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AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 1, 1991.—Referred to the Committee on the Judiciary and ordered to be printed

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1991

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress various amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The amendments proposed by the Judicial Conference to Rules 4, 4.1, 12, 26, 28, 30, and 71A are not transmitted at the present time pending further consideration by the Court.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein new chapter headings VIII and IX, amendments to Rules C and E of the Supplemental Rules for certain Admiralty and Maritime Claims, new Forms 1A and 1B to the Appendix of Forms, the abrogation of Form 18A, and amendments to Civil Rules 5, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 72, and 77, as hereinafter set forth.

[See infra, pp. _____ _____ _____]

2. That the foregoing additions to and changes in the Federal Rules of Civil Procedure, the Supplemental Rules for Certain Admiralty and Maritime Claims, and the Civil Forms shall take effect on December 1, 1991, and shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing addition to and changes in the Rules of Civil Procedure in accordance with the provisions of Seciton 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) FILING WITH THE COURT DEFINED. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

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Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Rule 15. Amended and Supplemental Pleadings

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(c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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Rule 24. Intervention

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(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. §

2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

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

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(c) PERSONS NOT PARTIES. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

Rule 35. Physical and Mental Examinations of Persons

(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to

produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF EXAMINER.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party,

the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

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(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

Rule 41. Dismissal of Actions

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(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or tocomply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court

in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

* * * * *

Rule 44. Proof of Official Record

(a) AUTHENTICATION.

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is

kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the

foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

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Rule 45. Subpoena

(a) FORM; ISSUANCE.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena

commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) SERVICE

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's

attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may

authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an

order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

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

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

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be

reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place

not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Rule 47. Selection of Jurors

* * * * *

(b) PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S. C. § 1870.

(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.

Rule 48. Number of Jurors--Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

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

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any

reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and

shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court

erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them,

shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

* * * * *

(c) JUDGMENT ON PARTIAL FINDINGS. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rule 53. Masters

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(e) REPORT.

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

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Rule 63. Inability of a Judge to Proceed

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may

proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

VIII. PROVISIONAL AND FINAL REMEDIES

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IX. SPECIAL PROCEEDINGS

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Rule 72. Magistrates; Pretrial Orders

(a) NONDISPOSITIVE MATTERS. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after

being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

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Rule 77. District Courts and Clerks

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(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure

to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

APPENDIX OF FORMS

* * * * *

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

To: [Fill in the name of the person to be served by a summons if service is necessary], on behalf of ---------[Name of any entity on whose behalf that person may be notified of the action].

A lawsuit has been commenced against [you or the entity on whose behalf you are addressed]. A copy of the complaint is attached to this notice. It has been filed in [name of district court]. It has been assigned docket number ----.

The purpose of this Notice and Request is to save the cost of service on you of a summons in that action. I hereby request that you sign the enclosed waiver. The cost of service will be avoided if I receive a signed copy of this form before ---------- [at least 30 days after the date designated below as the date on which this Notice and Request is sent, or 60 days if addressee is

not in any judicial district of the United States]. I enclose a stamped and addressed envelope [or other means of cost-free return] for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return this form, it will be filed with the court and no summons will be served on you, but the action will proceed as if you had been served on the date of filing. You will not be required to answer the complaint until ------- [60 days from the date designated below as the date on which this notice is sent, or 90 days if the addressee is not in any judicial district].

If you do not comply, I will effect service in a manner authorized by the Federal Rules of Civil Procedure and will ask the court to require you [or the party on whose behalf you are served] to pay the full costs of such service. In that connection, please read the statement of your duty to waive the service of the summons which is set forth in officially prescribed language on the reverse side [or at the foot] of the waiver form.

I affirm that this request is being sent to you on behalf of the claimant this ------- day of -----, 19--.

Signature of Plaintiff's Attorney

Form 1B. Waiver of Service of Summons

TO: [plaintiff's name and address]

I acknowledge receipt of your request that I waive service of a summons in the action of ---------- [caption of action] which is case number ------ [docket number] on the docket of the United States District Court for the ----------[name of district]. I have also received a copy of the complaint in the action, two copies of an instrument by which I can waive service of a summons and which formally explains the Duty to Waive Service, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service on me of a summons and an additional copy of the complaint in this lawsuit

and I do not require that you serve me in the manner provided by Rule 4.

I retain any defenses or objections I [or the entity on whose behalf I am addressed] may have to the lawsuit or the jurisdiction or venue of the court except any defense based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me [or the party on whose behalf I am addressed] if I do not answer the complaint within the time allowed by Rule 12(a) of the Federal Rules of Civil Procedure, but that on no account will a judgment be entered before the date specified for my answer in your request for this waiver.

Signature of Addressee

Date:----------

Relationship to Defendant, if responding on behalf of an entity:----------

TO BE PRINTED ON REVERSE SIDE OF THE WAIVER FORM PROVIDED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, OR SET FORTH AT THE FOOT OF THE WAIVER INSTRUMENT IF THE FORM IS NOT USED:

THE DUTY TO WAIVE SERVICE OF A SUMMONS

Rule 4 of the Federal Rules of Civil Procedure requires all parties to cooperate in saving the cost of service of the summons and complaint. A defendant who is notified of an action and asked for a waiver of service of a summons will be required to bear the cost of such service unless good cause be shown for the failure to sign such a waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over your person or property. A party who waives service of the summons retains any defenses or objections except any that might relate to the summons or to the service of the summons and complaint, and may later object to the jurisdiction of the court or the place where the action has been brought.

A defendant who waives service of a summons must serve on the plaintiff an answer to the complaint. The answer should also be filed with the court. If the answer is not served within the time allowed by Rule 12(a), a default judgment may be taken against that defendant. A defendant is allowed more time to answer if service is waived than if the summons is actually served.

Form 18-A. [Abrogated]

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

* * * * *

RULE C. Actions in Rem: Special Provisions

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(3) JUDICIAL AUTHORIZATION AND PROCESS. Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may

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

filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

* * * * *

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

RULE E. Actions in Rem and Quasi in Rem: General Provisions

* * * * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the

process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff

with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions With Respect to Property in Custody. The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

* * * * *

(5) RELEASE OF PROPERTY.

* * * * *

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by

the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

* * * * *

(9) DISPOSITION OF PROPERTY; SALES.

* * * * *

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) Sales, Proceeds. All sales of property shall be made by the marshal or a deputy marshal, or by other person or

organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

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

ROBERT E. KEETON
CHAIRMAN

JAMES E. MACKLIN, 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

March 25, 1991

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

As recommended in the attached addendum to the Report of the Judicial Conference Committee on the Rules of Practice and Procedure, on March 12, 1991, the Judicial Conference of the United States determined to request that the Court disregard the proposed revision of Rule 16 of the Federal Rules of Civil Procedure which was forwarded to the Court by my memorandum of December 27, 1990. In furtherance of that determination, please disregard the revision. It will be reconsidered by the Advisory Committee along with other Rule 16 proposals.

James E. Macklin, Jr.

Enclosure

Agenda E-21 (Addendum)
Rules
March 1991

ADDENDUM TO THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your committee has learned that the text and Advisory Committee's note to a proposed revision of Rule 16 that had been approved by the Advisory Committee on Civil Rules were inadvertently omitted from the materials actually submitted by the Standing Committee on Rules of Practice and Procedure to the Judicial Conference for its September 1990 meeting. Accordingly, although a brief description of the proposed change to Rule 16 was included in the Standing Committee's report to the Conference, the text and notes were not actually before the Judicial Conference when it approved the Standing Committee's report. Likewise, although a reference to a proposed amendment of Rule 16 is included in the transmittal letter from the Conference to the Supreme Court, dated November 19, 1990, the text and notes were not actually submitted to the Supreme Court. A supplemental submission with respect to Rule 16 was made by the Administrative Office to the Supreme Court on December 27, 1990, but the material so transmitted represented an earlier draft and not the revision that had been approved by the Advisory Committee and the Standing Committee.

For your information, the correct text of proposed Rule 16 that should have been transmitted along with the Advisory Committee notes is attached to this addendum.

In view of the foregoing, it is the conclusion of your committee that the Conference has not, in fact, approved any proposed revision of Rule 16 and that the Supreme Court should be asked to disregard the proposed Rule 16 amendment now pending before it. Your committee further concluded that none of the four changes to Rule 16 which the Standing Committee on Rules of Practice and Procedure had originally approved is critical. Three of the changes were included only to provide a convenient cross-reference to other portions of the Rules. The fourth is a substantive change but not of great consequence. The Advisory Committee on Civil Rules is now considering several other changes to Rule 16 and the four changes contained in the 1990 revision can conveniently be included in the version that the Advisory Committee will be submitting at a later time.

> Recommendation 5: That the Conference recommend to the Supreme Court that it disregard any proposed revision of Rule 16 of the Federal Rules of Civil Procedure, at this time. For the sake of clarity, it is explicitly stated that this recommendation to disregard applies only to Rule 16 and not to recommendations for amendments of other rules.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

19 NOV 1990

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Civil Procedure, and amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Civil Rule 4.1, proposed amendments to Rules 4, 5, 12, 15, 16, 24, 26, 28, 30, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 71A, 72, and 77; proposed new Chapter headings VIII and IX; proposed amendments to the Appendix of Forms; and proposed amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims. The proposed amendments are accompanied by Advisory Committee Notes.

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

Respectfully,

L. Ralph Mecham

Enclosures

EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE SEPTEMBER 1990

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

I. Amendments to the Rules of Practice and Procedure

B. Federal Rules of Civil Procedure

The Advisory Committee on the Federal Rules of Civil Procedure has submitted to your Committee proposed new Civil Rule 4.1; proposed amendments to Civil Rules 4, 5, 12, 15, 16, 24, 26, 28, 30, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 71A, 72, and 77; proposed new Chapter headings VIII and IX; proposed amendments to the Appendix of Forms; and proposed amendments to Admiralty Rules C and E. Most of these amendments were approved for publication by your Committee at its July 1989 meeting; some had been approved earlier.

The amendments to Rule 4 would result in a reorganization of the provisions of Rule 4 to eliminate overlapping provisions, to remove certain disconnected provisions to a new Rule 4.1, and to make the organization of this frequently amended rule more rational and easily accessible to practitioners. A number of substantive changes were made to accomplish the following: (1) authorize the use of any means of service provided by the state in which a defendant is served, as well as by the forum state: (2) permit nationwide exercise of personal jurisdiction in Federal question cases unless Congress otherwise provides; (3) clarify and extend the cost-saving practice of securing waivers of actual service of process; (4) call attention to the Hague Convention and other pertinent treaties; (5) reduce the risk that a plaintiff may lose a meritorious claim against the United States for failure to serve process properly on it; (6) allow the United States to effect service more economically and further reduce the use of United States marshals for service of process. Proposed new Civil Rule 4.1 would contain provisions eliminated from the old Rule 4 to achieve greater textual clarity.

The proposed amendment to Rule 5(d) would require that a person making service under the Rule certify the means of service. The proposed amendment to Rule 5(e), like the proposed amendment to Appellate Rule 25(a), is a reaction to the recommendation of the Judicial Improvements Committee that the rules permit local rules that would allow filing by electronic means if use of such means were approved by the Judicial Conference. The proposed amendment is consistent with the proposed appellate rule that any local rules must be consistent with any standards established by the Judicial Conference. Since it would not be effective until and unless the Judicial Conference first acts, your Committee approved this amendment even though it has not been submitted for public comment. Finally, another proposed amendment to Rule 5(e) would foreclose the local practice in some districts of requiring the clerk to reject for filing, instruments that do not conform to specified standards.

The proposed amendment to Rule 12 is necessary to conform with the proposed amendments to Rule 4. It also provides additional time to answer for defendants who waive service of process.

Rule 15 would be amended to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. It would compel a different result in cases like Schiavone v. Fortune, 106 S.Ct. 2379 (1986).

The proposed amendment to Rule 16(b) would establish that the time for the scheduling order be within 60 days after the appearance of any defendant. The proposed revision of Rule 16(d) is derivative from the proposals to be made with respect to Rules 50 and 52. It would call attention to the appropriate uses of Rules 42, 50, 52, and 56 at the pretrial stage to reduce the scope of discovery or of trial. The proposed amendment to Rule 24 would merely conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged.

Two amendments of Rule 26 are proposed. The first is to subdivision (a) and would create a preference for internationally agreed methods of discovery when such methods are available. The second revision would add a paragraph to subdivision (b) to impose on parties asserting privileges a duty to disclose information that would enable adversaries to resist the claims of privilege. The proposed amendment to Rule 28 is intended to conform the rule to the Hague Convention on the Taking of Evidence Abroad.

The proposal to amend Rule 30 would conform the rule to the revision of Rule 4 by postponing depositions in actions in which the defendant has waived service of process. More extensive amendments to Rule 30 were temporarily withdrawn by the Advisory Committee in light of the comments received.

The proposed amendment to Rule 34 would reflect the change effected by the proposed revision to Rule 45; it provides for a subpoena to compel non-parties to produce documents and things and to submit to inspections on premises. The proposed amendment to Rule 35 reflects changes in the rule made by Congress in 1988 permitting clinical psychologists to perform mental examinations conducted pursuant to that rule. The proposed amendment would extend the scope of professions authorized to conduct such examinations by permitting examinations by suitably licensed or certified examiners.

Rule 41 would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c) that would be more broadly useful. The proposed amendment to Rule 44 would take advantage of the Hague Public Documents Convention. The rule would also be amended to delete references to specific jurisdictions no longer subject to the sovereignty of the United States.

The proposed amendment of Rule 45 would substantially re-write the rule. The aims of revision are (1) to clarify and enlarge the protections afforded non-parties who are subject to subpoenas; (2) to facilitate access outside the deposition procedure to documents and things in the possession of non-parties; (3) to facilitate service of subpoenas at places distant from the district in which the action is pending; (4) to enable the court to compel a witness found within its state to attend trial; and (5) to clarify the text of the rule. The amendment would, inter alia, permit the issuance of subpoenas by attorneys as officers of the court, including attorneys in distant districts.

The proposed amendment to Rule 47 would eliminate the institution of the "alternate" juror. This, together with the amendment of Rule 48, would permit all jurors who sit through the case to participate in the verdict. In addition to providing that all jurors who hear the evidence would be permitted to participate in the verdict, Rule 48 would be revised to conform the rule to existing practice in requiring at

least six jurors. The proposed amendment would limit the number of jurors seated to twelve.

The proposed amendments to Rule 50 would serve several purposes. One is to enable the court to render judgment at any time during a jury trial when it becomes clear a party is entitled to such judgment. A second is to abandon familiar terminology that carries the burden of anachronisms suggested by the text of the present subdivision 50(a). A third is to articulate the standard for entry of judgment as a matter of law with sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function. The standard is not changed from the present law. In addition, Rule 52 would be amended to add subdivision (c) authorizing the court to enter judgment at any time during a non-jury trial when it becomes clear a party is entitled to such judgment. This provision is a companion to the proposed revision of Rule 50. The two proposals are also reflected in the language that would be added to Rule 16. Their shared purpose is to reduce the number of long trials. Judges using these devices as intended may schedule the course of a trial in such manner as to reach first any dispositive issues on which either party may fail to carry a burden of production or proof.

The proposed amendment to Rule 53 would impose on special masters the duty to distribute their reports to the parties. This would reduce dependence on the office of the clerks to perform this service.

Substantial proposed amendments to Rule 56 were temporarily withdrawn by the Advisory Committee in light of the comments received.

The proposed amendment to Rule 63 would facilitate the use of a substitute judge in the event the trial judge is unable to proceed. A substitute judge at a bench trial would be required to recall material witnesses who are available to testify again if such recall would not be an undue burden.

The proposed amendment to Rule 71A would conform that rule to the revised Rule 4. The revision to Rule 71A was not circulated for public comment, but since the amendment is technical, your Committee approved the change without publication. Rule 72 would be amended to eliminate discrepancy in the present rule in measuring the time for objection to a magistrate's action. The proposed revision of Rule 77 would conform that rule to the proposed revision of Appellate Rule 4, which will enable the district courts to deal with the increasingly frequent

problem of parties receiving no notice of judgments from which appeals might be taken.

The proposed amendments to chapter headings VIII and IX are designed to clarify the organization of the rules. The proposed revisions to the Appendix of Forms would delete Form 18A and replace it with new Forms 1A and 1B to accommodate the waiver of service provisions of amended Rule 4.

Finally, proposed amendments to Admiralty Rules C and E would conform those rules to Rule 4, as amended, by reducing the required use of United States marshals.

Except as noted above, the above-referenced new rule, amendments, chapter headings, and revisions to the forms were approved for public comment by your Committee and were published in October 1989. Hearings were held in Chicago and San Francisco. Minor changes were made in response to the comments received. Your Committee approves the proposed rule and amendments.

The above-proposed rule and amendments to the Federal Rules of Civil Procedure, the proposed amended chapter headings and amendments to the Appendix of Forms of the Federal Rules of Civil Procedure and the proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims are set out in Appendix B and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

Recommendation 3: That the Judicial Conference approve new Rule 4.1 and amendments to Rules 4, 5, 12, 15, 16, 24, 26, 28, 30, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 71A, 72, and 77 of the Federal Rules of Civil Procedure; new chapter headings VIII and IX and amendments to the Appendix of Forms to the Federal Rules of Civil Procedure; and amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims and transmit them to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

Agenda E-20 (Appendix B)
Rules
September 1990

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

June 19, 1990

TO: HON. JOSEPH F. WEIS, JR, CHAIR, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM: JOHN F. GRADY, CHAIR, ADVISORY COMMITTEE ON CIVIL RULES

I have the honor to report the recommendation of the Civil Rules Committee that the Supreme Court of the United States be advised to promulgate a substantial package of amendments to the Federal Rules of Civil Procedure.

These recommendations are based upon many extensive comments by the bench and bar on the package of proposals published for comment in October, 1989. Minor revisions have been made to many of the proposed amendments then published, and three of the proposals, the amendments to Rules 30, 38 and 56, have been temporarily withdrawn pending republication of more substantial revisions.

It is the hope of the Civil Rules Committee that so much of this package as your committee may approve will be transmitted to the Judicial Conference of the United States for consideration at its fall meeting, and that the rules might be promulgated with an effective date in 1991.

RULE 4.

This rule would be almost entirely re-written, to serve the following aims:

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

Second, the revised rule clarifies and extends the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants magnifying costs of service by requiring

expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

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

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

Fifth, the revision enables the United States to effect service more economically and further reduces the use of United States marshals in the performance of routine duties of service.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made who can be constitutionally subject to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. But a new provision makes those limits inapplicable to cases in which there is no state in which the defendant can be sued.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

RULE 4.1.

This is a new rule. The purpose in creating a new rule is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. The new rule would provide nationwide service of orders of civil commitment enforcing decrees or injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights.

RULE 5.

This rule would be revised in three significant respects. The first is to require that the person making service under the rule file a certificate of service. The second is to make provisional authorization for the use of FAX to file papers with district courts.

The third is to foreclose the practice of some districts requiring the clerk to reject for filing instruments that do not conform to specified standards.

RULE 12.

Amendment of this rule is necessary to conform to the revision of Rule 4. The revision provides additional time for answer by defendants who waive service of process.

RULE 14.

This rule would be amended to assure that third party defendants are provided with copies of current pleadings in actions to which they are joined as parties.

RULE 15.

The revision of this rule would prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. It extends the relation back of amendments that change the party or the naming of the party.

RULE 16.

An amendment to subdivision (b) is proposed with respect to the time for scheduling. The present rule requires that this be done within 120 days after filing, but it is possible that the defendant may not have been served by then. The Civil Rules Committee proposes that the time for scheduling be within 60 days after the appearance of a defendant.

The revision of subdivision (d) calls attention to the appropriate uses that may be made of Rules 42, 50, 52, and 56 at the pretrial stage to reduce the compass of discovery or of trial. The revision is related to concurrent amendments of Rules 50 and 52.

RULE 24.

This revision would conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged.

RULE 26.

Two revisions of this rule are proposed. The first is to subdivision (a) and creates a preference for internationally agreed methods of discovery when such methods are available. The second revision is to add a paragraph to subdivision (b) to impose

on parties asserting privileges a duty to disclose information enabling adversaries to resist such claims of privileges.

RULE 28.

The amendments to this rule conform the rule to the Hague Evidence Convention.

RULE 30.

This rule would be revised to conform to the revision of Rule 4, to postpone depositions in actions in which the defendant has waived service of process.

RULE 34.

This amendment would reflect the change effected by the proposed revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises.

RULE 35.

The revision adds a requirement that a professional appointed pursuant to this rule must be suitably licensed or certified. It is occasioned by a 1988 Congressional amendment of the rule. The requirement that the examiner be suitably licensed is intended to authorize the court to consider the appropriateness of the credentials of any specialist whom the court is asked to appoint pursuant to this rule.

RULE 41.

This rule would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c) that would be more broadly useful.

RULE 44.

The revision of this rule would make appropriate use of the Hague Documents Convention and would delete an obsolete reference.

RULE 45.

This rule would be completely re-written. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the

court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

RULE 47.

This revision would eliminate the use of alternate jurors, a practice that proceeded from the premise that a jury should number precisely twelve. It would also allow the court to excuse a juror during deliberations if the juror could not continue.

RULE 48.

This revision specifies that a jury may render a verdict with as few as six remaining members, and limits the number to twelve.

RULE 50.

This rule would be revised for several purposes. One is to enable the court to render judgment at any time during a jury trial that it is clear that a party is entitled to such judgment. A second is to abandon familiar terminology that carries a burden of anachronisms suggested by the text of the present subdivision 50(a). A third is to articulate the standard for entry of judgment as a matter of law with sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function. The standard is not changed from the present law.

Likewise retained is the provision requiring that a motion for judgment be made prior to submission if it is to be renewed after verdict. The Civil Rules Committee determined that there was sufficient reason to retain that requirement although some persons have argued for its deletion; the requirement does protect against possible surprise.

RULE 52.

This rule would be revised to add subdivision (c) authorizing the court to enter judgment at any time during a non-jury trial that it became clear that a party is entitled to such judgment. This provision is a companion to the revision of Rule 50, and replaces the deleted provisions of Rule 41. The two proposals are also reflected in the language added to Rule 16. Their shared purpose is to reduce the number of long trials. Judges using these devices as intended may schedule the course of a trial in such manner as to reach first any dispositive issues on which either party is likely to fail to carry a burden of production or proof.

RULE 53.

This rule would be revised to impose on special masters the duty to distribute their reports to the parties. This would reduce dependence on the office of the clerks to perform this service.

RULE 63.

This proposed revision would provide for a substitute judge. Such a judge at a bench trial would be required to recall material witnesses who are available to testify again.

CHAPTER HEADINGS VIII AND IX.

These revisions clarify the organization of the rules.

RULE 71A.

This revision would delete an incorrect reference to Rule 4. It has not been published for comment, but is merely technical in nature.

RULE 72.

This revision would clarify an ambiguity regarding the time for objection to a magistrate's report.

RULE 77.

This revision is proposed to conform to a proposed revision of the Federal Rules of Appellate Procedure which will enable the district courts to deal with the increasingly frequent problem of the party receiving no notice of an unfavorable judgment from which an appeal might be taken.

APPENDIX OF FORMS

This revision would delete the present Form 18A, and replace it with new Forms 1A and 1B that accurately reflect the proposed new Rule 4. These forms have been published for comment.

ADMIRALTY RULE C.

This revision conforms to the amendment of Rule 4 by reducing the required use of United States marshals.

ADMIRALTY RULE E.

This revision conforms to the amendment of Rule 4 by reducing the required use of United States marshals.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Special Note: If paragraph (k)(2) of the proposed revision of Rule 4 is disapproved by the Congress, it is nevertheless recommended that the rule be approved with the deletion of the paragraph, which is separable from the revised rule, and the numerical designation (1) from the preceding paragraph of subdivision (k).

Rule 4 ~~Process~~ Summons

(a) ~~SUMMONS: ISSUANCE. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.~~

~~(b) SAME:~~ FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if

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

any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. ~~When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.~~ The court may allow a summons to be amended.

(b) ISSUANCE. Upon the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If in proper form, the clerk shall sign and seal the summons and issue it to the plaintiff for service on the defendant. A summons or a copy of the summons if it is addressed to multiple defendants shall be issued for each defendant to be served.

(c) SERVICE WITH COMPLAINT; BY WHOM MADE.

(1) ~~Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose~~ A summons shall be served together with a copy of the complaint. The plaintiff shall be responsible for service of a summons and complaint within the time allowed under subdivision (m) of this rule and shall furnish the person effecting service with such copies of the summons and complaint as are necessary.

(2)(A) ~~A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served~~ Service may be effected by any person who is not a party and is not less than 18 years of age~~.~~, provided that the court may at the request of the plaintiff direct that service be effected by a person or officer (who may be a United States marshal or deputy United States marshal) specially appointed by the court for that

purpose. A special appointment shall be made when the plaintiff is

~~(2) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only~~

~~(i) on behalf of a party~~ authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or ~~of~~ a seaman authorized to proceed under Title 28, U.S.C. § 1916~~,~~.

~~(ii) on behalf of the United States or an officer or agency of the United States, or~~

~~(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be~~

~~properly effected in that particular action.~~

~~(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule~~

~~(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or~~

~~(ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by~~

~~the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).~~

~~(B) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.~~

~~(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.~~

~~(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.~~

(d) ~~SUMMONS AND COMPLAINT: PERSON TO BE SERVED.~~ WAIVER OF SERVICE; DUTY TO SAVE COSTS OF

SERVICE; REQUEST TO WAIVE. ~~The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:~~

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association subject to service under subdivisions (e), (f), or (h) of this rule, who receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of service of a summons. To avoid costs, the plaintiff may notify the defendant of the commencement of the action and request that the defendant waive service of a summons. If the notice and request

(A) is in writing and addressed to an individual who is the defendant or who could be served pursuant to subdivision (h) of this rule

as representative of an entity that is the defendant; and

(B) is dispatched through first-class mail or other reliable means; and

(C) is accompanied by a copy of the complaint and identifies the court in which it has been filed; and

(D) informs the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request; and

(E) sets forth the date on which the request is sent; and

(F) allows the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from such date if the defendant is addressed outside any judicial district of the United States; and

(G) provides the defendant with an extra copy of the notice and request and a prepaid means of compliance in writing;

and the defendant fails to comply with the request, the court shall impose the costs of effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant timely returning a waiver so requested shall not be required to serve an answer to the complaint until 60 days from the date on which the request of waiver of service was sent, or 90 days from such date if the defendant was addressed outside any judicial district of the United States.

(4) When a waiver of service is filed by the plaintiff with the court, the action shall proceed as if a summons and complaint had been served at the time of filing of the waiver and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request for a waiver of service

of a summons shall include the costs of service under subdivision (e), (f) or (h) of this rule and the costs, including a reasonable attorney's fee, of any motion required to collect such costs of service.

(~~f~~ e) SERVICE UPON INDIVIDUALS WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless otherwise provided by federal law, service ~~U~~upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in any judicial district of the United States:

(1) pursuant to the law of the State in which the district court is held, or in which service is effected, for the service of a summons upon such defendant in an action brought in the courts of general jurisdiction of such State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of

abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) SERVICE UPON INDIVIDUALS IN A FOREIGN COUNTRY. Unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in a foreign country:

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

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

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

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of copies of the summons and of the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(iii) diplomatic or consular officers when authorized by the United States Department of State; or

(3) by whatever means may be directed by the court, including service by means not authorized by international agreement or not

consistent with the law of a foreign country, if the court finds that internationally agreed means or the law of the foreign country (A) will not provide a lawful means by which service can be effected, or (B) in cases of urgency, will not permit service of process within the time required by the circumstances.

(~~2~~ g) SERVICE UPON INFANTS AND INCOMPETENT PERSONS. Service ~~U~~upon an infant or an incompetent person ~~by serving the summons and complaint~~ shall be effected in a judicial district of the United States in the manner prescribed by the law of the state in which the service is made for the service of summons or like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person shall be effected in a foreign country in the manner prescribed by subparagraphs (2)(A) or (2)(B) of subdivision (f) of this rule or by such means as the court may direct.

(~~3~~ h) SERVICE UPON CORPORATIONS AND ASSOCIATIONS. Unless otherwise provided by federal law, service ~~U~~upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, and from whom a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by paragraph (e)(1) of this rule or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a foreign country in any manner prescribed for individuals by subdivision (f)

of this rule, except personal delivery as provided in clause (f)(2)(C)(i).

(4 i) SERVICE UPON THE UNITED STATES, AND ITS AGENCIES, CORPORATIONS OR OFFICERS.

(1) Service ~~U~~upon the United States, shall be effected by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also

sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(~~5~~ 2) Service ~~U~~upon an officer, ~~or~~ agency, or corporation of the United States ~~,~~ shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by sending a copy of the summons and of the complaint by registered or certified mail to such officer, ~~or~~ agency, or corporation. ~~If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.~~

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

(~~f~~ j) SERVICE UPON FOREIGN, STATE OR LOCAL GOVERNMENTS.

(1) Service upon a foreign state or political subdivision thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service ~~U~~upon a state or municipal corporation or other governmental organization thereof subject to suit~~,~~ shall be effected by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons upon any such defendant.

~~(e) SUMMONS: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the~~

~~manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.~~

~~(f~~ k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. ~~All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional~~

~~parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1) (6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at same places. A subpoena may be served within the territorial limits provided in Rule 45.~~

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held, or

(B) who is a party joined under Rule 14 or Rule 19 and served at a place within a judicial district of the United States and not more than

100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U. S. C. § 1335, or

(D) when authorized by a statute of the United States.

(2) Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing a waiver of service is also effective to establish jurisdiction with respect to claims arising under federal law over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(~~c~~ l) ~~RETURN~~ PROOF OF SERVICE. If service is not waived, ~~T~~the person ~~serving the process~~ effecting service shall make proof ~~of service~~ thereof to the court ~~promptly and in any event within the time during which the person served must~~

~~respond to the process~~. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made outside any judicial district of the United States, proof may be made pursuant to any applicable treaty or convention, or if service is made pursuant to paragraphs (2) or (3) of subdivision (f) of this rule, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. ~~If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision.~~ Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

~~(h) AMENDMENT. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that~~

~~material prejudice would result to the substantial rights of the party against whom the process issued.~~

~~(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.~~

~~(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; of (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice;or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or~~

~~association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.~~

~~(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other~~

~~evidence of delivery to the addressee satisfactory to the court.~~

(~~j~~ m) ~~SUMMONS:~~ TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint ~~and the party on whose behalf such service was required cannot show good cause why such service was not made within that period~~, the court ~~action~~ shall ~~be dismissed as to that defendant without prejudice~~ upon ~~the court's~~ its own initiative after notice to ~~such party or upon motion~~ the plaintiff dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time, provided however that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision shall not apply to service in a foreign country pursuant to subdivision (~~i~~f) of this rule.

(n) SEIZURE OF PROPERTY; SERVICE OF SUMMONS NOT FEASIBLE.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that the plaintiff cannot with reasonable efforts serve the defendant with a summons in any manner authorized by this rule, the court may assert jurisdiction over any assets of the defendant found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court sits.

COMMITTEE NOTES

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

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

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

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

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

Fifth, the revision corrects a hiatus in the enforcement of federal law by providing nationwide territorial jurisdiction over defendants who are subject to the jurisdictional reach of no state.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made who can be constitutionally subject to the jurisdiction of the courts of the United States. The present

territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. But a new provision makes those limits inapplicable to cases in which there is no state in which the defendant can be sued.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

The Caption of the Rule. Rule 4 was entitled "Service of Process" and applied to the service not only of summons, but also other process as well, although these are not specified by the present rule. The service of process in eminent domain proceedings is governed by Rule 71A. The service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived as provided in subdivision (d), a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the present rule which bear specifically on the service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

Subdivision (a). The revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be in all cases the same. Few states now employ distinctive requirements of form for a summons and the applicability of such requirements in federal court can only serve as a trap for an unwary party or attorney.

A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1131 (2d ed. 1987).

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

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

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving summons. Subdivision (c) now extends that reduced dependence on the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, would be permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to provide through special appointment of a marshal, a deputy, or some other person, for the service of a summons in two classes of cases specified by statute, actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to provide for official service on motion of a party. Where a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals

Service to perform services in actions brought by the United States. 28 U. S. C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subparagraph (c)(2)(C) and (D) added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. This device should be useful in dealing with furtive defendants or those who are outside the United States and can be actually served only at substantial and unnecessary expense.

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. The Mayo Foundation, 886 F. 2d 161 (8th cir. 1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

An individual or corporate defendant may be requested to waive service of a summons wherever or however that defendant might be served. The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments subject to service under subdivision (j). Infants or incompetent persons are likewise not required to waive service because they are not presumed to understand the request and its consequences and must generally be served through fiduciaries.

The former rule was held to limit the acknowledgment procedure to cases in which the defendant could have been served within the forum state. CASAD, JURISDICTION IN CIVIL CASES (1986 Supp.), S5-13 and cases cited. But see United States v. Union Indemnity Ins. Co., 4 F.R.Serv. 3d 578 (E.D.N.Y. 1986). As Professor Casad observed,

there was no reason not to use this form of service outside the state, and there are many instances in which it has in fact been so used.

Paragraph (d)(1) is explicit that a timely waiver of service of a summons and complaint does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert any other defense that may be available. All that is eliminated are issues of the sufficiency of the summons and the sufficiency of the method by which it is served.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. It would, however, be sufficient cause not to shift the cost of service if the defendant did not receive the request or was insufficiently literate in English to understand it.

Because the transmission of the waiver does not purport to effect service except by consent, the transmission of a request for consent sent to a foreign country gives no reasonable offense to foreign sovereignty, even to foreign governments that have withheld their assent to service by mail. See Heidenberg, Service of Process and Gathering Information Relative to a Lawsuit Brought in West Germany, 9 INT'L LAW 725, 78-29 (1975). Because of the unreliability of some foreign mail services, the longer period of 60 days is provided for a return of a notice and request for waiver sent to a foreign country. The time limit of subdivision (m) is not applicable to such service.

Paragraph (d)(2) states what the present rule implies, that there is a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are

illustrated in Forms 1A and 1B, which replace the former Form 18A.

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

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

Paragraph (d)(3) extends the time for answer to assure that a defendant will not gain any delay by failing to waive service of the summons. Absent this extension, the defendant would be rewarded with additional time for answer under Rule 12(a) if the waiver is not returned, or if its return is postponed as long as the Notice and Request allows.

Paragraph (d)(4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980). It is also important to clarify the effective date for the purposes of Rules 12(a), 30(a), and 33(a).

The former provision set forth in subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs not reading the rule carefully supposed that service of the summons by ordinary mail was effective on receipt by the defendant, not only to establish the jurisdiction of the court over the defendant's person, but to toll the statute of limitations in actions in which service of the summons was required to toll the limitations period. The revised rule is clear that no tolling effect results from the dispatch of a Notice and Request that is not returned and filed, nor can the action proceed as it could if a summons had actually been served.

State limitations law may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable to circumstances in which the statute of limitations is about to run. Unless there is ample time, the plaintiff should proceed directly to the formal methods of service identified in subdivisions (e), (f) or (h).

Requested waiver should also be avoided when the time for service under subdivision (m) will expire before the ate on which the waiver must be returned. While a

plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F. Supp. 278 (N.D.Ga., 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h).

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

would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Subdivision (e). This subdivision displaced the former paragraph (d)(1) and clause (c)(2)(C)(i). It provides means for the service of summons on individuals in any judicial district. Together with subdivision (f), it provides for service on persons anywhere.

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

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

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

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

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state-law limitations on the exercise of jurisdiction over persons, the former subdivision (i)

limited service outside the United States to cases in which such extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of such statutory authority. E.g. Martens v. Winder, 341 F.2d 197 (9th Cir.), cert. denied 382 U.S. 937 (1965). Such authority was, however, found to exist by implication. E.g., SEC v. VTR, Inc., 39 F.R.D. 19 (S.D.N.Y. 1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

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

Paragraph (f)(1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., F. R. Civ. P. 4 (1986 Supp.). This Convention is an important means of dealing with problems of service in a foreign country. See generally RISTAU 1 INTERNATIONAL JUDICIAL ASSISTANCE 118-176 (1984). The use of the Convention is mandatory when available. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 722 (1988); Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. PITT. L. REV. 903 (1989). Therefore, this paragraph provides that the methods of service appropriate under an applicable treaty shall be employed if available when service is to be effected outside a judicial district of the United States, and if the applicable treaty so requires.

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

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

Two minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subparagraph (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

Paragraph (f)(2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule.

Service by methods that are violations of foreign law are not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods of conforming to local practice or using a local authority.

Subparagraph (f)(2)(C) prescribes other methods authorized by the former rule, and a new one set forth in clause (iii). This clause allows American consular and diplomatic officers to serve process in a foreign country pursuant to State Department rules. There is a statutory provision for this in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a)(4).

Paragraph (f)(3) authorizes the court to approve additional methods of service to be employed when circumstances justify. In approving exceptional service in urgent circumstances, the paragraph tracks the text of the Hague Convention. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court shall direct the method of service and may approve means that are not authorized by international agreement or that are contrary to foreign law. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corporation, 248 F. Sup.. 537 (S.D.N.Y. 1965).

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

Subdivision (h). This provision retains the text of the present paragraph (d)(3), with changes reflecting those made in subdivision (e). Provision is also explicitly made for service on a corporation or

association in a foreign country as formerly provided in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

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

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

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

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

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (k)(1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who could be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Subparagraph (k)(1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See CASAD, JURISDICTION IN CIVIL ACTIONS, chap. 5 (1983).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f) that provide for service of a summons and complaint anywhere in the world.

This paragraph corrects a hiatus in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable

limitation on the power of state courts which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Intern. v. Rudolf Wolff & Co., Ltd., 108 S.Ct. 404, 411 (1987). This paragraph provides a federal reach in actions not subject to such nationwide service provisions if it is needed to enable the federal courts to enforce the national law.

There remain Constitutional limitations on the exercise of territorial jurisdiction of federal courts over persons outside the United States. These arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977). There may also be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of the "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d. 280, 286 n.3 (3d Cir. 1981). Compare World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp of Ireland v. Compagnie des Bauxites des Guinee, 456 U.S. 692, 702-703 (1982); Asahi Metal Indus v. Superior Court of Cal., Solano County, 107 S. Ct. 1026, 1033-1035 (1987). See generally Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 VILL. L. REV. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U. S. C. §§ 1404, 1406. The availability of § 1404 providing for transfer for fairness and convenience precludes any conflict

between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Ind. v. Superior Court of Cal., Solano County, 107 S. CT. 1026, 1035 (1987), quoting United States v. First National City Bank, 379 U. S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach is inapplicable to cases in which federal jurisdiction rests on the diversity of citizenship of the parties. This is perhaps a necessary application of the principle of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Cf. Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963). The extension of the federal reach under this rule is also applicable only to defendants against whom a federal claim is made.

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1132 (2d ed. 1987).

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

The new subdivision explicitly provides that the court shall allow additional time for service if there is good cause for the plaintiff's failure to effect it in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief was formerly available in some cases, partly in reliance on Rule 6(b), and it was not the purpose of the former rule to be rigorous in the imposition of a

dismissal for slowness in effecting service. Relief may be justified, for example, in a case in which the applicable statute of limitations would bar the refiled action, or the defendant was evading service or concealing a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F. R. D. 104 (E.D.Mich. 1987). A specific instance of good cause is set forth in paragraph (i)(3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts and Eyeglasses, 876 F. 2d. 596 (7th cir. 1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to "the plaintiff" even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (n)(1) saves the rule from superseding 28 U.S.C. § 1655 or any similar provisions bearing on seizures or liens.

Paragraph (n)(2) provides for other uses of quasi-in-rem jurisdiction, but limits its use to necessitous circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a

defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing such seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

Rule 4.1 Service of Other Process

(a) GENERALLY. Process, other than a summons as provided in Rule 4 or subpoena as provided in Rule 45, shall be served by a United States marshal or a deputy United States marshal, or by a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). Such process may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(b) ENFORCEMENT OF ORDERS: COMMITMENT FOR CIVIL CONTEMPT. An order of civil commitment of a person held to be in contempt of a decree or

injunction issued to enforce the laws of the United States may be served and enforced in any district. Orders of civil contempt enforcing other decrees or injunctions shall be served in the state in which is located the court issuing the order to be enforced or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

COMMITTEE NOTE

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

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

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. Chagras v. United States, 369 F. 2d 643 (5th

cir. 1966). The same is true for service of an order to show cause. Waffenschneider v. Mackay, 763 F. 2d 711 (5th cir. 1985).

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

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

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court ~~either before service~~

~~or~~ within a reasonable time ~~there~~after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) FILING WITH THE COURT DEFINED. The filing of ~~pleadings and other~~ papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in

proper form as required by these rules or any local rules or practices.

COMMITTEE NOTES

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

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

Subdivision (e). The words "pleading and other" are stricken as unnecessary. Pleadings are papers within the meaning of the rule. The revision also accommodates the development of the use of facsimile transmission for filing.

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

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

(a) WHEN PRESENTED.

(1) Unless a different time is prescribed in a statute of the United States, ~~A~~ a defendant shall serve an answer

(A) within 20 days after the service of the summons and complaint upon that defendant, or

(B) if service of the summons has been waived on request made pursuant to Rule 4(d), within 60 days from the date on which the request of waiver was sent, or 90 days from such date if the defendant was addressed outside any judicial district of the United States ~~except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.~~

(2) A party served with a pleading stating a cross-claim against that party

shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(3) The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(~~i~~ A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be

served within 10 days after notice of the court's action; or

(~~2~~ B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

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COMMITTEE NOTE

Subdivision (a) is revised by the addition of subparagraph (a)(1)(B) to reflect amendments to Rule 4. A defendant who waives service of process on request made pursuant to Rule 4(d) is protected against any resulting abbreviation of the time for answer. Pursuant to Rule 4(d)(3), the defendant is allowed 60 days from the date of dispatch of the notice and request, or 90 days if the defendant is addressed outside any judicial district of the United States.

The time of dispatch appears on the face of the request for waiver and is hence a date readily known to both parties. It is therefore the date used to measure the return day for the waiver form, so that the plaintiff can know on a day certain that service of process will be necessary, and is accordingly also a useful date for measuring the time for answer. The defendant who returns the waiver is given additional time for answer in order to assure that the defendant loses nothing by waiving service of process.

The subdivision is also amended to strike a reference to a subdivision of Rule 4 that has been deleted from that rule. It is also amended to strike the reference to state law with respect to the time for answer. This amendment accords with the amendment to Rule 4 in providing nationwide uniformity with respect to the form and content of a summons: 20 days after service of the summons is the time normally required for answer wherever the district court may sit.

Rule 15. Amended and Supplemental Pleadings

* * * * *

(c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) ~~Whenever~~ the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, ~~the amendment relates back to the date of the original pleading.~~ or

(3) ~~An~~ the amendment ~~changing~~ changes the party or the naming of the party against whom a

claim is asserted ~~relates back~~ if the foregoing provision (2) is satisfied and, within the period provided by ~~law~~ Rule 4(m) for ~~commencing the action against~~ service of the summons and complaint, the party to be brought in by amendment~~, that party~~ (~~1~~ A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (~~2~~ B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of ~~clauses~~ subparagraphs (~~1~~ A) and (~~2~~ B) ~~hereof~~ this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

* * * * *

COMMITTEE NOTE

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

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

Paragraph (c)(3). This paragraph has been revised to change the result in Schiavone v. Fortune, supra, with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If

the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in Schiavone v. Fortune that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure, 63 NOTRE DAME L. REV. 720 (1988); Brussack, Outrageous Fortune: The Case for Amending Rule 15(c) Again, 61 S. CAL. L. REV. 671 (1988); Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 86 MICH. L. REV. 1507 (1987).

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

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

Rule 24. Intervention

* * * * *

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. §

2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

COMMITTEE NOTE

Language is added to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules. As the text provides, counsel challenging the constitutionality of legislation in an action in which the appropriate government is not a party should call the attention of the court to its duty to notify the appropriate governmental officers. The statute imposes the burden of notification on the court, not the party making the constitutional challenge, partly in order to protect against any possible waiver of constitutional rights by parties inattentive to the need for notice. For this reason, the failure of a party to call the court's attention to the matter cannot be treated as a waiver.

Rule 26. General Provisions Governing Discovery

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other

purposes; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.

(b) DISCOVERY SCOPE AND LIMITS.

* * * * *

(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

* * * * *

COMMITTEE NOTES

Subdivision (a). Language is added to this subdivision to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. Societe Nationale v. U. S. Dist. Ct., S. D. Iowa, 107 S. Ct. 2542, 2557-2568 (1987). Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. PITT. L. REV. 903 (1989); Alley & Prescott, Recent Developments in the United States Under the Hague Evidence Convention, 2 LEIDEN J. INT'L LAW 19 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The rule of comity stated in this rule does not apply to discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the place of trial. E.g. Insurance Corp. of Ireland v. Campagnie des Bauxites, 456 U. S. 694 (1982). The rule also does not apply to the taking of depositions of parties or persons controlled by parties who may be deposed within the United States. However, comity may be employed in matters to which the requirement of the rule does not apply. Cf. Societe Nationale v. U. S. Dist. Ct., S. D. Iowa, 107 S. Ct. 2542 (1987).

Nor does the rule require comity where the discovery methods available by treaty are "inadequate or inequitable." This provision allows the court to make a discreet judgment on the facts as to the sufficiency of the internationally agreed discovery methods. Illustratively, a party should be required to make first resort under the Hague Convention despite a partial Article 23 reservation by the country in which discovery

is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery.

The rule also directs the court to authorize the use of other discovery methods as may be needed to assure that discovery is not "inequitable." International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule 26-37 should not be permitted to use the Hague Convention or a similar international agreement or even the law of the party's own country to create obstacles to equivalent discovery by an adversary.

Indeed, the court is not precluded by the rule from authorizing, to assure that discovery is adequate and equitable, the use of discovery methods that may violate the laws of another country. Cf. Societe Internationale v. Rogers, 357 U. S. 197 (1958). Where the impediment to discovery is imposed by public authority not at the request of the international litigant or the non-party from whom information is sought, accommodation may be necessary to reconcile the requirement of this rule that discovery be equitable to foreign law. But in no circumstance can the court authorize discovery methods that violate the mandate of a treaty that is the law of the United States.

Subdivision (b). A new paragraph (b)(5) is added. Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The party claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who claims a privilege or protection but fails to disclose the claim is at risk of waiving the privilege or protection and may be subject to sanctions under Rule 37(b)(2). A party claiming a privilege or protection who fails to provide adequate information about the claim to the party seeking

the information may be compelled to do so by motion made pursuant to Rule 37(a). Such motions and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A party receiving a discovery request that is too broad may be faced with a burdensome task to provide full information regarding all that party's claims to privilege or work product protection. Such a party is entitled to a protective order under subdivision (c) of this rule. The issue of the sufficiency of a disclosure is appropriate for resolution at a pretrial conference conducted under Rule 16(b), and may require an examination of documents in camera.

Rule 28. Persons Before Whom Depositions May Be Taken

* * * * *

(b) IN FOREIGN COUNTRIES. Subject to the provisions of Rule 26(a) ~~In a foreign country~~, depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (~~2~~ 4) before a person commissioned by the court, and a person so commissioned shall have

the power by virtue of his commission to administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~. A commission or a letter ~~rogatory~~ of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter ~~rogatory~~ of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter ~~rogatory~~ of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. A letter ~~rogatory~~ of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter ~~rogatory~~ of request need not be excluded merely for the reason that it is not a verbatim

transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

* * * * *

COMMITTEE NOTE

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties which the United States may enter into in the future, as sources of additional methods for taking depositions abroad. Pursuant to revised Rule 26(a), the party taking the deposition is obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath.

The term "letter of request" has been substituted in the rule for the former term, "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Rule 30. Depositions Upon Oral Examination

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by

deposition upon oral examination. 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),~~ if service has been waived pursuant to Rule 4(d), 70 days after the date on which the request for waiver was sent or 100 days if the defendant was addressed outside any judicial district of the United States, 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.

* * * * *

COMMITTEE NOTE

Subdivision (a). The revision deletes the reference to Rule 4(e), a provision that has itself been deleted.

The revision also adds a provision conforming this rule to Rules 4(d) and 12(a), as amended, providing a grace period for all defendants wherever served; those who waive service, like those who are served, are protected from depositions until 10 days after the date on which the answer must be filed.

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

* * * * *

(c) PERSONS NOT PARTIES. ~~This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land~~ A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

COMMITTEE NOTE

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.

Rule 35. Physical and Mental Examinations of Persons

(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical ~~examination by a physician,~~ or mental examination by a ~~physician or psychologist~~ suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF ~~EXAMINING PHYSICIAN OR PSYCHOLOGIST~~ EXAMINER.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy

of the detailed written report of the ~~examining physician or psychologist~~ examiner setting out the ~~physician's~~ examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an ~~physician or psychologist~~ examiner fails or refuses to make a report the court may exclude the ~~physician~~ examiner's testimony if offered at trial.

(2) * * * * *

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This

subdivision does not preclude discovery of a report of an ~~examining physician or psychologist~~ examiner or the taking of a deposition of the ~~physician psychologist~~ examiner in accordance with the provisions of any other rule.

~~(c) DEFINITIONS. For the purpose of this rule, a psychologist is a psychologist licensed or certified by a State or the District of Columbia.~~

COMMITTEE NOTE

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical pyschologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

The requirement that the examiner be suitably licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2234 (1986 Supp.). The revision is intended to encourage the exercise of

this discretion, especially with respect to examinations by persons having narrow qualifications.

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

Rule 41. Dismissal of Actions

* * * * *

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. ~~After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court~~

~~renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).~~ Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

* * * * *

COMMITTEE NOTE

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

Rule 44. Proof of Official Record

(a) AUTHENTICATION.

(1) Domestic. An official record kept within the United States, or any state, district,

or commonwealth, ~~territory, or insular possession thereof,~~ or within ~~the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands~~ a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political sub-division in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested

by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or

52 convention to which the United States and the
53 foreign country in which the official record is
54 located are parties.

* * * * *

COMMITTEE NOTE

The amendment to paragraph (a)(1) strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official records should be treated as domestic records.

The amendment to paragraph (a)(2) adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Moreover, it does not affect the former practice of attesting the records, but only changes the method of certifying the attestation.

The Hague Public Documents Convention provides that the requirement of a final certification is abolished and replaced with a model apostille, which is to be issued by officials of the country where the records are located. See Hague Public Documents Convention, Arts. 2-4. The apostille certifies the signature, official position, and seal of the attesting officer. The authority who issues the apostille must maintain a register or card index showing the serial number of the apostille and other relevant information recorded on it. A foreign court can then check the serial number and information on the apostille with the issuing authority in order to guard against the use of fraudulent apostilles. This system provides a reliable method for maintaining the integrity of the authentication process, and the apostille can be accorded greater weight than the

normal authentication procedure because foreign officials are more likely to know the precise capacity under their law of the attesting officer than would an American official. See generally Comment, The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 11 HARV. INT'L L.J. 476, 482, 488 (1970).

Rule 45. Subpoena

(a) ~~FOR ATTENDANCE OF WITNESSES;~~ FORM; ISSUANCE.

(1) Every subpoena shall ~~be issued by the clerk under the seal of the court, shall~~

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions(c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, ~~or a subpoena for the production of documentary evidence,~~ signed ~~and sealed~~ but otherwise in blank, to a party requesting it, who shall ~~fill~~ complete it ~~in~~ before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) ~~FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.~~

~~(c)~~ SERVICE

(1) A subpoena may be served by ~~the marshal, a deputy marshal, or by~~ any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein

shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

~~(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.~~

~~(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and~~

~~of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.~~

~~The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order~~

~~at any time before or during the taking of the deposition.~~

~~(2) A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.~~

~~(c) SUBPOENA FOR A HEARING OR TRIAL.~~

~~(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held.~~

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, ~~A~~ a subpoena ~~requiring the attendance of a witness at a hearing or trial~~ may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, ~~or~~ trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or

rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place ~~where the district court is held~~ of the deposition, hearing, trial, production or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

~~(2)~~ A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden

or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the

subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

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

travel from any such place within the state in which the trial is held, or

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

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met

without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(~~c~~ e) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to

257 require a non-party to attend or produce at a place
258 not within the limits provided by clause (ii) of
259 subparagraph (c)(3)(A).

COMMITTEE NOTES

Purposes of Revision. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a). This subdivision is amended in seven significant respects.

First, Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. This revision perhaps culminates an evolution. Subpoenas were long issued by specific order of the court. As this became a burden to the court, general orders were made authorizing clerks to issue subpoenas on request. Since 1948, they have been issued in blank by the clerk of any federal court to any lawyer, the clerk serving as stationer to the bar. In allowing counsel to issue the subpoena, the rule is merely a recognition of present reality.

Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions. In ICC v. Brimson, 154 U.S. 447 (1894), the Court upheld a statute directing federal courts to issue

subpoenas to compel testimony before the ICC. In CAB v. Hermann, 353 U.S. 322 (1957), the Court approved as established practice the issuance of administrative subpoenas as a matter of absolute agency right. And in NLRB v. Warren Co., 350 U.S. 107 (1955), the Court held that the lower court had no discretion to withhold sanctions against a contemnor who violated such subpoenas. The 1948 revision of Rule 45 put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute. Two courts of appeals have touched on the issue and have described lawyer-issued subpoenas as mandates of the court. Waste Conversion, Inc. v. Rollins Environmental Services (NJ), Inc., 893 F. 2d. 605 (3d cir, 1990); Fisher v. Marubent Cotton Corp., 526 F. 2d 1338, 1340 (8th cir., 1975). Cf. Young v. United States ex rel Vuitton et Fils S.A., 481 U. S. 787, 821 (1987)(Scalia, J., concurring). This revision makes the rule explicit that the attorney acts as an officer of the court in issuing and signing subpoenas.

Necessarily accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power. The latter development is reflected in the provisions of subdivision (c) of this rule, and also in the requirement imposed by paragraph (3) of this subdivision that the attorney issuing a subpoena must sign it.

Second, Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted pro haec vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks' offices some distance from the place at which the action

proceeds. This change does not enlarge the burden on the witness.

Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished by the provisions of Paragraph (a)(1).

Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

Fifth, Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Sixth, Paragraph (a)(1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice

required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Subdivision (b). Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes.

The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

Paragraph (b)(3) retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

Subdivision (c). This provision is new and states the rights of witnesses. It is not intended to diminish rights conferred by Rules 26-37 or any other authority.

Paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. No change in existing law is thereby effected. Abuse of a subpoena is an actionable tort, Board of Ed. v. Farmingdale Classroom Teach. Ass'n,

38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is also embodied in Model Rule of Professional Conduct 4.4. The liability of the attorney is correlative to the expanded power of the attorney to issue subpoenas. The liability may include the cost of fees to collect attorneys' fees owed as a result of a breach of this duty.

Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short time periods under Rule 6 and to allow a bit more time for such objections to be made.

A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, e.g., United States v. Columbia Broadcasting Systems, Inc., 666 F.2d 364 (9th Cir. 1982).

Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power. It replaces and enlarges on the former subdivision (b) of this rule and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the witness who may read it on the subpoena, where it is required to be printed by the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed or modified. It restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1), with one important change. Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides.

This extension is subject to the qualification provided in the next paragraph, which authorizes the court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial. The traveling non-party witness may be entitled to reasonable compensation for the time and effort entailed.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness. An additional circumstance in which such action is required is a request for costly production of documents; that situation is expressly governed by subparagraph (b)(2)(B).

Clause (c)(3)(B)(i) authorizes the court to quash, modify, or condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information. It corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4). A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, e.g., Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, Compelling the Expert Witness: Fairness and Utility Under the Federal

Rules of Civil Procedure, 19 GA.L.REV. 71 (1984); Note, Discovery and Testimony of Unretained Experts, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in United States v. Columbia Broadcasting Systems Inc., 666 F.2d 364 (9th Cir. 1982). See also Wright v. Jeep Corporation, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in Kaufman v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify...."

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d). This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5). Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems

unjustified. The person claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e). This provision retains most of the language of the former subdivision (f).

"Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. E.g., Walker v. City of Birmingham, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

Rule 47. Selection of Jurors

* * * * *

(b) ~~ALTERNATE JURORS. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The~~

~~additional peremptory challenges may be used against an alternate juror only, and the other peremptory challengesallowed by law shall not be used against an alternate juror.~~

PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S. C. § 1870.

(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.

COMMITTEE NOTE

Subdivision (b). The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c). This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial.

Sickness, family emergency or juror miscondct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

Rule 48. ~~Juries of Less Than Twelve--Majority Verdict~~ Number of Jurors--Participation in Verdict

~~The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.~~

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

COMMITTEE NOTE

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. Cf. Ballew v.

Georgia, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. Ray v. Parkside Surgery Center, 13 F. R. Serv. 585 (6th cir. 1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in Ballew v. Georgia, supra.

Rule 50. ~~Motion for a Directed Verdict and for~~ Judgment ~~Notwithstanding the Verdict~~ as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) ~~MOTION FOR DIRECTED VERDICT: WHEN MADE;~~

~~EFFECT. A party who moves for a directed verdict~~

~~at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.~~

JUDGMENT AS A MATTER OF LAW

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL ~~JUDGMENT NOTWITHSTANDING THE VERDICT~~. Whenever a motion for a ~~directed verdict~~ judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing ~~N~~not later than 10 days after entry of judgment~~, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed~~

~~verdict~~. A motion for a new trial under Rule 59 may be joined with a renewal of the ~~this~~ motion for judgment as a matter of law, or a new trial may be ~~prayed for~~ requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law ~~if the requested verdict had been directed~~. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law ~~if the requested verdict had been directed~~ or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment ~~notwithstanding the verdict, provided for in subdivision (b) of this rule,~~ as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new

trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party ~~whose verdict has been set aside on motion for judgment notwithstanding the verdict~~ against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment ~~notwithstanding the verdict~~.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment ~~notwithstanding the verdict~~ as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to

a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment ~~notwithstanding the verdict~~. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

COMMITTEE NOTE

Subdivision (a). The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. Cf. Galloway v. United States, 319 U. S. 372 (1943).

The revision abandons the familiar terminology of direction of verdict for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. See generally Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate

trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. Cf. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury"); Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986) ("the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case ..."); McLaughlin v. The Fellows Gear Shaper Co., 4 F.R.Serv. 3d 607 (3d Cir. 1986) (per Adams, J., dissenting: "This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury"). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. Slocum v New York Insurance Co., 228 U.S. 364 (1913). But cf. Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., Benson v. Allphin, 788 F. 2d. 268

(7th cir. 1986) ("this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict"). See generally 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. E.g., Kutner Buick, Inc. v. American Motors Corp., 848 F. 2d 614 (3d cir. 1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on

the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this requirement is to meet the requirements of F. R. App. P. 4(a)(4).

Subdivision (c). Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d). Revision of this subdivision conforms the language to that of the previous subdivisions.

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not

necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in ~~Rule 41(b)~~ subdivision (c) of this rule.

(b) AMENDMENT.* * * * *

(c) JUDGMENT ON PARTIAL FINDINGS. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or

third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

COMMITTEE NOTE

Subdivision (c) is added. It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.

As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on

questions of law as provided in Rule 56(a) and are not shielded by the "clear error" standard of review.

Rule 53. Masters

* * * * *

(e) REPORT.

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

* * * * *

COMMITTEE NOTE

The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

Rule 63. ~~Disability~~ Inability of a Judge to Proceed

If ~~by reason of death, sickness or other disability, a judge before whom an action has been tried~~ a trial or hearing has been commenced and the judge is unable to ~~perform the duties to be performed by the court under these rules~~ proceed, ~~after a verdict is returned or findings of fact and conclusions of law are filed, then~~ any other judge ~~regularly sitting in or assigned to the court in which the action was tried~~ may ~~perform those duties;~~ proceed with it ~~but if such other judge is satisfied that such other judge cannot perform those duties because such other judge did not preside at the trial or for any other reason, such other judge may in such other judge's discretion grant a new trial~~ upon certifying familiarity with the record and determining that the proceedings in

the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE NOTE

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. United States v. Lane, 708 F. 2d 1394, 1395-1397 (9th cir. 1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. E.g., Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir. 1982, en banc) cert. denied, 459 U.S. 910 (1982) (jury trial); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711 (6th Cir. 1977) (non-jury trial). See generally Comment, The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co., 67 MINN. L. REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the

disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F. R. Ev. 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. Anderson v. City of Bessemer City NC, 470 U. S. 564, 575 (1985); Marshall v. Jerrico Inc, 446 U. S. 238, 242 (1980). See also United States v. Radatz, 447 U.S. 667 (1980).

VIII. PROVISIONAL AND FINAL REMEDIES ~~AND SPECIAL PROCEEDINGS~~

COMMITTEE NOTE

The purpose of the revision is to divide this chapter of the Rules into two. No substantive change is effected.

IX. SPECIAL PROCEEDINGS

Committee Note

This chapter heading is to be inserted between Rule 71 and Rule 71A.

Rule 71A. Condemnation Of Property

* * * * *

(d) PROCESS.

* * * * *

(3) Service of Notice.

(i) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 ~~(c) and (d)~~ upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

* * * * *

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4 ~~(g) and (h)~~.

* * * * *

COMMITTEE NOTE

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

Rule 72. Magistrates; Pretrial Orders

(a) NONDISPOSITIVE MATTERS. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the

case is assigned shall consider such objections ~~made by the parties, provided they are served and filed within 10 days after entry of the order,~~ and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

* * * * *

COMMITTEE NOTE

This amendment is intended to eliminate a discrepancy in measuring the 10 days for serving and filing objections to a magistrate's action under subdivisions (a) and (b) of this Rule. The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed within 10 days of entry of the order, but required objections to dispositive motions to be made within 10 days of being served with a copy of the recommended disposition. Subdivision (a) is here amended to conform to subdivision (b) to avoid any confusion or technical defaults, particularly in connection with magistrate orders that rule on both dispositive and nondispositive matters.

The amendment is also intended to assure that objections to magistrate's orders that are not timely made shall not be considered. Compare Rule 51.

Rule 77. District Courts and Clerks

* * * * *

(d) NOTICE OF ORDER OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each

party who is not in default for failure to appear, and shall make a note in the docket of the mailing. ~~Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but~~ aAny party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

COMMITTEE NOTE

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1986); Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates, 780 F.2d 1043 (D.C. Cir. 1986); In re OPM Leasing Services, Inc., 769 F.2d 911 (2d Cir. 1985); Spika v. Village of Lombard, Ill., 763 F.2d 282 (7th Cir. 1985); Hall v. Community Mental Health Center of Beaver County, 772 F.2d 42 (3d Cir. 1985); Wilson v. Atwood v. Stark, 725 F.2d 255 (5th Cir. en banc), cert dismissed, 105 S.Ct. 17 (1984); Case v. BASF Wyandotte, 727 F.2d 1034 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 386 (1984); Hensley v. Chesapeake &

Ohio R.R.Co., 651 F.2d 226 (4th Cir. 1981); Buckeye Cellulose Corp. v. Electric Construction Co., 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

APPENDIX OF FORMS

* * * * *

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

To: [Fill in the name of the person to be served by a summons if service is necessary], on behalf of ----------[Name of any entity on whose behalf that person may be notified of the action].

A lawsuit has been commenced against [you or the entity on whose behalf you are addressed]. A copy of the complaint is attached to this notice. It has been filed in [name of district court]. It has been assigned docket number ----.

The purpose of this Notice and Request is to save the cost of service on you of a summons in that action. I hereby request that you sign the enclosed waiver. The cost of service will be avoided if I receive a signed copy of this form before ---------- [at least 30 days after the date designated below as the date on which this Notice and Request is sent, or 60 days if addressee is

not in any judicial district of the United States]. I enclose a stamped and addressed envelope [or other means of cost-free return] for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return this form, it will be filed with the court and no summons will be served on you, but the action will proceed as if you had been served on the date of filing. You will not be required to answer the complaint until ------- [60 days from the date designated below as the date on which this notice is sent, or 90 days if the addressee is not in any judicial district].

If you do not comply, I will effect service in a manner authorized by the Federal Rules of Civil Procedure and will ask the court to require you [or the party on whose behalf you are served] to pay the full costs of such service. In that connection, please read the statement of your duty to waive the service of the summons which is set forth in officially prescribed language on the reverse side [or at the foot] of the waiver form.

I affirm that this request is being sent to you on behalf of the claimant this ------- day of -----, 19--.

Signature of Plaintiff's Attorney

Form 1B. Waiver of Service of Summons

TO: [plaintiff's name and address]

I acknowledge receipt of your request that I waive service of a summons in the action of ---------- [caption of action] which is case number ------ [docket number] on the docket of the United States District Court for the ----------[name of district]. I have also received a copy of the complaint in the action, two copies of an instrument by which I can waive service of a summons and which formally explains the Duty to Waive Service, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service on me of a summons and an additional copy of the complaint in this lawsuit

and I do not require that you serve me in the manner provided by Rule 4.

I retain any defenses or objections I [or the entity on whose behalf I am addressed] may have to the lawsuit or the jurisdiction or venue of the court except any defense based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me [or the party on whose behalf I am addressed] if I do not answer the complaint within the time allowed by Rule 12(a) of the Federal Rules of Civil Procedure, but that on no account will a judgment be entered before the date specified for my answer in your request for this waiver.

Signature of Addressee

Date:----------

Relationship to Defendant, if responding on behalf of an entity:----------

TO BE PRINTED ON REVERSE SIDE OF THE WAIVER FORM PROVIDED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, OR SET FORTH AT THE FOOT OF THE WAIVER INSTRUMENT IF THE FORM IS NOT USED:

THE DUTY TO WAIVE SERVICE OF A SUMMONS

Rule 4 of the Federal Rules of Civil Procedure requires all parties to cooperate in saving the cost of service of the summons and complaint. A defendant who is notified of an action and asked for a waiver of service of a summons will be required to bear the cost of such service unless good cause be shown for the failure to sign such a waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over your person or property. A party who waives service of the summons retains any defenses or objections except any that might relate to the summons or to the service of the summons and complaint, and may later object to the jurisdiction of the court or the place where the action has been brought.

A defendant who waives service of a summons must serve on the plaintiff an answer to the complaint. The answer should also be filed with the court. If the answer is not served within the time allowed by Rule 12(a), a default judgment may be taken against that defendant. A defendant is allowed more time to answer if service is waived than if the summons is actually served.

COMMITTEE NOTE

These Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18-A.

Form 18-A. [Abrogated]

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

* * * * *

RULE C. Actions in Rem: Special Provisions

* * * * *

(3) JUDICIAL AUTHORIZATION AND PROCESS. Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action is rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant ~~and deliver it~~. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to

enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon

filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

* * * * *

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

COMMITTEE NOTE

These amendments are designed to conform the rule to Fed.R.Civ.P. 4, as amended. As with recent amendments to Rule 4, it is intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the govnernment to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

The seizure of a vessel, with or without cargo, remains a task assigned to the Marshal. Successful arrest of a vessel frequently requires the enforcement presence of an armed government official and the cooperation of the United States Coast Guard and other governmental authorities. If the marshal is called upon to seize the vessel, it is expected that the same officer will also be responsible for the seizure of any property on board the vessel at the time of seizure that is to be the object of arrest or attachment.

RULE E. Actions in Rem and Quasi in Rem: General Provisions

* * * * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant

cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall ~~execute the process by~~ affix~~ing~~ a copy thereof to the property in a conspicuous place and ~~by leaving~~ leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until

notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions With Respect to Property in Custody. The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect

to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

* * * * *

(5) RELEASE OF PROPERTY.

* * * * *

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be released without

an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

* * * * *

(9) DISPOSITION OF PROPERTY; SALES

* * * * *

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or

organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) Sales, Proceeds. All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other ~~proper officer~~ person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

COMMITTEE NOTE

These amendments are designed to conform this rule to Fed. R. Civ. P. 4, as amended. They are intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

○