ~~to be Discussed~~ for Consideration at Pretrial Conferences.** ~~The~~

21 ~~participants a~~At any conference under this rule ~~may consider and take action~~

22 consideration may be given, and appropriate action taken, with respect to

23 (1) the formulation and simplification of the issues, including the

24 elimination of frivolous claims or defenses;

25 (2) the necessity or desirability of amendments to the pleadings;

26 (3) the possibility of obtaining admissions of fact and of documents which

27 will avoid unnecessary proof, stipulations regarding the authenticity of

28 documents, and advance rulings from the court on the admissibility of evidence;

29 (4) the avoidance of unnecessary proof and of cumulative evidence, and
30 limitations or restrictions on the use of testimony under Rule 702 of the Federal
31 Rules of Evidence;
32 (5) the appropriateness of summary adjudication under Rule 56, which
33 may include an order adjudicating claims, defenses, or issues under Rule 56 if
34 all parties have had reasonable opportunity to discover and present material
35 pertinent to the adjudication;
36 (6) the control and scheduling of discovery, including orders affecting
37 disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;
38 (~~5~~7) the identification of witnesses and documents, the need and schedule
39 for filing and exchanging pretrial briefs, and the date or dates for further
40 conferences and for trial;
41 (~~6~~8) the advisability of referring matters to a magistrate judge or master;
42 (~~7~~9) the possibility of settlement ~~or~~ and the use of ~~extrajudicial~~ special
43 procedures to ~~resolve~~ assist in resolving the dispute;
44 (~~8~~10) the form and substance of the pretrial order;
45 (~~9~~11) the disposition of pending motions;
46 (1~~0~~2) the need for adopting special procedures for managing potentially
47 difficult or protracted actions that may involve complex issues, multiple parties,
48 difficult legal questions, or unusual proof problems;
49 (13) an order for a separate trial pursuant to Rule 42(b) with respect to
50 a claim, counterclaim, cross-claim, or third-party claim, or with respect to any
51 particular issue of fact in the case;

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

56 (15) an order establishing a reasonable limit on the length of time allowed
57 for the presentation of evidence or on the number of witnesses or documents
58 that may be presented; and

59 (1~~1~~6) such other matters as may ~~aid in~~ facilitate the just, speedy, and
60 inexpensive disposition of the action.

61 At least one of the attorneys for each party participating in any conference before trial
62 shall have authority to enter into stipulations and to make admissions regarding all
63 matters that the participants may reasonably anticipate may be discussed. The court
64 may require that parties, or their representatives or insurers, attend a conference to
65 consider possibilities of settlement and participate in proceedings ordered under
66 paragraph (9).

67 * * * *

COMMITTEE NOTES

Subdivision (b). One purpose of this amendment is to provide an appropriate time 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 can create problems because Rule 4(m) allows 120 days for service of the summons and complaint, and the scheduling order should not be entered until at least one defendant has been served and appeared in the action. The revision allows only 60 days, but measures the time from the date a defendant first appears. The subdivision, as well as subdivision (c)(8), is also revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

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 under Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing 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 might 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.

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 (9) 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 for application of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed or, under revised Rule 56(g)(3), enter a show cause order that initiates the process. Indeed, if participants at a conference agree that certain facts are not in dispute and are prepared to present their arguments on the controlling law, there is no reason why the court's ruling cannot be issued after the conference is concluded.

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 changes should also be made in the timing of disclosures of expert testimony--perhaps advancing the time such disclosures would otherwise be due under revised Rule 26(a)(2) or directing that such disclosures be made by one party before being made by other parties--or in the timing or form of the disclosure of trial witnesses and documents. With the addition of subdivision (c)(6), the provisions of Rule 26(f) relating to a "Discovery Conference" are being deleted.

Paragraph (9) is revised to enhance the court's powers in utilizing a variety of procedures to facilitate settlement, such as through mini-trials, mediation, and nonbinding arbitration. The revision of paragraph (9) should be read in conjunction with the revision later added to the subdivision, authorizing the court to direct that the parties or their representatives or insurers attend a settlement conference or participate in special proceedings designed to foster settlement. Cf. G. Heileman Brewing Co. v. Oat Mfg. Co., 871 F.2d 1016 (7th Cir. 1989); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

Parties should not be forced by the court into settlements, and the lack of interest of a party to participate in settlement discussions may be a signal that the time and expense involved in pursuing settlement may be unproductive. Nevertheless, the court should have the power in appropriate cases to require parties to participate in proceedings that may indicate to them--or their adversaries--the wisdom of resolving the litigation without resort to a full trial on the merits. Of course the court should not impose unreasonable burdens on a party as a device to extract settlement, such as by requiring officials with broad responsibilities to attend a settlement conference involving relatively minor matters.

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 extent of evidence established at a conference in advance of trial 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 exhibits, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 **(a) Required Disclosures; ~~Discovery~~ Methods to Discover Additional Matter.**

2 (1) **Initial Disclosures.** Except in actions exempted by local rule or when

3 otherwise ordered, each party shall, without awaiting a discovery request, provide

4 to every other party:

5 (A) the name and, if known, the address and telephone number of

6 each individual likely to have information that bears significantly on any

7 claim or defense, identifying the subjects of the information;

8 (B) a copy of, or a description by category and location of, all
9 documents, data compilations, and tangible things in the possession,
10 custody, or control of the party that are likely to bear significantly on any
11 claim or defense;

12 (C) a computation of any category of damages claimed by the
13 disclosing party, making available for inspection and copying as under Rule
14 34 the documents or other evidentiary material on which such computation
15 is based, including materials bearing on the nature and extent of injuries
16 suffered; and

17 (D) for inspection and copying as under Rule 34 any insurance
18 agreement under which any person carrying on an insurance business may
19 be liable to satisfy part or all of a judgment which may be entered in the
20 action or to indemnify or reimburse for payments made to satisfy the
21 judgment.

22 Unless the court otherwise directs or the parties otherwise stipulate with the
23 court's approval, these disclosures shall be made (i) by a plaintiff within 30 days
24 after service of an answer to its complaint; (ii) by a defendant within 30 days
25 after serving its answer to the complaint; and, in any event, (iii) by any party that
26 has appeared in the case within 30 days after receiving from another party a
27 written demand for accelerated disclosure accompanied by the demanding party's
28 disclosures. A party is not excused from disclosure because it has not fully
29 completed its investigation of the case, or because it challenges the sufficiency

30 of another party's disclosures, or, except with respect to the obligations under
31 clause (iii), because another party has not made its disclosures.

32 **(2) Disclosure of Expert Testimony.**

33 (A) In addition to the disclosures required in paragraph (1), each
34 party shall disclose to every other party any evidence that the party may
35 present at trial under Rules 702, 703, or 705 of the Federal Rules of
36 Evidence. This disclosure shall be in the form of a written report prepared
37 and signed by the witness which includes a complete statement of all
38 opinions to be expressed and the basis and reasons therefor; the data or
39 other information relied upon in forming such opinions; any exhibits to be
40 used as a summary of or support for such opinions; the qualifications of the
41 witness; and a listing of any other cases in which the witness has testified
42 as an expert at trial or in deposition within the preceding four years.

43 (B) Unless the court designates a different time, the disclosure shall
44 be made at least 90 days before the date the case has been directed to be
45 ready for trial, or, if the evidence is intended solely to contradict or rebut
46 evidence on the same subject matter identified by another party under
47 paragraph (2)(A), within 30 days after the disclosure made by such other
48 party. These disclosures are subject to the duty of supplementation under
49 subdivision (e)(1).

50 (C) By local rule or by order in the case, the court may alter the
51 type or form of disclosures to be made with respect to particular experts
52 or categories of experts, such as treating physicians.

53 (3) **Pretrial Disclosures.** In addition to the disclosures required in the
54 preceding paragraphs, each party shall provide to every other party the following
55 information regarding the evidence that the disclosing party may present at trial
56 other than solely for impeachment purposes:
57 (A) the name and, if not previously provided, the address and
58 telephone number of each witness, separately identifying those whom the
59 party expects to present and those whom the party may call if the need
60 arises;
61 (B) the designation of those witnesses whose testimony is expected
62 to be presented by means of a deposition and, if not taken by stenographic
63 means, a transcript of the pertinent portions of such deposition testimony;
64 and
65 (C) an appropriate identification of each document or other exhibit,
66 including summaries of other evidence, separately identifying those which
67 the party expects to offer and those which the party may offer if the need
68 arises.
69 Unless otherwise directed by the court, these disclosures shall be made at least
70 30 days before trial. Within 14 days thereafter, unless a different time is
71 specified by the court, other parties shall serve and file (i) any objections that
72 deposition testimony designated under subparagraph (B) cannot be used under
73 Rule 32(a) and (ii) any objection to the admissibility of the materials identified
74 under subparagraph (C). Objections not so made, other than under Rules 402-03
75 of the Federal Rules of Evidence, shall be deemed waived unless excused by the

76 court for good cause shown.

77 **(4) Form of Disclosures; Filing.** The disclosures required by the
78 preceding paragraphs shall be made in writing and signed by the party or counsel
79 in compliance with subdivision (g)(1). The disclosures shall be served as
80 provided by Rule 5 and, unless otherwise ordered, promptly filed with the court.

81 **(5) Methods to Discover Additional Matter.** Parties may obtain discovery
82 by one or more of the following methods: depositions upon oral examination or
83 written questions; written interrogatories; production of documents or things or
84 permission to enter upon land or other property under Rule 34 or 45(a)(1)(C),
85 for inspection and other purposes; physical and mental examinations; and
86 requests for admission. * * * *

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

89 **(1) In General.** Parties may obtain discovery regarding any matter, not
90 privileged, which is relevant to the subject matter involved in the pending action,
91 whether it relates to the claim or defense of the party seeking discovery or to the
92 claim or defense of any other party, including the existence, description, nature,
93 custody, condition and location of any books, documents, or other tangible things
94 and the identity and location of persons having knowledge of any discoverable
95 matter. It is not ground for objection that the information sought will be
96 inadmissible at the trial if the information sought appears reasonably calculated
97 to lead to the discovery of admissible evidence.

98 **(2) Limitations.** Limitations in these rules on the number and length of

99 depositions and the number of interrogatories may be altered by local rule for
100 particular types or classifications of cases. The frequency or extent of use of the
101 discovery methods ~~set forth in subdivision (a)~~ permitted under these rules and
102 any local rule shall be limited by the court if it determines that: (i) the discovery
103 sought is unreasonably cumulative or duplicative, or is obtainable from some
104 other source that is more convenient, less burdensome, or less expensive; (ii) the
105 party seeking discovery has had ample opportunity by discovery in the action to
106 obtain the information sought; or (iii) ~~the discovery is unduly burdensome or~~
107 ~~expensive~~ the burden or expense of the proposed discovery outweighs its likely
108 benefit, taking into account the needs of the case, the amount in controversy,
109 limitations on the parties' resources, ~~and~~ the importance of the issues at stake
110 in the litigation, and the importance of the proposed discovery to the resolution
111 of the issues. The court may act upon its own initiative after reasonable notice
112 or pursuant to a motion under subdivision (c).

113 ~~(2) Insurance Agreements. A party may obtain discovery of the existence~~
114 ~~and contents of any insurance agreement under which any person carrying on an~~
115 ~~insurance business may be liable to satisfy part or all of a judgment which may~~
116 ~~be entered in the action or to indemnify or reimburse for payments made to~~
117 ~~satisfy the judgment. Information concerning the insurance agreement is not by~~
118 ~~reason of disclosure admissible in evidence at trial. For purposes of this~~
119 ~~paragraph, an application for insurance shall not be treated as part of an~~
120 ~~insurance agreement.~~

121 * * * *

122 **(4) Trial Preparation: Experts.** ~~Discovery of facts known and opinions~~
123 ~~held by experts, otherwise discoverable under the provisions of subdivision (b)(1)~~
124 ~~of this rule and acquired or developed in anticipation of litigation or for trial,~~
125 ~~may be obtained only as follows:~~

126 **(A)**~~(i)~~ A party may ~~through interrogatories require any other party~~
127 ~~to identify each person whom the other party expects to call as an expert~~
128 ~~witness at trial, to state the subject matter on which the expert is expected~~
129 ~~to testify, and to state the substance of the facts and opinions to which the~~
130 ~~expert is expected to testify and a summary of the grounds for each~~
131 ~~opinion. (ii) Upon motion, the court may order further discovery by other~~
132 ~~means, subject to such restrictions as to scope and such provisions,~~
133 ~~pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses~~
134 ~~as the court may deem appropriate.~~ depose, after any report required
135 under subdivision (a)(2) has been provided, any person who has been
136 identified as an expert whose opinions may be presented at trial.

137 **(B)** A party may, through interrogatories or by deposition, discover
138 facts known or opinions held by an expert who has been retained or
139 specially employed by another party in anticipation of litigation or
140 preparation for trial and who is not expected to be called as a witness at
141 trial~~;~~ only as provided in Rule 35(b) or upon a showing of exceptional
142 circumstances under which it is impracticable for the party seeking
143 discovery to obtain facts or opinions on the same subject by other means.

144 **(C)** Unless manifest injustice would result, (i) the court shall require

145 that the party seeking discovery pay the expert a reasonable fee for time
146 spent in responding to discovery under subdivisions (b)(4)(A)~~(ii)~~ and
147 (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under
148 ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with~~
149 ~~respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the
150 court shall require~~,~~ the party seeking discovery to pay the other party a fair
151 portion of the fees and expenses reasonably incurred by the latter party in
152 obtaining facts and opinions from the expert.

153 **(5) Claims of Privilege or Protection of Trial Preparation Materials.**
154 When information is withheld from disclosure or discovery on a claim that it is
155 privileged or subject to protection as trial preparation materials, the claim shall
156 be made expressly and shall be supported by a description of the nature of the
157 documents, communications, or things not produced or disclosed that is sufficient
158 to enable other parties to contest the claim.

159 **(c) Protective Orders.** Upon motion by a party or by the person from whom
160 discovery is sought, accompanied by a certificate that the movant in good faith has
161 conferred or attempted to confer with other affected parties in an effort to resolve the
162 dispute without court action, and for good cause shown, the court in which the action
163 is pending or alternatively, on matters relating to a deposition, the court in the district
164 where the deposition is to be taken may make any order which justice requires to
165 protect a party or person from annoyance, embarrassment, oppression, or undue
166 burden or expense, including one or more of the following: (1) that the disclosure or
167 discovery not be had; (2) that the disclosure or discovery may be had only on specified

168 terms and conditions, including a designation of the time or place; (3) that the
169 discovery may be had only by a method of discovery other than that selected by the
170 party seeking discovery; (4) that certain matters not be inquired into, or that the scope
171 of the disclosure or discovery be limited to certain matters; (5) that discovery be
172 conducted with no one present except persons designated by the court; (6) that a
173 deposition after being sealed be opened only by order of the court; (7) that a trade
174 secret or other confidential research, development, or commercial information not be
175 ~~disclosed~~ revealed or be ~~disclosed~~ revealed only in a designated way; (8) that the
176 parties simultaneously file specified documents or information enclosed in sealed
177 envelopes to be opened as directed by the court.

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

182 **(d) ~~Sequence and~~ Timing and Sequence of Discovery.** Except with leave of
183 court or upon agreement of the parties, a party may not seek discovery from any
184 source before making the disclosures under subdivision (a)(1) and may not seek
185 discovery from another party before the date such disclosures have been made by, or
186 are due from, such other party. Unless the court upon motion, for the convenience
187 of parties and witnesses and in the interests of justice, orders otherwise, methods of
188 discovery may be used in any sequence and the fact that a party is conducting
189 discovery, whether by deposition or otherwise, shall not operate to delay any other
190 party's discovery.

191 (e) **Supplementation of Disclosures and Responses.** A party who has made a
192 disclosure under subdivision (a) or responded to a request for discovery with a
193 disclosure or response ~~that was complete when made~~ is under ~~no~~ a duty to supplement
194 or correct the disclosure or response to include information thereafter acquired~~, except~~
195 ~~as follows:~~

196 (1) A party is under a duty seasonably to supplement ~~the response with~~
197 ~~respect to any question directly addressed to (A) the identity and location of~~
198 ~~persons having knowledge of discoverable matters, and (B) the identity of each~~
199 ~~person expected to be called as an expert witness at trial, the subject matter on~~
200 ~~which the person is expected to testify, and the substance of the person's~~
201 ~~testimony.~~ its disclosures under subdivision (a) if the party learns that the
202 information disclosed is not complete and correct. With respect to expert
203 testimony that the party expects to offer at trial, the duty extends both to
204 information contained in reports under Rule 26(a)(2)(A) and to information
205 provided through a deposition of the expert, and any additions or other changes
206 to such information shall be disclosed by the time the party's disclosures under
207 Rule 26(a)(3) are due.

208 (2) A party is under a duty seasonably to amend a prior response to an
209 interrogatory, request for production, or request for admission if the party learns
210 ~~obtains information upon the basis of which (A) the party knows~~ that the
211 response ~~was incorrect when made, or (B) the party knows that the response~~
212 ~~though correct when made is no longer true and the circumstances are such that~~
213 ~~a failure to amend the response is in substance a knowing concealment~~ is not

214 complete and correct.

215 ~~(3) A duty to supplement responses may be imposed by order of the court,~~

216 ~~agreement of the parties, or at any time prior to trial through new requests for~~

217 ~~supplementation of prior responses.~~

218 (f) ~~Discovery Conference.~~[Abrogated.] ~~At any time after commencement of~~

219 ~~an action the court may direct the attorneys for the parties to appear before it for a~~

220 ~~conference on the subject of discovery. The court shall do so upon motion by the~~

221 ~~attorney for any party if the motion includes:~~

222 ~~(1) A statement of the issues as they then appear;~~

223 ~~(2) A proposed plan and schedule of discovery;~~

224 ~~(3) Any limitations proposed to be placed on discovery;~~

225 ~~(4) Any other proposed orders with respect to discovery; and~~

226 ~~(5) A statement showing that the attorney making the motion has made~~

227 ~~a reasonable effort to reach agreement with opposing attorneys on the matters~~

228 ~~set forth in the motion. Each party and each party's attorney are under a duty~~

229 ~~to participate in good faith in the framing of a discovery plan if a plan is~~

230 ~~proposed by the attorney for any party. Notice of the motion shall be served on~~

231 ~~all parties. Objections or additions to matters set forth in the motion shall be~~

232 ~~served not later than 10 days after service of the motion.~~

233 ~~Following the discovery conference, the court shall enter an order tentatively~~

234 ~~identifying the issues for discovery purposes, establishing a plan and schedule for~~

235 ~~discovery, setting limitations on discovery, if any; and determining such other matters,~~

236 ~~including the allocation of expenses, as are necessary for the proper management of~~

237 ~~discovery in the action. An order may be altered or amended whenever justice so~~
238 ~~requires.~~

239 ~~Subject to the right of a party who properly moves for a discovery conference to~~
240 ~~prompt convening of the conference, the court may combine the discovery conference~~
241 ~~with a pretrial conference authorized by Rule 16.~~

242 (g) **Signing of Disclosures, Discovery Requests, Responses, and Objections.**

243 (1) Every disclosure made pursuant to subdivision (a) shall be signed by
244 at least one attorney of record in the attorney's individual name, whose address
245 shall be stated. A party who is not represented by an attorney shall sign the
246 request, response, or objection and state the party's address. The signature of
247 the attorney or party constitutes a certification that to the best of the signer's
248 knowledge, information, and belief formed after a reasonable inquiry the
249 disclosure is complete and correct as of the time it is made.

250 (2) Every request for discovery or response or objection thereto made by
251 a party represented by an attorney shall be signed by at least one attorney of
252 record in the attorney's individual name, whose address shall be stated. A party
253 who is not represented by an attorney shall sign the request, response, or
254 objection and state the party's address. The signature of the attorney or party
255 constitutes a certification ~~that the signer has read the request, response, or~~
256 ~~objection, and~~ that to the best of the signer's knowledge, information, and belief
257 formed after a reasonable inquiry it is: (~~1~~A) consistent with these rules and
258 warranted by existing law or a good faith argument for the extension,
259 modification, or reversal of existing law; (~~2~~B) not interposed for any improper

260 purpose, such as to harass or to cause unnecessary delay or needless increase in
261 the cost of litigation; and (3C) not unreasonable or unduly burdensome or
262 expensive, given the needs of the case, the discovery already had in the case, the
263 amount in controversy, and the importance of the issues at stake in the litigation.
264 If a request, response, or objection is not signed, it shall be stricken unless it is
265 signed promptly after the omission is called to the attention of the party making
266 the request, response, or objection, and a party shall not be obligated to take any
267 action with respect to it until it is signed.
268 (3) If a certification is made in violation of the rule, the court, upon
269 motion or upon its own initiative, shall impose upon the person who made the
270 certification, the party on whose behalf the request, response, or objection is
271 made, or both, an appropriate sanction, which may include an order to pay the
272 amount of the reasonable expenses incurred because of the violation, including
273 a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision is revised to impose on parties a duty to disclose, without awaiting 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) to identify at the outset of the case all persons with pertinent knowledge about the case and sources of potential documentary evidence, (2) to disclose in detail all expert opinions that may be offered at trial, and (3) to identify the persons and exhibits that may be offered at trial. Interrogatories should no longer be needed to obtain this information. The enumeration in Rule 26(a) of items required to be disclosed does not prevent a court by local rule or by order in a specific case from requiring that the parties disclose additional information without a discovery request.

The 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. 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

in Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-723 (1989). The rule is based upon the experience of several district courts that have required such disclosures by local rule or standing orders.

Paragraph (1). As the functional equivalent of standing 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 district court to exempt a particular case from the requirement for automatic disclosure or to provide by local rule for the exclusion from this obligation of categories of cases in which discovery will probably be unnecessary, such as review of Social Security decisions.

Subparagraph (A) requires identification of all persons likely to have information that bears significantly on any of the claims and defenses presented by the pleadings in the case, including damages. The limitation to those with "significant" information is not intended to provide an excuse for failure to identify persons whose information would not support the party's contentions, but rather to eliminate the burdensomeness or potential deception arising from a listing of large numbers of persons who in some cases (e.g., some construction contract disputes) may have some knowledge about minor details in the case but would be unlikely to be called as witnesses by any party. As officers of the court, counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding whether their 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 exhibits is not required, the disclosure should describe and categorize the nature and types of documents, including computerized data, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents should 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. Unlike subdivisions (a)(1)(C) and (D), this rule does not require production of any documents, and, where only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. In some cases, particularly where few documents are involved, a disclosing party may prefer simply to provide copies of the documents rather than describe them; and the rule is written to afford this option to the disclosing party.

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 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. Note that, if a party seeks to obtain materials bearing on its claim for

damages which are in the possession of another party, it should seek production by request under Rule 34.

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).

The disclosures specified in subdivision (a)(1) are to be made within 30 days after the first answer by a defendant. (In cases with multiple defendants, each defendant should make its disclosure within 30 days after answering.) To avoid undue delay when an answer is deferred pending a ruling on a Rule 12 motion, the rule permits any party to accelerate the time for disclosures by making its own disclosure and serving a demand that adverse parties make their disclosures within 30 days thereafter.

A longer or shorter period for the disclosures may, however, be established by the court. For example, a court may direct that the disclosures be made in advance of a scheduling conference under Rule 16(b) even if answers have not been filed due to pendency of Rule 12 motions. With approval of the court, the parties may agree to delay the disclosures (when, for example, early settlement appears probable).

Before making its disclosure, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. However, the inability of a party to fully complete its investigation of the case is not a sufficient justification for extending the time for initial disclosures--the party should make its initial disclosure based on the information then available and, as its investigation continues, supplement its responses under subdivision (e)(1). A party is not excused from its obligation of disclosure merely because it questions the sufficiency of disclosures made by another party.

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 this disclosure in a scheduling order under Rule 16(b), and frequently it will be appropriate to require that one party make its disclosure before other parties make their disclosures. The rule provides that, in default of such an order, the disclosures are to be made by all parties at least 90 days before the case has been directed 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 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 rule contemplates a detailed and complete report prepared by the expert, stating the testimony such a 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 702 of the Federal Rules of Evidence provides an additional incentive for full disclosure; namely, that an expert will not ordinarily be permitted to provide testimony on direct examination that was not revealed in advance of trial.

The rule also requires production of the data and other information relied upon by the expert and any exhibits or charts that summarize or support the expert's opinions. Given the obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed. Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses, and revised subdivision (e)(1) requires disclosure of any changes made in an expert's opinions.

By order in the case, or more generally by a local rule, courts may alter the form of disclosure for certain types of experts. For example, treating physicians might be relieved from any requirement to prepare a written report or to be subjected to a two-phase deposition.

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 not otherwise 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, 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 whose testimony the party expects to present should be listed separately from those whose testimony will be presented only if needed because of unanticipated developments during trial.

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.

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). The rule requires a separate listing of each exhibit, but permits 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 collectively shown as a single exhibit with their starting and ending dates. As for witnesses, the party is required to designate the exhibits it expects to offer separately from those it will offer only if needed because of unanticipated developments during trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to indicate objections to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402-03 of the evidence rules). Such 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 times set in the rule for the final pretrial disclosures are 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 objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A writing is required to assure that the parties and counsel are mindful of the solemnity of the obligations imposed; a signature on such a disclosure is a certification that it is complete. Consistent with Rule 5(d), the written disclosures shall be filed with the court unless otherwise directed.

An informal meeting of counsel is the preferred method of exchanging the required information. The initial meeting provides an opportunity to clarify their disclosures, discuss the exchange of additional discoverable information without the need for formal discovery requests, identify information needed for an early consideration of settlement, and plan for document production and such depositions as may be needed. By conferring to make the disclosures required by subdivision (a)(3) counsel can consider steps to avoid unnecessary proof and cumulative evidence.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection of documents and premises from non-parties without the need for a deposition. [Asterisks are shown following the first sentence of this paragraph in

recognition that a proposed amendment to this rule adding a sentence relating to conduct of certain discovery outside the United States is currently pending before the Supreme Court; the change in the first sentence, as shown in this revision, is proposed without regard to whether or not the provision relating to foreign discovery is ultimately adopted.]

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 the potential cost of wide-ranging discovery and thus increased 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 and length of depositions and the number of 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 and length of depositions and the presumptive number of interrogatories allowed in particular types or classifications of cases.

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) provides that expert witnesses who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the current 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 and by the presumptive limit under Rule 30 on the length of the depositions. The requirement under Rule 26(a)(2)(A) for disclosure of a complete and detailed statement of the expected testimony of the expert may, moreover, eliminate the need for some such depositions. A party that wants to take the deposition of its own expert for use at trial must, unless excused by the court under Rule 26(a)(2)(C) provide the expert's written report under Rule 26(a)(2)(A) before the deposition.

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. The basic features of this provision are embodied in a proposed amendment to Rule 26 that is currently pending before the Supreme Court. Since some changes in the pending amendment are proposed, and since it is proposed that this paragraph become part of the rule even if the pending amendment to Rule 26 is not adopted, this revision shows the paragraph in its entirety as a new provision.

The Committee Notes prepared at the time the pending amendment was submitted to the Supreme Court state the purpose of the revision: namely, to establish a procedure by which materials withheld from disclosure or discovery on the basis of a claim of privilege or work product protection are identified, with sufficient information provided so that other parties can determine whether to contest that claim. As those Notes indicate, a party can seek relief by a motion for a protective order under subdivision (c) if providing this information would be unduly burdensome.

Subdivision (c). This subdivision is revised to require 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 has been unable to get opposing parties even to discuss the matter, the efforts taken in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that a party may not begin any formal discovery from any source unless it has made its initial disclosure under subdivision (a)(1), and may not seek formal discovery from another party prior to the time such disclosure has been made, or should have been made, by the other party. Leave of court is required to begin discovery at an earlier date. This subdivision does not apply to interviews of witnesses and other informal discovery, which may--and indeed ordinarily should--be undertaken prior to preparing pleadings to the extent consistent with ethical principles.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures directed by revised subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether information is discovered by the client or by the attorney. Supplementations should be made with special promptness as discovery deadlines and trial approaches.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and request for admission, but not ordinarily to deposition testimony. However, changes in the opinions expressed by an expert at a deposition are subject to a duty of disclosure under subdivision (e)(1). The obligation to supplement discovery responses applies whenever a party learns that its prior response is no longer complete and correct, and is not limited (as under the former rule) to situations in which a failure to supplement would have constituted a "knowing concealment."

Subdivision (f). These provisions are deleted. The special "discovery conference" envisioned by the 1980 amendment has not proved to be an effective device to prevent discovery abuses. Rule 16, taken in conjunction with the current revisions to Rules 26-37, provides adequate authority for the court to exercise its responsibilities in controlling discovery.

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.

[Special Note for Publication: As currently drafted, the sanctions provisions of both Rule 11 and Rule 26(g) have potential application with respect to discovery motions, requests, responses, and objections that are filed with the court. Consideration will be given to the question whether this "overlap" should be eliminated, perhaps making the sanctions provisions contained in Rules 26 and 37 the sole source for sanctions with respect to discovery papers. Comments are welcomed at the present time on this question, as such a change might be made without additional publication.]

Rule 29. Stipulations Regarding Discovery Procedure

1 Unless the court orders otherwise, the parties may by written stipulation (1)

2 provide that depositions may be taken before any person, at any time or place, upon

3 any notice, and in any manner and when so taken may be used like other depositions,

4 and (2) modify the procedures for other methods of discovery, except that stipulations

5 extending the time provided in Rules 33, 34, and 36 for responses to discovery may,

6 if they would interfere with any time set for completion of discovery, for hearing of a

7 motion, or for trial, be made only with the approval of the court.

COMMITTEE NOTES

As revised, the rule provides that, unless the court otherwise orders, the parties are not required to obtain the court's approval of stipulations to extend the 30-day period for responding to interrogatories, requests for production, and requests for admission unless the effect would be to interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

Rule 30. Depositions Upon Oral Examination

1 **(a) When Depositions May Be Taken; When Leave Required.**

(1) ~~After commencement of the action,~~ any party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) Leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), must be obtained if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition, if taken, would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and

25 be unavailable for examination within the United States unless the person's
26 deposition is taken before expiration of such period.

27 **(b) Notice of Examination: General Requirements;~~ Special Notice;~~**
28 **~~Non-Stenographic~~ Means of Recording; Production of Documents and Things;**
29 **Deposition of Organization; Deposition by Telephone.**

30 (1) A party desiring to take the deposition of any person upon oral
31 examination shall give reasonable notice in writing to every other party to the
32 action. The notice shall state the time and place for taking the deposition and
33 the name and address of each person to be examined, if known, and, if the name
34 is not known, a general description sufficient to identify the person or the
35 particular class or group to which the person belongs. If a subpoena duces
36 tecum is to be served on the person to be examined, the designation of the
37 materials to be produced as set forth in the subpoena shall be attached to or
38 included in the notice.

39 (2) ~~Leave of court is not required for the taking of a deposition by the~~
40 ~~plaintiff if the notice (A) states that the person to be examined is about to go~~
41 ~~out of the district where the action is pending and more than 100 miles from the~~
42 ~~place of trial, or is about to go out of the United States, or is bound on a voyage~~
43 ~~to sea, and will be unavailable for examination unless the person's deposition is~~
44 ~~taken before expiration of the 30-day period, and (B) sets forth facts to support~~
45 ~~the statement. The plaintiff's attorney shall sign the notice, and the attorney's~~
46 ~~signature constitutes a certification by the attorney that to the best of the~~
47 ~~attorney's knowledge, information, and belief the statement and supporting facts~~

48 ~~are true. The sanctions provided by Rule 11 are applicable to the certification.~~

49 ~~If a party shows that when the party was served with notice under this~~
50 ~~subdivision (b)(2) the party was unable through the exercise of diligence to~~
51 ~~obtain counsel to represent the party at the taking of the deposition, the~~
52 ~~deposition may not be used against the party.~~

53 The party taking the deposition shall state in the notice the means by which
54 the testimony shall be recorded, which, unless the court orders otherwise, may
55 be by sound, sound-and-visual, or stenographic means. Unless the court orders
56 otherwise, the party taking the deposition shall bear the cost of such recording.

57 (3) ~~The court may for cause shown enlarge or shorten the time for taking~~
58 ~~the deposition.~~ Any party may provide for a transcription to be made from the
59 recording of a deposition taken by nonstenographic means. With prior notice to
60 the deponent and other parties, any party may designate other means to record
61 the testimony of the deponent in addition to that specified by the person taking
62 the deposition. The additional record or transcript shall be made at that party's
63 expense unless the court otherwise orders.

64 (4) ~~The parties may stipulate in writing or the court may upon motion~~
65 ~~order that the testimony at a deposition be recorded by other than stenographic~~
66 ~~means. The stipulation or order shall designate the person before whom the~~
67 ~~deposition shall be taken, the manner of recording, preserving and filing the~~
68 ~~deposition, and may include other provisions to assure that the recorded~~
69 ~~testimony will be accurate and trustworthy. A party may arrange to have a~~
70 ~~stenographic transcription made at the party's own expense. Any objections~~

~~under subdivision (e), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.~~ Unless otherwise agreed by the parties, a deposition shall be conducted before a person designated under Rule 28 and shall begin with a statement on the record by such officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded by other than stenographic means, items (A)-(C) shall be repeated at the beginning of each unit of recorded tape. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

* * * *

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1)~~, and 45(d)~~, a deposition taken by telephone or other remote electronic means is taken in the

94 district and at the place where the deponent is to answer questions propounded
95 to the deponent.

96 **(c) Examination and Cross-Examination; Record of Examination; Oath;**
97 **Objections.** Examination and cross-examination of witnesses may proceed as
98 permitted at the trial under the provisions of the Federal Rules of Evidence, exclusive
99 of Rule 615 thereof. The officer before whom the deposition is to be taken shall put
100 the witness on oath and shall personally, or by someone acting under the officer's
101 direction and in the officer's presence, record the testimony of the witness. The
102 testimony shall be taken stenographically or recorded by any other means ~~ordered in~~
103 ~~accordance with~~ authorized by subdivision (b)(42) of this rule. ~~If requested by one of~~
104 ~~the parties the testimony shall be transcribed.~~ All objections made at the time of the
105 examination to the qualifications of the officer taking the deposition, or to the manner
106 of taking it, or to the evidence presented, or to the conduct of any party, and any other
107 objection to the proceedings, shall be noted by the officer upon the record of the
108 deposition. Evidence objected to shall be taken subject to the objections. In lieu of
109 participating in the oral examination, parties may serve written questions in a sealed
110 envelope on the party taking the deposition and the party taking the deposition shall
111 transmit them to the officer, who shall propound them to the witness and record the
112 answers verbatim.

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

114 (1) Unless otherwise authorized by the court or agreed to by the parties,
115 actual examination of the deponent on the record shall be limited to six hours.
116 Additional time shall be allowed by the court if needed for a fair examination

117 of the deponent and consistent with the principles stated in Rule 26(b)(2), or if
118 the deponent or another party has impeded or delayed the examination. If the
119 court finds such an impediment, delay, or other conduct that frustrates the fair
120 examination of the deponent, it may impose upon the person responsible
121 therefor an appropriate sanction, including the reasonable costs and attorney'
122 fees incurred by any parties as a result thereof.
123 (2) At any time during the taking of the deposition, on motion of a party
124 or of the deponent and upon a showing that the examination is being conducted
125 in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress
126 the deponent or party, the court in which the action is pending or the court in
127 the district where the deposition is being taken may order the officer conducting
128 the examination to cease forthwith from taking the deposition, or may limit the
129 scope and manner of the taking of the deposition as provided in Rule 26(c). If
130 the order made terminates the examination, it shall be resumed thereafter only
131 upon the order of the court in which the action is pending. Upon demand of the
132 objecting party or deponent, the taking of the deposition shall be suspended for
133 the time necessary to make a motion for an order. The provisions of Rule
134 37(a)(4) apply to the award of expenses incurred in relation to the motion.
135 **(e) ~~Submission to~~ Review by Witness; Changes; Signing.** ~~When the testimony~~
136 ~~is fully transcribed, the deposition shall be submitted to the witness for examination~~
137 ~~and shall be read to or by the witness, unless such examination and reading are waived~~
138 ~~by the witness and by the parties. Any changes in form or substance which the witness~~
139 ~~desires to make shall be entered upon the deposition by the officer with a statement~~

140 ~~of the reasons given by the witness for making them. The deposition shall then be~~
141 ~~signed by the witness, unless the parties by stipulation waive the signing or the witness~~
142 ~~is ill or cannot be found or refuses to sign. If the deposition is not signed by the~~
143 ~~witness within 30 days of its submission to the witness, the officer shall sign it and state~~
144 ~~on the record the fact of the waiver or of the illness or absence of the witness or the~~
145 ~~fact of the refusal to sign, together with the reason, if any, given therefor; and the~~
146 ~~deposition may then be used as fully as though signed unless on a motion to suppress~~
147 ~~under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign~~
148 ~~require rejection of the deposition in whole or in part.~~ If requested by the deponent
149 or a party before completion of the deposition, the deponent shall have 30 days after
150 being notified by the officer that the transcript or recording is available in which to
151 review the transcript or recording and, if there are changes in form or substance, to
152 sign a statement reciting such changes and the reasons given by the deponent for
153 making them. The officer shall indicate in the certificate prescribed by subdivision
154 (f)(1) whether any review was requested and, if so, shall append any changes made by
155 the deponent during the period allowed.

156 **(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.**

157 (1) The officer shall certify ~~on the deposition~~ that the witness was duly
158 sworn by the officer and that the deposition is a true record of the testimony
159 given by the witness. This certificate shall be set forth in a writing and
160 accompany the record of the deposition. Unless otherwise ordered by the court,
161 the officer shall ~~then~~ securely seal the deposition in an envelope or package
162 indorsed with the title of the action and marked "Deposition of [here insert name

163 of witness]" and shall promptly file it with the court in which the action is
164 pending~~ or send it by registered or certified mail to the clerk thereof for filing~~
165 or transmit it to the attorney who arranged for the transcript or recording, in
166 which event the attorney shall store it under conditions that will protect it against
167 loss, destruction, tampering, or deterioration. Documents and things produced
168 for inspection during the examination of the witness, shall, upon the request of
169 a party, be marked for identification and annexed to the deposition and may be
170 inspected and copied by any party, except that if the person producing the
171 materials desires to retain them the person may (A) offer copies to be marked
172 for identification and annexed to the deposition and to serve thereafter as
173 originals if the person affords to all parties fair opportunity to verify the copies
174 by comparison with the originals, or (B) offer the originals to be marked for
175 identification, after giving to each party an opportunity to inspect and copy them,
176 in which event the materials may then be used in the same manner as if annexed
177 to the deposition. Any party may move for an order that the original be annexed
178 to and returned with the deposition to the court, pending final disposition of the
179 case.

180 (2) Unless otherwise ordered by the court or agreed by the parties, the
181 officer shall retain stenographic notes of any deposition taken by stenographic
182 means or a copy of the recording of any deposition taken by nonstenographic
183 means. Upon payment of reasonable charges therefor, the officer shall furnish
184 a copy of the transcript or other recording of the deposition to any party or to
185 the deponent.

186 * * * *

187 * * * *

COMMITTEE NOTES

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. [In showing deletion of the second sentence, it is shown in its present form, disregarding the changes contained in a proposed amendment now pending before the Supreme Court, since those changes would also be eliminated under this revision.]

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 over the objection of any party; 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 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 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.

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), delaying the commencement of formal discovery until after exchange of initial disclosure statements, the rule requires leave of court 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 having to first 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 because they are redundant to Rules 11 and 26(g) as revised in 1983. 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 means of recording, without the need to obtain court approval for one taken by other than stenographic means. A party choosing to record a deposition only by videotape or audiotape should do so with the knowledge 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. Other parties may, at their own expense, arrange for other means of recording in addition to that specified by the party taking the deposition. 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 means 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 non-stenographic recording of a deposition be made by an officer authorized under Rule 28 and contains provisions designed to provide basic safeguards to assure the utility and integrity of the record.

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). In addition, the revision addresses the recurring problem as to who may be present at a deposition. Courts have disagreed as to whether other potential witnesses should be excluded from depositions through invocation of Rule 615 of the evidence rules or only when ordered 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, could be ordered under Rule 26(c)(5).

Subdivision (d). Paragraph (1) is added to this subdivision to create a presumptive limit of one working day--six hours of actual examination--on the length of depositions. The rule 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).

The rule authorizes longer depositions when justified under the principles stated in Rule 26(b)(2). In appropriate cases such authorizations would be included in the scheduling order entered under Rule 16(b). The parties are also permitted--and expected--to agree to longer depositions, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Six hours should be sufficient time for most depositions--if counsel exercise judgment and selectivity in their examination. Experience in courts that have imposed such limits by local rule or order demonstrates that, when a deponent is to be examined by more than one party, counsel can usually agree on an equitable allocation of the time permitted.

The presumptive limit on duration applies even when a party is deposing an opponent's expert, given the advance disclosure required under Rule 26(a)(2)(A).

New paragraph (1) 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. For example, instructions to a deponent not to answer (except to assert privileges, to claim protection of work product materials, to prevent inquiry into matters precluded by the court through an order under Rule 26(c)(4), or to suspend a deposition in order to file a motion under paragraph (2)) are ordinarily improper, as are suggestions on how a question should be answered (whether directly or through "speaking objections"). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. They should limit any objections to those that are well founded and necessary for protection of the interest of a party or deponent, bearing in mind that most objections are preserved and need be interposed at the deposition only with respect to the form of a question, the responsiveness of an answer, or to protect privileged information. The refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of the deponent is also subject to sanctions as a practice frustrating conduct of the deposition.

<u>Subdivision (e).</u> Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken by stenographic means. Reporters frequently have difficulties obtaining signatures--and 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.

<u>Subdivision (f).</u> 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 it to the attorney taking the deposition (or ordering the transcript), who then becomes custodian for the court of the original recording 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

Rule 31. Depositions Upon Written Questions

1 **(a) Serving Questions; Notice.**

2 (1) ~~After commencement of the action, a~~any party may take the testimony

3 of any person, including a party, by deposition upon written questions without

4 leave of court except as provided in paragraph (2). The attendance of witnesses

5 may be compelled by the use of subpoena as provided in Rule 45. ~~The~~

6 ~~deposition of a person confined in prison may be taken only by leave of court on~~

7 ~~such terms as the court prescribes.~~

8 (2) Leave of court, which shall be granted to the extent consistent with the

9 principles stated in Rule 26(b)(2), must be obtained if the person to be examined

10 is confined in prison or if, without the written stipulation of the parties,

11 (A) a proposed deposition, if taken, would result in more than ten

12 depositions being taken under this rule or Rule 30 by the plaintiffs, or by

13 the defendants, or by third-party defendants;

14 (B) the person to be examined has already been deposed in the case;

15 or

16 (C) a party seeks to take a deposition before the time specified in

17 Rule 26(d).

18 (3) A party desiring to take a deposition upon written questions shall serve
19 them upon every other party with a notice stating (1) the name and address of
20 the person who is to answer them, if known, and if the name is not known, a
21 general description sufficient to identify the person or the particular class or
22 group to which the person belongs, and (2) the name or descriptive title and
23 address of the officer before whom the deposition is to be taken. A deposition
24 upon written questions may be taken of a public or private corporation or a
25 partnership or association or governmental agency in accordance with the
26 provisions of Rule 30(b)(6).

27 (4) Within ~~30~~14 days after the notice and written questions are served, a
28 party may serve cross questions upon all other parties. Within ~~10~~7 days after
29 being served with cross questions, a party may serve redirect questions upon all
30 other parties. Within ~~10~~7 days after being served with redirect questions, a party
31 may serve recross questions upon all other parties. The court mav for cause
32 shown enlarge or shorten the time.

33 * * * *

COMMITTEE NOTES

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.

Rule 32. Use of Depositions in Court Proceedings

1 **(a) Use of Depositions.**

2 * * * *

3 (3) The deposition of a witness, whether or not a party, may be used by
4 any party for any purpose if the court finds:

5 (A) that the witness is dead; or

6 (B) that the witness is at a greater distance than 100 miles from the
7 place of trial or hearing, or is out of the United States, unless it appears
8 that the absence of the witness was procured by the party offering the
9 deposition; or

10 (C) that the witness is unable to attend or testify because of age,
11 illness, infirmity, or imprisonment; or

12 (D) that the witness was deposed under Rule 26(b)(4); or

13 (~~D~~E) that the party offering the deposition has been unable to
14 procure the attendance of the witness by subpoena; or

15 (~~E~~F) upon application and notice, that such exceptional
16 circumstances exist as to make it desirable, in the interest of justice and
17 with due regard to the importance of presenting the testimony of witnesses
18 orally in open court, to allow the deposition to be used.

19 A deposition taken without leave of court pursuant to a notice under Rule
20 30(a)(2)(C) shall not be used against a party who demonstrates that, when served
21 with the notice, it was unable through the exercise of diligence to obtain counsel
22 to represent it at the taking of the deposition; nor shall a deposition be used
23 against a party who, having received less than 11 days notice of the deposition,
24 has promptly upon receiving such notice filed a motion for a protective order

25 under Rule 26(c)(2) requesting that the deposition not be held or be held at a

26 different time or place and such motion is still pending at the time the

27 deposition is held.

28 * * * *

29 **(c) Form of Presentation.** Except as otherwise directed by the court, a party

30 offering deposition testimony pursuant to this rule may offer it in stenographic or

31 nonstenographic form but, if offering it in nonstenographic form, shall also provide the

32 court with a transcript of the portions so offered. On request of any party in a case

33 tried before a jury, deposition testimony offered other than for impeachment purposes

34 shall be presented in nonstenographic form, if available, unless the court for good

35 cause orders otherwise.

36 * * * *

37 * * * *

COMMITTEE NOTES

Subdivision (a). Subdivision (a)(3) is amended to permit use of the deposition of experts without having to establish their unavailability to testify in person. At the present time, depositions of treating physicians are routinely used without accounting for their unavailability. Under revised Rule 26, depositions of experts will ordinarily be taken only if adverse parties have been provided in advance with a detailed written report from the expert; and under revised Rule 30 any party can have a deposition taken by video-tape. With these protections, there is no reason why a party should be forced to bear the additional expense of having the deposed expert testify in person at trial.

The last sentence of the revised rule not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision dealing 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 and with good cause, be

spared the risk of nonattendance at the deposition held before its motion is ruled upon. 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 11 days should necessarily be deemed as 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.

Rule 33. Interrogatories to Parties

1 **(a) Availability~~; Procedures for Use~~.** Without leave of court or written
2 stipulation, a~~A~~ny party may serve upon any other party written interrogatories, not
3 exceeding 15 in number including all subparts, to be answered by the party served or,
4 if the party served is a public or private corporation or a partnership or association or
5 governmental agency, by any officer or agent, who shall furnish such information as
6 is available to the party. Leave to serve additional interrogatories shall be granted to
7 the extent consistent with the principles of Rule 26(b)(2). Without leave of court or
8 written stipulation, i~~I~~nterrogatories may~~, without leave of court,~~ not be served ~~upon~~
9 ~~the plaintiff after commencement of the action and upon any other party with or after~~
10 ~~service of the summons and complaint upon that party~~ before the time specified in
11 Rule 26(d).

12 **(b) Answers and Objections.**

13 (1) Each interrogatory shall be answered separately and fully in writing

14 under oath, unless it is objected to, in which event the objecting party shall state
15 the reasons for objection ~~shall be stated in lieu of an answer~~ and shall answer
16 to the extent the interrogatory is not objectionable.
17 (2) The answers are to be signed by the person making them, and the
18 objections signed by the attorney making them.
19 (3) The party upon whom the interrogatories have been served shall serve
20 a copy of the answers, and objections if any, within 30 days after the service of
21 the interrogatories~~, except that a defendant may serve answers or objections~~
22 ~~within 45 days after service of the summons and complaint upon that defendant.~~
23 ~~The court may allow a~~A shorter or longer time may be directed by the court or,
24 in the absence of such an order, agreed to in writing by the parties.
25 (4) All grounds for an objection to an interrogatory shall be stated with
26 specificity. Any ground not stated in a timely objection is waived unless the
27 failure to object is excused by the court for good cause shown.
28 (5) The party submitting the interrogatories may move for an order under
29 Rule 37(a) with respect to any objection to or other failure to answer an
30 interrogatory.
31 **(~~b~~c) Scope; Use at Trial.** Interrogatories may relate to any matters which can
32 be inquired into under Rule 26(b)(1), and the answers may be used to the extent
33 permitted by the rules of evidence.
34 An interrogatory otherwise proper is not necessarily objectionable merely
35 because an answer to the interrogatory involves an opinion or contention that relates
36 to fact or the application of law to fact, but the court may order that such an

37 interrogatory need not be answered until after designated discovery has been

38 completed or until a pre-trial conference or other later time.

39 **(ed) Option to Produce Business Records.** * * * *

COMMITTEE NOTES

Purpose of Revision. The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. To facilitate reference, subdivision (a) is divided into two paragraphs.

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2).

Each party is allowed to serve 15 interrogatories, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation by using "subparts" seeking discrete information. As with the number of depositions authorized by Rule 30, leave to pursue additional discovery is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served unless the requesting party has made its initial disclosures under Rule 26(a)(1), nor prior to the time that such disclosures have been made, or are due, from the opposing party.

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which fifteen are to be answered, or resubmit interrogatories that comply with the rule. See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of

facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5) which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g) authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

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

1 * * * *

2 (b) **Procedure.** ~~The request may, without leave of court, be served upon the~~

3 ~~plaintiff after commencement of the action and upon any other party with or after~~

4 ~~service of the summons and complaint upon that party.~~ The request shall set forth the

5 items to be inspected either by individual item or by category, and describe each item

6 and category with reasonable particularity. The request shall specify a reasonable

7 time, place, and manner of making the inspection and performing the related acts.

8 Without leave of court or written stipulation, a request may not be served before the

9 time specified in Rule 26(d).

10 The party upon whom the request is served shall serve a written response within

11 30 days after the service of the request~~, except that a defendant may serve a response~~

12 ~~within 45 days after service of the summons and complaint upon that defendant~~. ~~The~~

13 ~~court may allow a~~A shorter or longer time may be directed by the court or, in the

14 absence of such an order, agreed to in writing by the parties. The response shall state,

15 with respect to each item or category, that inspection and related activities will be

16 permitted as requested, unless the request is objected to, in which event the reasons

17 for the objection shall be stated. If objection is made to part of an item or category,

18 the part shall be specified and inspection permitted of the remaining parts. The party

19 submitting the request may move for an order under Rule 37(a) with respect to any

20 objection to or other failure to respond to the request or any part thereof, or any

21 failure to permit inspection as requested.

22 A party who produces documents for inspection shall produce them as they are

23 kept in the usual course of business or shall organize and label them to correspond

24 with the categories in the request.

25 * * * *

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery from another party until it has made the disclosures required by Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. 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.

Rule 36. Requests for Admission

1 **(a) Request for Admission.** A party may serve upon any other party a written

2 request for the admission, for purposes of the pending action only, of the truth of any

3 matters within the scope of Rule 26(b)(1) set forth in the request that relate to

4 statements or opinions of fact or of the application of law to fact, including the

5 genuineness of any documents described in the request. Copies of documents shall be
6 served with the request unless they have been or are otherwise furnished or made
7 available for inspection and copying. ~~The request may, without leave of court, be~~
8 ~~served upon the plaintiff after commencement of the action and upon any other party~~
9 ~~with or after service of the summons and complaint upon that party.~~ <u>Without leave</u>
10 <u>of court or written stipulation, requests for admission may not be served before the</u>
11 <u>time specified in Rule 26(d).</u>

12 Each matter of which an admission is requested shall be separately set forth.
13 The matter is admitted unless, within 30 days after service of the request, or within
14 such shorter or longer time as the court may allow<u> or as the parties may agree to in</u>
15 <u>writing</u>, the party to whom the request is directed serves upon the party requesting the
16 admission a written answer or objection addressed to the matter, signed by the party
17 or by the party's attorney~~, but, unless the court shortens the time, a defendant shall not~~
18 ~~be required to serve answers or objections before the expiration of 45 days after~~
19 ~~service of the summons and complaint upon that defendant~~. If objection is made, the
20 reasons therefor shall be stated. The answer shall specifically deny the matter or set
21 forth in detail the reasons why the answering party cannot truthfully admit or deny the
22 matter. A denial shall fairly meet the substance of the requested admission, and when
23 good faith requires that a party qualify an answer or deny only a part of the matter of
24 which an admission is requested, the party shall specify so much of it as is true and
25 qualify or deny the remainder. An answering party may not give lack of information
26 or knowledge as a reason for failure to admit or deny unless the party states that the
27 party has made reasonable inquiry and that the information known or readily

28 obtainable by the party is insufficient to enable the party to admit or deny. A party
29 who considers that a matter of which an admission has been requested presents a
30 genuine issue for trial may not, on that ground alone, object to the request; the party
31 may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why
32 the party cannot admit or deny it.
33 * * * *
34 * * * *

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery from another party until it has made the disclosures required by Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party.

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

1 **(a) Motion For Order Compelling Disclosure or Discovery.** A party, upon
2 reasonable notice to other parties and all persons affected thereby, may apply for an
3 order compelling disclosure or discovery as follows:
4 **(1) Appropriate Court.** An application for an order to a party ~~may~~ shall
5 be made to the court in which the action is pending~~, or, on matters relating to~~
6 ~~a deposition, to the court in the district where the deposition is being taken~~. An
7 application for an order to a ~~deponent~~ person who is not a party shall be made
8 to the court in the district where the ~~deposition is being taken~~ discovery is being,
9 or is to be, taken.
10 **(2) Motion.**
11 (A) If a party fails to make a disclosure required by Rule 26(a), any

12 other party may move to compel disclosure and for appropriate sanctions.
13 The motion shall be accompanied by a certification that the movant in
14 good faith has conferred or attempted to confer with the party not making
15 the disclosure in an effort to secure the disclosure without court action.
16 (B) If a deponent fails to answer a question propounded or
17 submitted under Rules 30 or 31, or a corporation or other entity fails to
18 make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer
19 an interrogatory submitted under Rule 33, or if a party, in response to a
20 request for inspection submitted under Rule 34, fails to respond that
21 inspection will be permitted as requested or fails to permit inspection as
22 requested, the discovering party may move for an order compelling an
23 answer, or a designation, or an order compelling inspection in accordance
24 with the request. The motion shall be accompanied by a certification that
25 the movant in good faith has conferred or attempted to confer with the
26 person or party failing to make the discovery in an effort to secure the
27 information or material without court action. When taking a deposition on
28 oral examination, the proponent of the question may complete or adjourn
29 the examination before applying for an order.
30 ~~If the court denies the motion in whole or in part, it may make such protective~~
31 ~~order as it would have been empowered to make on a motion made pursuant to~~
32 ~~Rule 26(c).~~
33 (3) **Evasive or Incomplete Disclosure, Answer, or Response.** For purposes
34 of this subdivision an evasive or incomplete disclosure, answer, or response is to

35 be treated as a failure to disclose, answer, or respond.

36 (4) ~~Award of~~ Expenses ~~of Motion~~ and Sanctions.

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

49 (B) If the motion is denied, the court may make such protective
50 order as it would have been empowered to make on a motion under Rule
51 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard,
52 require the moving party or the attorney advising the motion or both of
53 them to pay to the party or deponent who opposed the motion the
54 reasonable expenses incurred in opposing the motion, including attorney's
55 fees, unless the court finds that the making of the motion was substantially
56 justified or that other circumstances make an award of expenses unjust.

57 (C) If the motion is granted in part and denied in part, the court

58 may make such protective order as it would have been empowered to make
59 on a motion under Rule 26(c) and may, after affording an opportunity to
60 be heard, apportion the reasonable expenses incurred in relation to the
61 motion among the parties and persons in a just manner.
62 * * * *
63 **(c) ~~Expenses on~~ Failure to Disclose; False or Misleading Disclosure; Refusal**
64 **to Admit.**
65 (1) A party that without substantial justification fails to disclose
66 information as required by Rule 26(a) or 26(e)(1) shall not, unless such failure
67 is harmless, be permitted to present as substantive evidence at trial or on a
68 motion under Rule 56 any evidence not so disclosed, and, if such evidence is
69 presented by an adverse party, the adverse party shall be permitted to disclose
70 at the trial or hearing the fact of such failure to disclose. In addition or in lieu
71 thereof, the court, on motion after affording an opportunity to be heard, may
72 impose other appropriate sanctions, which, in addition to requiring payment of
73 reasonable expenses including attorney's fees caused by the failure, may preclude
74 the party from conducting discovery and may include any of actions authorized
75 under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.
76 (2) If a party fails to admit the genuineness of any document or the truth
77 of any matter as requested under Rule 36, and if the party requesting the
78 admissions thereafter proves the genuineness of the document or the truth of the
79 matter, the requesting party may apply to the court for an order requiring the
80 other party to pay the reasonable expenses incurred in making that proof,

81 including reasonable attorney's fees. The court shall make the order unless it
82 finds that (~~1~~A) the request was held objectionable pursuant to Rule 36(a), or
83 (~~2~~B) the admission sought was of no substantial importance, or (~~3~~C) the party
84 failing to admit had reasonable ground to believe that the party might prevail on
85 the matter, or (~~4~~D) there was other good reason for the failure to admit.
86 **(d) Failure of Party to Attend at Own Deposition or Serve Answers to**
87 **Interrogatories or Respond to Request for Inspection.** If a party or an officer,
88 director, or managing agent of a party or a person designated under Rule 30(b)(6) or
89 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take
90 the deposition, after being served with a proper notice, or (2) to serve answers or
91 objections to interrogatories submitted under Rule 33, after proper service of the
92 interrogatories, or (3) to serve a written response to a request for inspection submitted
93 under Rule 34, after proper service of the request, the court in which the action is
94 pending on motion may make such orders in regard to the failure as are just, and
95 among others it may take any action authorized under paragraphs (A), (B), and (C)
96 of subdivision (b)(2) of this rule. Any motion specifying a failure under clauses (2) or
97 (3) shall be accompanied by a certification that the movant in good faith has conferred
98 or attempted to confer with the party failing to answer or respond in an effort to
99 obtain such answer or response without court action. In lieu of any order or in
100 addition thereto, the court shall require the party failing to act or the attorney advising
101 that party or both to pay the reasonable expenses, including attorney's fees, caused by
102 the failure unless the court finds that the failure was substantially justified or that
103 other circumstances make an award of expenses unjust.

104 The failure to act described in this subdivision may not be excused on the ground

105 that the discovery sought is objectionable unless the party failing to act has ~~applied~~

106 pending a motion for a protective order as provided by Rule 26(c).

107 * * * *

108 (g) ~~Failure to Participate in the Framing of a Discovery Plan.~~[Abrogated] ~~If~~

109 ~~a party or a party's attorney fails to participate in the framing of a discovery plan by~~

110 ~~agreement as is required by Rule 26(f), the court may, after opportunity for hearing,~~

111 ~~require such party or attorney to pay to any other party the reasonable expenses,~~

112 ~~including attorney's fees, caused by the failure.~~

COMMITTEE NOTES

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 timely 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 without court action before filing a motion with the court. This requirement is based on successful experience with local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4), where it more logically belongs.

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 this subdivision.

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 it clearer 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). This subdivision is amended to provide sanctions for failure to make a disclosure required by Rule 26(a) without need for a motion under subdivision (a)(2)(A).

Paragraph (1) requires exclusion as substantive evidence of material that, without substantial justification, is not disclosed as required by Rule 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, whether at trial or on motion 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 key witness known to all parties; the failure to list as a trial witness a person so listed by another party; 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 material that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule permits an opposing party, who discovers and introduces such undisclosed evidence, to make known to the jury the fact of the nondisclosure, enabling an argument similar to that of spoliation of evidence. In addition, by cross-reference to the sanctions under subdivision (b)(2), the rule provides the court with a full range of alternative sanctions--such as declaring specified facts to be

established or preventing contradictory evidence--that, though not self-executing, can be imposed when found to be warranted after a hearing.

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 deleted in light of the abrogation of Rule 26(f).

Rule 43. Taking of Testimony

1 (a) **Form.** In all trials the testimony of witnesses shall be taken ~~orally~~ in open
2 court, unless otherwise provided by an Act of Congress or by these rules, the Federal
3 Rules of Evidence, or other rules adopted by the Supreme Court. Subject to the right
4 of cross-examination, the court, in a nonjury trial, may permit or require that the direct
5 examination of a witness, or a portion thereof, be presented through adoption by the
6 witness of an affidavit signed by the witness, a written statement or report prepared
7 by the witness, or a deposition of the witness. The contents thereof are admissible to
8 the same extent as if the witness testified orally with respect thereto.
9 * * * *

COMMITTEE NOTES

Rule 43 is revised to dispel any doubts as to the power of the court under Rule 611(a) of the Federal Rules of Evidence to permit or require in appropriate circumstances that the direct examination of a witness, or a portion thereof, be presented in the form of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness. Presentation of direct testimony in this manner can greatly

expedite trial and may make the testimony more understandable without sacrifice to the benefits of the adversarial system, since the witness will be subject to cross-examination in the traditional manner with respect to the written statement.

This procedure is not appropriate for all cases or for all witnesses. The amendment applies only in nonjury cases, and even in such cases the primary usage will be with expert testimony or with "background" testimony from lay witnesses concerning matters not in substantial dispute.

The revision of Rule 43 is not intended to limit by implication the powers of the court under Rule 611(a) of the Federal Rules of Evidence, such as having a witness testify in a narrative fashion rather than in question-and-answer form.

Rule 54. Judgments; Costs

1 * * * *

2 (d) Costs; Attorneys' Fees.

3 (1) Costs Other than Attorneys' Fees. Except when express provision

4 therefor is made either in a statute of the United States or in these rules, costs

5 other than attorneys' fees shall be allowed as of course to the prevailing party

6 unless the court otherwise directs; but costs against the United States, its officers,

7 and agencies shall be imposed only to the extent permitted by law. Such cCosts

8 may be taxed by the clerk on one day's notice. On motion served within 5 days

9 thereafter, the action of the clerk may be reviewed by the court.

10 (2) Attorneys' Fees.

11 (A) Claims for attorneys' fees and related nontaxable expenses,

12 including fees sought under Rule 11, 16, 26, or 37, and under 28 U.S.C. §

13 1927, shall be made by motion unless the substantive law governing the

14 action provides for the recovery of such fees as an element of damages to

15 be proved at trial.

16 (B) Unless otherwise provided by statute or directed by the court,
17 the motion shall be filed and served not later than 14 days after entry of
18 judgment, shall specify the judgment and the statute, rule, or other grounds
19 entitling the moving party to the award, and shall state the amount or
20 provide a fair estimate of the fees sought. If directed by the court, the
21 motion shall also disclose the terms of any agreement with respect to fees
22 to be paid for the services for which claim is made.

23 (C) On request of a party or class member, the court shall afford an
24 opportunity for adversary submissions with respect to the motion in
25 accordance with Rule 43(e) or Rule 78. The court may determine issues
26 of liability for fees before receiving submissions bearing on issues of
27 evaluation of services for which liability is imposed by the court. The order
28 shall set forth the court's findings and conclusions as provided in Rule
29 52(a) and shall be expressed in the form of a judgment as provided in Rule
30 58.

31 (D) By local rule the court may establish (i) an appropriate schedule
32 by which the value of legal services performed in the district is ordinarily
33 to be measured, and (ii) special procedures by which issues relating to such
34 fees may be resolved without extensive evidentiary hearings. In addition,
35 the court may refer issues relating to the value of services to a special
36 master under Rule 53 without regard to the provisions of subdivision (b)
37 thereof and may refer a motion for attorneys' fees to a magistrate judge

38 under Rule 72(b) as if a dispositive pretrial matter.

COMMITTEE NOTES

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. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules, as well as provide a mechanism by which through local rule a court could adopt schedules presumptively specifying the prevailing current hourly rates for attorneys.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorney's fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees. It applies also to requests for reimbursement of expenses not taxable as costs to the extent recoverable under governing law. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991) (expert witness fees not recoverable under 42 U.S.C. § 1988). As noted in subparagraph (A), it does not 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.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court 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 made no general provision for a time limit on claims for attorneys' fees. White v. N.H. Dept. of Employment Security, 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).

The provisions of paragraph (2) apply in general to requests for fees as sanctions authorized or mandated in the rules. In many circumstances such requests should be made at or shortly after the time of the conduct complained of, and not be delayed until the conclusion of the case. The 14-day period stated in subparagraph (B) should be understood not as authorizing parties to delay such requests, but as establishing an outer limit for such motions.

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 this dispute to proceed at the same time as review on the merits.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment. 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 upon entry of a new judgment following a reversal or remand by the appellate court.

The rule does not require that at the time of filing the motion be supported 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 have ordinarily 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 course 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 judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the award contain findings and conclusions in conformity with Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court by local rule to establish procedures facilitating the efficient and fair resolution of fee claims. Under Rule 83 such local rules must be submitted to the judicial council of the circuit.

Clause (i) authorizes the court to establish by local rule a schedule of standard hourly rates suitable for use when the substantive law governing fee awards requires consideration of such rates. These rates are appropriately localized, the standards of value should be uniform among the judges in any district, and a published standard should facilitate the settlement of disputes involving the value of legal services performed. The schedule would specify prevailing hourly rates (or ranges of rates) customarily charged within the district, taking into account the experience of counsel and perhaps the type of litigation and other factors. Such standards should be regularly reconsidered in light of experience and changing circumstances. The parties would be permitted to show that hourly rates different from those in the schedule would be appropriate in the circumstances of the case or, indeed, that the substantive law does not require consideration of such rates.

Clause (ii) authorizes the court by local rule to establish special procedures for resolving disputes regarding fee awards without extensive evidentiary hearings. Such a 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 deemed as accepted by the parties unless objected to within a specified time.

Subparagraph (D) also explicitly permits, without need for a local rule, a judge 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.

Rule 56. Summary Judgment

(a) ~~**For Claimant**~~**Of Claims, Defenses, and Issues**. ~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~ The court without a trial may enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, may summarily determine a defense, or may summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of material facts not genuinely in dispute. In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based.

~~(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

(b) **Facts Not Genuinely In Dispute.** A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the relevant admissible evidence shown to be available for presentation at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under

23 Rule 50.

24 (c) **Motion and Proceedings Thereon.** ~~The motion shall be served at least 10~~

25 ~~days before the time fixed for the hearing. The adverse party prior to the day of~~

26 ~~hearing may serve opposing affidavits. The judgment sought shall be rendered~~

27 ~~forthwith if the pleadings, depositions, answers to interrogatories, and admissions on~~

28 ~~file, together with the affidavits, if any, show that there is no genuine issue as to any~~

29 ~~material fact and that the moving party is entitled to a judgment as a matter of law.~~

30 ~~A summary judgment, interlocutory in character, may be rendered on the issue of~~

31 ~~liability alone although there is a genuine issue as to the amount of damages.~~ A party

32 may move for summary adjudication at any time after the other parties to be affected

33 thereby have made an appearance in the case and have been afforded a reasonable

34 opportunity to discover relevant evidence pertinent thereto that is not in their

35 possession or under their control. Within 30 days after the motion is served, any other

36 party may serve and file a response thereto.

37 (1) Without argument, the motion shall (A) describe the claims, defenses,

38 or issues as to which summary adjudication is warranted, specifying the judgment

39 or determination sought; and (B) recite in separately numbered paragraphs the

40 specific facts asserted to be not genuinely in dispute and on the basis of which

41 the judgment or determination should be granted, citing the particular pages or

42 paragraphs of stipulations, admissions, interrogatory answers, depositions,

43 documents, affidavits, or other materials supporting those assertions.

44 (2) Without argument, a response shall (A) state the extent, if any, to

45 which the party agrees that summary adjudication is warranted, specifying with

46 respect thereto the judgment or determination that should be entered; (B)
47 indicate the extent to which the asserted facts recited in the motion are claimed
48 to be false or in genuine dispute, citing the particular pages or paragraphs of any
49 stipulations, admissions, interrogatory answers, depositions, documents, affidavits,
50 or other materials supporting that contention; and (C) recite in separately
51 numbered paragraphs any additional facts that preclude summary adjudication,
52 citing the materials evidencing such facts. To the extent a party does not timely
53 comply with clause (B) in challenging an asserted fact, it may be deemed to have
54 admitted such fact.

55 (3) If a motion for summary adjudication or response thereto is based to
56 any extent on depositions, interrogatory answers, documents, affidavits, or other
57 materials that have not been previously filed, the party shall append to its motion
58 or response the pertinent portions of such materials. Only with leave of court
59 may a party moving for summary adjudication supplement its supporting
60 materials.

61 (4) Arguments supporting a party's contentions as to the controlling law
62 or the evidence respecting asserted facts shall be submitted by a separate
63 memorandum at the time the party files its motion for summary adjudication or
64 response thereto or at such other times as the court may permit or direct.

65 **(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule
66 judgment is not rendered upon the whole case or for all the relief asked and a trial
67 is necessary, the court ~~at the hearing of the motion, by examining the pleadings and~~
68 ~~the evidence before it and by interrogating counsel, shall if practicable ascertain what~~

69 ~~material facts exist without substantial controversy and what material facts are actually~~
70 ~~and in good faith controverted. It shall thereupon~~ may make an order specifying the
71 controlling law or the facts that ~~appear without substantial controversy~~ are not
72 genuinely in dispute, including the extent to which liability or the amount of damages
73 or other relief is not ~~in controversy~~ a dispute for trial, and directing such further
74 proceedings in the action as are just. ~~Upon the trial of the action the facts so~~
75 ~~specified shall be deemed established, and the trial shall be conducted accordingly.~~
76 Unless the order is modified by the court for good cause, the trial shall be conducted
77 in accordance with the law so specified and by treating the facts so specified as
78 established. An order that does not adjudicate all claims with respect to all parties
79 may be entered as a final judgment to the extent permitted by Rule 54(b).
80 (e) ~~Form of Affidavits; Further Testimony; Defense Required~~ Matters to be
81 **Considered.** ~~Supporting and opposing affidavits shall be made on personal knowledge,~~
82 ~~shall set forth such facts as would be admissible in evidence, and shall show~~
83 ~~affirmatively that the affiant is competent to testify to the matters stated therein.~~
84 ~~Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall~~
85 ~~be attached thereto or served therewith. The court may permit affidavits to be~~
86 ~~supplemented or opposed by depositions, answers to interrogatories, or further~~
87 ~~affidavits. When a motion for summary judgment is made and supported as provided~~
88 ~~in this rule, an adverse party may not rest upon the mere allegations or denials of the~~
89 ~~adverse party's pleading, but the adverse party's response by affidavits or as otherwise~~
90 ~~provided in this rule, must set forth specific facts showing that there is a genuine issue~~
91 ~~for trial. If the adverse party does not so respond, summary judgment, if appropriate,~~

92 ~~shall be entered against the adverse party.~~ In deciding whether an asserted fact is not
93 genuinely in dispute, the court shall consider stipulations, admissions, and, to the
94 extent filed, the following: (1) depositions, interrogatory answers, and affidavits to the
95 extent such evidence would be admissible if the deponent, person answering the
96 interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it
97 affirmatively shows that the affiant would be competent to testify to the matters stated
98 therein; and (2) documentary evidence to the extent such evidence would, if
99 authenticated and shown to be an accurate copy of original documents, be admissible
100 at trial in the light of other evidence. A party may rely upon its own pleadings, even
101 if verified, only to the extent of allegations therein that are admitted by other parties.
102 Notwithstanding the foregoing, the court is not required to consider evidentiary
103 materials unless called to its attention pursuant to subdivision (c)(1) or (c)(2).

104 (f) **When Evidence ~~Affidavits are~~ Unavailable.** Should it appear from the
105 affidavits of a party opposing ~~the~~ a motion for summary adjudication that the party
106 cannot for ~~reasons stated present by affidavit facts essential to justify the party's~~
107 ~~opposition~~ good cause shown present materials needed to support that opposition, the
108 court may ~~refuse the application for judgment or~~ deny the motion, may permit an offer
109 of proof, may order a continuance to permit affidavits to be obtained or depositions
110 to be taken or discovery to be had, or may make such other order as is just.

111 (g) ~~**Affidavits Made in Bad Faith**~~**Conduct of Proceedings**. ~~Should it appear to~~
112 ~~the satisfaction of the court at any time that any of the affidavits presented pursuant~~
113 ~~to this rule are presented in bad faith or solely for the purpose of delay, the court shall~~
114 ~~forthwith order the party employing them to pay to the other party the amount of the~~

115 ~~reasonable expenses which the filing of the affidavits caused the other party to incur,~~

116 ~~including reasonable attorney's fees, and any offending party or attorney may be~~

117 ~~adjudged guilty of contempt.~~ The court (1) may preclude, or specify the period for

118 filing, motions for summary adjudication with respect to particular claims, defenses,

119 or issues; (2) may enlarge or shorten the time for responding to motions for summary

120 adjudication, after considering the opportunity for discovery and the time reasonably

121 needed to obtain or submit pertinent materials; (3) may on its own initiative direct the

122 parties to show cause within a reasonable period why specified facts should not be

123 treated as not genuinely in dispute and why summary adjudication based thereon

124 should not be entered; and (4) may conduct a hearing to consider further arguments,

125 rule on the admissibility of evidence, or receive oral testimony to clarify whether an

126 asserted fact is genuinely in dispute.

COMMITTEE NOTES

Purpose of Revision. This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and admitted at trial, can have but one outcome--while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The current caption, "Summary Judgment" is retained. However, the revised rule, like the former rule, also covers decisions that, by resolving only defenses or issues not dispositive of a claim, are more properly viewed as "summary determinations." The text of the revised rule adds language to clarify that it provides procedures for both types of "summary adjudications."

In various parts the revision (1) eliminates ambiguities and inconsistencies within the rule, (2) sets a single and consistent standard for determining when summary adjudication is appropriate, (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

Subdivision (a). This subdivision combines the provisions previously contained in subdivisions (a) and (b). It adds third-party claims to the list of claims subject to disposition by summary judgment, but deletes (as surplusage) the specific reference to declaratory judgments. The former provisions allowed motions for "summary judgment" as to "any part" of a claim; the revision permits summary determination of an "issue substantially affecting but not wholly dispositive" of a claim or defense--the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some significant impact on discovery, trial, or settlement.

The revised language makes clear at the outset of the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is appropriate only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses; when the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions from other parties whose rights depend on those facts. As with the prior rule, elimination of trial through summary adjudication is not mandatory even when the standards of the rule are satisfied.

The court is directed to indicate the factual and legal basis if it grants summary judgment or summarily determines a defense or issue. A lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute, on the basis of which summary adjudication is appropriate. The determination that a fact is not in genuine dispute is, when reviewed on appeal, treated as a question of law.

Subdivision (b). The standards stated in this subdivision for determining whether a fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The rule clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

Subdivision (c). Revised subdivision (c) provides a structure for presentation and consideration of motions for summary adjudication, and should displace in large part the numerous local rules spawned by deficiencies in the former rule. Adoption of this structure is not intended to create procedural pitfalls to deprive parties of trial with respect to facts in genuine dispute, but rather to provide a framework enabling the courts to discharge more effectively their responsibility in deciding whether such controversies exist.

A primary benefit of summary adjudication is elimination of ultimately wasteful

discovery and other preparation for trial. For this reason, early filing of a motion for summary adjudication may be desirable in many cases. However, if a party will need to obtain evidence from other persons in order to show that a fact is in genuine dispute, it should have a reasonable opportunity for discovery respecting those matters before being confronted with a motion for summary judgment or summary determination. It should also have a sufficient time--ordinarily more than the 10 days specified in the prior rule--to marshal and present its evidentiary materials to the court. The times specified in the revised rule for filing motions for summary adjudication and responses to such motions incorporate these principles.

Paragraphs (1) and (2) prescribe a format for motions for summary adjudication and responses thereto. They are to be non-argumentative, for arguments are to be presented in separate memorandums under paragraph (4). They must be specific, particularly with respect to the facts asserted to be not in genuine dispute. They must provide a cross-reference to the specific portions of any evidentiary materials relied upon to support a contention that a fact is or is not in genuine dispute; failure to do so will, under revised subdivision (e), relieve the court of the obligation to consider such materials.

Pertinent portions of evidentiary materials not previously filed must be attached to the motion or response. As under the prior rule, a movant must obtain leave of court to supplement its supporting materials because such late filing may prejudice other parties or merit an extension of time for responses. The obligation to obtain leave of court applies only to evidentiary materials, and not to memorandums and arguments filed under paragraph (4).

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not previously filed is not, of course, applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to cite and demonstrate in their responses the existence of such evidence.

A response to a motion for summary adjudication--formally recognized for the first time in this revision--can be filed by any party and can take several forms. In multiple-party cases a party similarly situated to the movant may merely wish to adopt the position of the movant in its response. The parties to be adversely affected by the judgment or determination sought in the motion may agree that the asserted facts, or some of them, are true but claim that, because of a different view regarding the controlling law, summary judgment or summary determination in their favor is warranted. Frequently, of course, the parties to be adversely affected by the judgment or determination sought in the motion will oppose the grant of any summary adjudication, either because of a different view of the law or because some of the asserted facts are believed to be false or at least in genuine dispute or because there are additional facts rendering the asserted facts not dispositive of the claim, defense, or issue. Subdivision (c)(2) is written to accommodate any of these

possibilities. Of course, a party may also file a separate cross motion for summary adjudication if there are other facts asserted to be not in genuine dispute on the basis of which it is entitled to a favorable judgment or determination as a matter of law.

A party is not required to file a response to a summary adjudication motion. The failure to make a timely response, however, may be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine dispute, the party must file a timely response that indicates the extent of disagreement with the movant's statement of the fact and provides reference to the evidentiary materials supporting its position. Failure to do so may result in the fact being deemed admitted for purposes of the pending action. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

The substance of the last sentence of former subdivision (c), relating to partial summary judgments on issues of liability, has been incorporated into the revision of subdivision (d).

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication is an interlocutory order not subject to the law-of-the-case doctrine; and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate for example because of developments in the case or changes of law.

Confusion was caused by the reference in the former provisions to a "hearing on the motion." While oral argument on a motion for summary adjudication is often desirable--and is explicitly authorized in subdivision (g)(4)--the court is not precluded from considering such motions solely on the basis of written submissions.

Subdivision (e). Implementing the principle stated in subdivision (b) that the court should consider (in addition to facts stipulated or admitted) only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary adjudication. Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as during a conference under Rule 16.

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying

in person, with the proviso that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

Independent authentication of documentary evidence is not required--submission of the materials under the rule should be treated as sufficient authentication. Similarly, independent evidence that the materials submitted are accurate copies of the originals is not required. However, if other evidence would be required at trial to establish admissibility--such as the foundation for business records--the party presenting such records should provide the supporting evidence through deposition, interrogatory answers, or affidavits. Voluminous data should, as permitted under Federal Rules of Evidence 1006, be submitted by means of an affidavit summarizing the data and offering, if not previously provided, access to the underlying data.

The last sentence in revised subdivision (e) provides that the court is required to consider only the materials called to its attention by the parties. Subdivision (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal.

Subdivision (f). Extensions of time to oppose summary adjudication should be less frequent than under former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party is unable to procure supporting materials that would satisfy the requirements of subdivision (e).

Subdivision (g).. The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of summary adjudications, or indeed even to direct that such motions not be filed with respect to particular claims, defenses, or issues. At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

Subdivision (g)(2) recognizes the court's power to change the time within which parties may respond to motions for summary judgment or summary determinations. Depending on the circumstances, particularly the extent to which discovery has or has not been afforded or available, the extent to which the facts have been stipulated or admitted, and the imminence of trial, the 30-day period prescribed in subdivision (c) may be lengthened or shortened.

Subdivision (g)(3) permits the court to initiate an inquiry into the appropriateness of summary adjudication. Such an inquiry may be initiated in an order setting a conference under Rule 16 or might arise as a result of discussions during such a conference. In any event, the parties should be afforded a reasonable opportunity to marshal and submit evidentiary materials if they assert facts are in genuine dispute and to present legal arguments bearing on the appropriateness of summary adjudication.

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications. One such purpose would be to hear oral arguments supplementing the written submissions. (Other portions of the revision to Rule 56 have eliminated the language that seemed to require such a hearing.) Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

The former provisions of subdivision (g), providing sanctions when "affidavits . . . are presented in bad faith or solely for the purpose of delay," have been eliminated as unnecessary in view of the amendments to Rule 11. The provisions of revised Rule 11 apply not only to affidavits submitted under Rule 56 but also to motions, responses, briefs, and other supporting materials. Motions for summary adjudication should not be filed merely to "educate" the court or as a discovery device intended to flush out the evidence of an opposing party.

Rule 58. Entry of Judgment

1 Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or
2 upon a decision by the court that a party shall recover only a sum certain or costs or
3 that all relief shall be denied, the clerk, unless the court otherwise orders, shall
4 forthwith prepare, sign, and enter the judgment without awaiting any direction by the
5 court; (2) upon a decision by the court granting other relief, or upon a special verdict
6 or a general verdict accompanied by answers to interrogatories, the court shall
7 promptly approve the form of the judgment, and the clerk shall thereupon enter it.

8 Every judgment shall be set forth on a separate document. A judgment is effective
9 only when so set forth and when entered as provided in Rule 79(a). Entry of the
10 judgment shall not be delayed for the taxing of costs. Entry of the judgment shall not
11 be delayed, nor the time for appeal extended, in order to award fees, except that,
12 when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court,
13 before a notice of appeal has been filed and become effective, may order that the
14 motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate
15 Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of
16 judgment except upon the direction of the court, and these directions shall not be
17 given as a matter of course.

COMMITTEE NOTES

Ordinarily the post-judgment filing of a motion for attorney's fees under Rule 54(d)(2) will not affect the time for appeal from the underlying judgment. 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 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.

Rule 83. Rules by District Courts; Orders

1 (a) Local Rules. Each district court by action of a majority of the judges
2 thereof may from time to time, after giving appropriate public notice and an
3 opportunity to comment, make and amend rules governing its practice ~~not in~~consistent

4 with these rules. A local rule so adopted shall take effect upon the date specified by
5 the district court and shall remain in effect unless amended by the district court or
6 abrogated by the judicial council of the circuit in which the district is located. Copies
7 of rules and amendments so made by any district court shall upon their promulgation
8 be furnished to the judicial council and the Administrative Office of the United States
9 Courts and be made available to the public.

10 **(b) Experimental Rules.** With the approval of the Judicial Conference of the
11 United States, a district court may adopt an experimental local rule inconsistent with
12 these rules if it is consistent with the provisions of Title 28 of the United States Code
13 and is limited in its period of effectiveness to five years or less.

14 **(c) Orders.** In all cases not provided for by rule, the district judges and
15 magistrates judges may regulate their practice in any manner ~~not in~~consistent with
16 these rules ~~or~~ and with those of the district in which they act.

17 **(d) Enforcement.** Rules and orders pursuant to this rule shall be enforced in
18 a manner that protects all parties against forfeiture of substantial rights as a result of
19 negligent failures to comply with a requirement of form imposed by such a local rule
20 or order.

COMMITTEE NOTES

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and these rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar authorization in other rules should not be viewed as by precluding by implication the adoption of a local rule subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with these rules should be permitted only with approval of the Judicial Conference of the United States, and then only for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") provided the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect parties against loss of substantive rights in the enforcement of local rules and standing orders against litigants who may be unfamiliar with their provisions.

The bulk of local rules and standing orders is now quite substantial. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by the elaboration of local rules enforced so rigorously that attorneys might be reluctant to hazard an appearance or clients reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local rules poses no problem for court

administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the substantive rights of the parties.

Rule 84. Forms

1 The forms contained in the Appendix of Forms are sufficient under the rules and
2 are intended to indicate the simplicity and brevity of statement which the rules
3 contemplate. <u>The Judicial Conference of the United States may authorize additional</u>
4 <u>forms and may revise or delete forms.</u>

COMMITTEE NOTES

The revision is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

1 ~~If~~ Testimony providing scientific, technical, or other specialized ~~knowledge~~
2 information, in the form of an opinion or otherwise, may be permitted only if (1) the
3 information is reasonably reliable and will substantially assist the trier of fact to
4 understand the evidence or to determine a fact in issue~~,~~ and (2) the~~a~~ witness is
5 qualified as an expert by knowledge, skill, experience, training, or education to provide
6 such testimony~~, may testify thereto in the form of an opinion or otherwise~~. Except
7 with leave of court for good cause shown, the witness shall not testify on direct
8 examination in any civil action to any opinion or inference, or reason or basis therefor,
9 that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of
10 the Federal Rules of Civil Procedure.

COMMITTEE NOTES

This revision is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.

The use of such testimony has greatly increased since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rule, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence, § 203 (3d ed., 1984). While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony has become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be

doubted and should be curtailed.

While concern for the quality and even integrity of hired testimony is not new, Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858); Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901), the hazards to the judicial process have increased as more technical evidence is presented:

> When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of dramatically opposed testimony.

3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 706[01] at 706-07 (1985).

While the admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision requires that expert testimony be "reasonably reliable" and "substantially assist" the fact-finder. The rule does not mandate a return to the strictures of Frye v. United States, 293 F.2d 1013 (D.C. Cir., 1923) (requiring general acceptance of the scientific premises on which the testimony is based). However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised Rule 26(c)(4) of the Federal Rules of Civil Procedure to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

The rule is also revised to complement changes in the Federal Rules of Civil Procedure requiring pretrial disclosure of the expert testimony to be presented at trial. The rule precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been adequately and timely disclosed in advance of trial. It has not been unusual for the testimony given at trial by an expert to vary substantially from that provided under former Fed. R. Civ. P. 26(b)(4)(A)(i) or at a deposition of the expert. At a minimum, any significant changes in an expert's expected testimony should be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure.

Additions or other changes to an expert's opinions must, under Fed. R. Civ. P. 26(e)(1), be disclosed no later than the time the proponent is required to disclose its witnesses and exhibits that are to be used at trial. Unless the court has specified another

time, these revisions must be disclosed at least 30 days before trial.

Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable, consistent with the oath or affirmation, to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new Fed. R. Crim. P. 16(a)(1)(E) and 16(b)(1)(C) will be determined in accordance with the principles that govern enforcement of the requirements of Fed. R. Crim. P 16.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

1 The expert may testify in terms of opinion or inference and give reasons therefor
2 without ~~prior disclosure of~~ first testifying to the underlying facts or data, unless the
3 court requires otherwise. The expert may in any event be required to disclose the
4 underlying facts or data on cross-examination.

COMMITTEE NOTES

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rule 702 and with revised Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure, which in civil cases require disclosure in advance of trial of the facts and data on which an expert's opinions are based.

If a serious question is raised under Rule 702 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.