# The *Impact* of Recent Changes in Federal Civil Procedure

**April 15, 1994**
**Westin Hotel - Tabor Center**

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TABLE OF CONTENTS

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# THE IMPACT OF RECENT CHANGES IN FEDERAL CIVIL PROCEDURE

## April 15, 1994
## Westin Hotel - Tabor Center

### Morning Session

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| 8:00 | Registration<br>Distribution of Materials |
| 8:30 | Welcome<br>Introduction of Speakers<br>- Thomas C. Seawell, Co-Chair<br>Civil Justice Reform Act Advisory Group |
| 8:45 | Legislative and Judicial History:<br>The Background of Reforms<br>- JoAnn Vogt, Esq. |
| 9:15 | Initial, Supplemental, and Pretrial Disclosures;<br>Related District of Colorado Local Rules;<br>Effect of Rule Changes on Pleading<br>- William E. Murane, Esq.<br><br>Discovery Requirements and Limitations<br>- Miles C. Cortez, Esq.<br><br>Experts, Discovery, Motions, and Other<br>Important Rules Changes<br>- Jeffrey Chase, Esq. |
| 10:00 | BREAK |

## Afternoon Session

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|---|---|
| 12:00 | Lunch<br>Guest Speaker: The Honorable William W. Schwarzer<br>Director, Federal Judicial Center |
| 1:30 | Coordination and Time Lines for the<br>Federal Rules; the Local Rules;<br>and Exempt, Settlement, and ADR Cases<br>- Edward T. Lyons, Esq. |
| 2:15 | Rule 11, Ethics and Sanctions<br>- Russell E. Yates, Esq. |
| 2:45 | BREAK |
| 3:00 | Appeals From the U.S. Bankruptcy Court<br>Appeals to the Tenth Circuit<br>Recent Changes to the Bankruptcy and<br>Appellate Rules<br>- Bobbee J. Musgrave, Esq. |
| | Impact of December 1, 1993, Amendments on<br>Bankruptcy Court Rules and Practice<br>-Thomas C. Seawell, Esq. |
| 3:45 | Civil Justice Reform Act Update<br>- Thomas C. Seawell, Esq. |
| 4:00 | Questions and Answers<br>Panel of U.S. District Judges |
| 5:00 | Adjournment |

**WILLIAM W. SCHWARZER**
Senior Judge, U.S. District Court
for the Northern District of California
and
Director, Federal Judicial Center

Judge Schwarzer received his AB and LLB degrees cum laude from the University of Southern California and Harvard Law School, respectively. He was a Teaching Fellow at Harvard Law School from 1951-52. In 1952 he joined the San Francisco law firm of McCutchen, Doyle, Brown & Enersen and was a partner in the firm from 1960 through 1967, when he was appointed a United States District Judge for the Northern District of California. He was elected Director of the Federal Judicial Center in 1990.

Judge Schwarzer served as Senior Counsel to the President's Commission on CIA Activities Within the United States in 1975; Chairman of the U.S. Judicial Conference Committee on Federal-State Jurisdiction; the Judicial Representative to the Council of the ABA Section on Antitrust Law; and trustee of the World Affairs Council of Northern California. He is a Judicial Fellow of the American College of Trial Lawyers, Fellow of the American Bar Foundation, member of the American Law Institute and of its Advisory Committee on Complex Litigation, and member of the Council on Foreign Relations. He received the American College of Trial Lawyers' Samuel E. Gates Litigation Award.

Judge Schwarzer has been a frequent lecturer and panel member at judicial training and C.L.E. programs, has lectured at the Salzburg Seminar, and is an adjunct professor at the Georgetown University Law Center. He is a member of

the advisory board of the American Bar Association's Central and East European Law Initiative and has participated in a number of rule of law programs abroad. He is the author of several books and numerous articles on a variety of subjects relating to the federal courts and the administration of justice.

**THOMAS C. SEAWELL**

Thomas C. Seawell graduated cum laude from Dartmouth College in 1959 and the University of Colorado School of Law in 1962, where he was Editor-in-Chief of the Rocky Mountain Law Review and elected to the Order of the Coif. Mr. Seawell has been in private practice in Denver since graduating from law school, except for 1967-68 when he was an Assistant United States Attorney for the District of Colorado. His practice has consisted primarily of civil litigation in the federal and state courts, with particular emphasis on commercial bankruptcy cases in the last few years. He is presently a principal in the firm of Ducker, Dewey & Seawell, P.C.

Mr. Seawell has served on the Board of Trustees of the Denver Bar Association and the Board of Directors of Continuing Legal Education in Colorado, Inc., as Chair of the Joint Management Committee of the Denver and Colorado Bar Associations, and as President of the Law Club of Denver. He is currently Co-Chair of the Civil Justice Reform Act Advisory Group for the District of Colorado.

**JoANN L. VOGT**

JoAnn Vogt is a partner at Rothgerber, Appel, Powers & Johnson. She joined the firm in 1987 after graduating from the University of Denver College of Law and serving as law clerk to the Honorable Joseph R. Quinn, Colorado Supreme Court. JoAnn is a member of the firm's Real Estate and Construction Litigation, Corporate and Commercial Litigation, and Intellectual Property practice groups, and devotes a substantial portion of her practice to appellate work. A native of Nebraska, JoAnn received her B.A. degree from the University of Nebraska and her M.A. and Ph.D. degrees from the University of Chicago, and taught German for a number of years before going to law school.

**WILLIAM E. MURANE**

Mr. Murane is a litigation partner of Holland & Hart in Denver, Colorado. He graduated from Dartmouth College in 1954 and received his law degree from Stanford Law School in 1957.

Mr. Murane has practiced with Holland & Hart since 1961, except for a tour in Washington as Deputy General Counsel of the U.S. Department of Commerce (1969-1970) and General Counsel of the Federal Deposit Insurance Corporation (1971-1972). He has a civil trial practice in the state and federal courts of Wyoming and Colorado, and is a Section Delegate to the ABA House of Delegates and a Fellow of the American College of Trial Lawyers.

**MILES C. CORTEZ, JR.**

Miles C. Cortez, Jr. has had an active civil litigation practice since 1970, concentrating on the prosecution and defense of business-related lawsuits. He is a graduate of Trinity University (B.A. Economics 1964) and the Northwestern University School of Law (J.D. 1967). Following graduation from Northwestern and admission to the bar in Illinois, he served two years in the U.S. Army, including a 1969 tour of duty as the Division Counterintelligence Officer for the First Infantry Division in Vietnam.

Mr. Cortez has served as President of the Denver Bar Association, Chairman of the Colorado Bar Association Ethics Committee, a member of the Colorado Bar Association Executive Committee and Board of Governors, and chairman of numerous state and local bar committees. He was a member of the Colorado Supreme Court's Board of Law Examiners (1984-1989), and serves on the Colorado Supreme Court Grievance Committee (1991-present). He is a member of the House of Delegates of the American Bar Association and the National Conference of Bar Presidents. He serves on the Civil Justice Reform Act Advisory Committee for the District of Colorado.

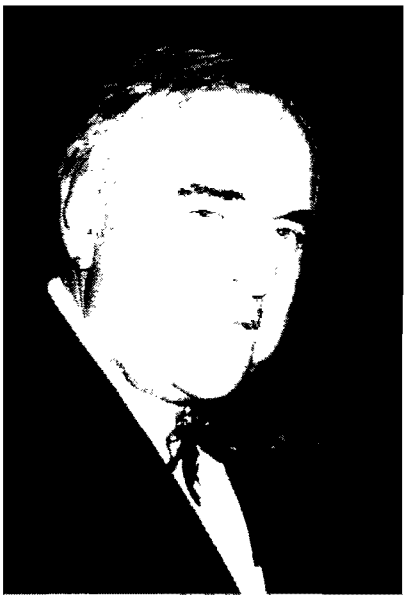
**JEFFREY A. CHASE**

Jeffrey A. Chase is a member of Holme Roberts & Owen LLC. He joined Holme Roberts & Owen LLC in 1975 and has concentrated on complex commercial litigation. He is now Chairman of the Commercial Litigation Section of the firm.

Mr. Chase received his B.A. from the University of Florida in 1968, and graduated from the University of Colorado School of Law in 1973, where he was elected to the Order of the Coif. Mr. Chase served as a law clerk to Chief Justice Edward E. Pringle during 1974-75. He served on the Colorado Supreme Court Grievance Committee from 1986 through 1991.

**EDWARD T. LYONS, JR.**

Edward T. Lyons, Jr. is a shareholder of Jones & Keller, P.C. He received his B.S. degree from Holy Cross College in 1953, and served in the United States Navy in 1953-56. Mr. Lyons received his LLB from the University of Michigan in 1959. He has extensive experience in civil litigation in the federal courts. He has appeared in cases before the United States Supreme Court, the United States Court of Appeals for the Fifth, Ninth and Tenth Circuits and before several federal agencies and commissions. He is a Master of the Bench of The Judge William E. Doyle Inn, American Inns of Court.



**RUSSELL E. YATES**

Russell E. Yates is a partner in the firm of Patton, Boggs & Blow, where he specializes in civil litigation. He devotes a substantial part of his practice to environmental issues and insurance coverage litigation. He is admitted to practice in Colorado and Pennsylvania, and has been specially admitted for trial purposes in Arizona, New Mexico and Minnesota. He is a member of the bar of the United States Claims Court and the United States District Court for the Districts of Colorado and Northern California.

Prior to joining Patton, Boggs & Blow, Mr. Yates maintained a practice for over 17 years in Durango, Colorado, with an emphasis on litigation. Between 1977 and 1979, he served as La Plata County Attorney.

Between 1985 and 1993, Mr. Yates served as a member of the United States District Court for the District of Colorado Committee on Conduct, chairing Panel B for two years. That committee is charged with the review, investigation and prosecution of unethical conduct complaints made by citizens, members of the bar and judges against attorneys licensed in the federal court.

**BOBBEE J. MUSGRAVE**

Bobbee J. Musgrave is a shareholder in Musgrave & Theis, P.C., a Denver firm emphasizing commercial litigation and antitrust. She graduated from Southern Illinois Law School in 1977, where she was a member of the law review. She has extensive experience in federal court practice, and successfully argued two recent antitrust cases before the Tenth Circuit. Ms. Musgrave is a member of the Colorado, Washington and Illinois bars, and is a former member of the faculty of the University of Puget Sound School of Law, where she taught constitutional law, employment discrimination and legal writing.

SUPREME COURT OF THE UNITED STATES

Thursday, April 22, 1993

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75 and 76, and new Rule 4.1 and abrogation of Form 18-A, and amendments to Forms 2, 33, 34, and 34A and new Forms 1A, 1B, and 35.

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and insofar as just and practicable, all proceedings in civil cases then pending.

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

Became effective December 1, 1993

NOTICE

A COMPLETE SET OF THE NEW
RULES OF CIVIL PROCEDURE, EFFECTIVE DECEMBER 1, 1993

MAY BE OBTAINED FROM THE

GOVERNMENT PRINTING OFFICE
Federal Building, Room 117
1961 Stout Street
Denver, Colorado 80294
Telephone (303) 844-3964
FAX (303) 844-4000

Cost: $5.50

# REPORT ON THE

# PROPOSED AMENDMENTS TO THE

# FEDERAL RULES OF CIVIL PROCEDURE

# AND FORMS

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Submitted To

THE JUDICIAL CONFERENCE OF THE UNITED STATES

By The

Standing Committee On Rules of Practice and Procedure

# PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS

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Submitted To

THE JUDICIAL CONFERENCE

OF

THE UNITED STATES

By

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On

Rules of Practice and Procedure

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## TABLE OF CONTENTS

Page

Proposed Amendments to the
Federal Rules of Civil Procedure

Proposed Amendments to Forms

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS**[1]

**Rule 1. Scope and Purpose of Rules**

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

**COMMITTEE NOTES**

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

**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~~

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

~~plaintiff separate or additional summons shall issue against any defendants.~~

~~(b) Same: Form.~~ **Form.** The summons shall be signed by the clerk, ~~be under~~ bear the seal of the court, ~~contain the name of~~ identify the court and ~~the names of~~ the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney~~, if any, otherwise the plaintiff's address~~ or, if unrepresented, of the plaintiff~~, and~~. It shall also state the time within which ~~these rules require~~ the defendant ~~to~~ must appear and defend, and ~~shall~~ notify the defendant that ~~in case of the defendant's~~ failure to do so will result in a 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 or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons

is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if 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 is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

(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 who is ~~not less than~~ at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States

marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is

~~(B) 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~~ is authorized to proceed as a seaman 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.~~

~~(G) 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).~~

~~(D) 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 with 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.~~

~~(2) 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 that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the

court in which it has been filed;

(D) shall inform 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;

(E) shall set forth the date on which the request is sent;

(F) shall allow 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 that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If the defendant fails to comply with the request, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being

served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing 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 to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(~~g~~i) **Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service ~~U~~upon

an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, 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 located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the 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 from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be

effected in a place not within any judicial district of the United States:

(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 a copy of the summons and 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

(3) by other means not prohibited by international agreement as may be directed by the court.

(g2) Service Upon Infants and Incompetent Persons. Service uUpon an infant or an incompetent person ~~by serving the summons and complaint~~ in a judicial district of the United States shall be effected 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 in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h3) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service uUpon a domestic or foreign

corporation or upon a partnership or other unincorporated association ~~which~~ that is subject to suit under a common name, and from which 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 subdivision (e)(1), 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 place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(~~i~~4) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service u~~U~~pon the United States~~,~~ shall be effected

(A) 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

(B) by also 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

(C) 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~~ the 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 also sending a copy of the summons and of the complaint by registered or certified mail to ~~such~~ the 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, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j~~6~~) **Service Upon Foreign, State, or Local Governments.**

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

(2) Service uUpon 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~~ its 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 or other like process 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 such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's 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 the 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 located, or

(B) who is a party joined under Rule 14 or Rule 19 and is 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) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing

a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(g1) ~~Return.~~ Proof of Service. If service is not waived, t~~T~~he 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~~ the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, 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 (e)(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; or (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 the individual 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~~ **Time Limit for Service.** If ~~a~~ 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~~ motion or on its own initiative ~~with~~ after notice to ~~such party or upon motion~~ the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided 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~~ does not apply to service in a foreign country pursuant to subdivision (~~i~~f) or (j)(1)~~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 personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets 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 is located.

**COMMITTEE NOTES**

***SPECIAL NOTE:*** *Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).*

**Purposes of Revision.** The general purpose of this

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

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

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

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

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

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

present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. A new provision enables district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.

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

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

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

Subdivision (a). Revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be the same in all cases. Few states now employ distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See

4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

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

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

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

The court remains obligated to appoint a marshal, a deputy, or some other person to effect service of a summons in two classes of cases specified by statute: actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to appoint a process server on motion of a party. If a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs

that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

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

The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail. Infants or incompetent persons likewise are not called upon to waive service because, due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.

It was unclear whether the former rule authorized mailing of a request for "acknowledgement of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to employ this device in an effort to obtain service outside the state, and there are many instances in which it was in

fact so used, with respect both to defendants within the United States and to defendants in other countries.

The opportunity for waiver has distinct advantages to a foreign defendant. By waiving service, the defendant can reduce the costs that may ultimately be taxed against it if unsuccessful in the lawsuit, including the sometimes substantial expense of translation that may be wholly unnecessary for defendants fluent in English. Moreover, a defendant that waives service is afforded substantially more time to defend against the action than if it had been formally served: under Rule 12, a defendant ordinarily has only 20 days after service in which to file its answer or raise objections by motion, but by signing a waiver it is allowed 90 days after the date the request for waiver was mailed in which to submit its defenses. Because of the additional time needed for mailing and the unreliability of some foreign mail services, a period of 60 days (rather than the 30 days required for domestic transmissions) is provided for a return of a waiver sent to a foreign country.

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the "service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. The only adverse consequence to the foreign defendant is one shared by domestic defendants; namely, the potential imposition of costs of service that, if successful in the litigation, it would not otherwise have to bear. However, this shifting of expense would not be proper under the rule if the foreign defendant's refusal to waive service was based upon a policy of its government prohibiting all waivers of service.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts

promptly in effecting service, and whose policies discourage its residents from waiving formal service, there will be little reason for a plaintiff to send the notice and request under subdivision (d) rather than use convention methods. On the other hand, the procedure offers significant potential benefits to a plaintiff when suing a defendant that, though fluent in English, is located in country where, as a condition to formal service under a convention, documents must be translated into another language or where formal service will be otherwise costly or time-consuming.

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

Paragraph (2) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18-A.

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

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the

sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request, was insufficiently literate in English to understand it, or was located in a foreign country whose laws or policies prohibited its residents from waiving service of formal judicial process even from its own courts.

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay by declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

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

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear

that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

The procedure of requesting waiver of service should also not be used if the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F. Supp. 278 (N.D. Ga. 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h). It may be noted that the presumptive time limit for service under subdivision (m) does not apply to service in a foreign country.

Paragraph (5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, costs of unneeded 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.

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the

waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

Subdivision (e). This subdivision replaces former subdivisions (c)(2)(C)(i) and (d)(1). It provides a means for service of summons on individuals within a judicial district of the United States. Together with subdivision (f), it provides for service on persons anywhere, subject to constitutional and statutory constraints.

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

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

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

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

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

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

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

Paragraph (1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., Fed. R. Civ. P. 4 (Supp. 1986). This Convention is an important means of dealing with problems of service in a foreign country. See generally 1 B. Ristau, International Judicial Assistance §§ 4-1-1 to 4-5-2 (1990). Use of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (noting that voluntary use of these procedures may be desirable even when service could constitutionally be effected in another manner); J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989). Therefore, this paragraph provides that, when service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires.

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

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

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

Paragraph (2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule. Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using a local authority. Subparagraph (C) prescribes other methods authorized by the former rule.

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corp., 248 F. Supp. 537 (S.D.N.Y. 1965).

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

Subdivision (h). This subdivision retains the text of former subdivision (d)(3), with changes reflecting those made in subdivision (e). It also contains the provisions for service on a corporation or association in a foreign country, as formerly found in subdivision (i).

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

Subdivision (i). This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it amends former subdivision (d)(4) to permit the United States attorney to be served by

registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States Attorney.

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

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

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

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

Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

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

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n.3 (3rd

Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill. L. Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule

is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procedure § 1132 (2d ed. 1987).

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

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987). A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts & Eyeglasses, 876 F.2d 596 (7th Cir. 1989).

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

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (1) incorporates any requirements of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

**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, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, 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. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located 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 NOTES**

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

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

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney. Chagas v. United States , 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause.

Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985).

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

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

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

* * * *

**(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. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means 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 by any local rules or practices.

**COMMITTEE NOTES**

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

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

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual

name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the~~

~~cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an

order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless

the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

**COMMITTEE NOTES**

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to

refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer

tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not

thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or

through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the

sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf.

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under

current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained

in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.

Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

**Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the 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 being served with ~~the service of~~ the summons and complaint ~~upon that defendant~~, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that 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~~ being served. 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.—

(3) 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.

(4) Unless a different time is fixed by court order, t~~T~~he 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~~:

(~~1~~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 NOTES**

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

**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(~~j~~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.

* * * *

**COMMITTEE NOTES**

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * *

**(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties~~,~~ by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend

the pleadings;

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

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

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

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

The order shall issue as soon as practicable but in ~~no~~ any event ~~more than 120~~ within 90 days after ~~filing of the complaint~~ the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge ~~when authorized by district court rule upon a showing of good cause~~.

(c) Subjects ~~to be Discussed~~ for Consideration at Pretrial Conferences. ~~The participants a~~At any conference under this rule

~~may consider and take action~~ consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

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

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~5~~7) the identification of witnesses

and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(~~6~~8) the advisability of referring matters to a magistrate judge or master;

(~~7~~9) ~~the possibility of~~ settlement ~~or~~ and the use of ~~extrajudicial~~ special procedures to ~~resolve~~ assist in resolving the dispute when authorized by statute or local rule;

(~~8~~10) the form and substance of the pretrial order;

(~~9~~11) the disposition of pending motions;

(10~~2~~) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

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

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(~~11~~6) such other matters as may ~~aid in~~ facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

* * * *

**COMMITTEE NOTES**

Subdivision (b). One purpose of this amendment is to provide a more appropriate deadline for the initial

scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying

the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

Subdivision (c). The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such

testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed or, under revised Rule 56(g)(3), enter a show cause order that initiates the process.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651-68; Section 104(b)(2), Pub.L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial

can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

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

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

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

the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

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

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

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the

parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the

witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on

the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

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

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

(C) an appropriate identification

of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

**(4) Form of Disclosures; Filing.** Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and

promptly filed with the court.

(5) Methods to Discover Additional Matter. 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 under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

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

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the

identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought need not be ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~ otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or~~

~~expensive~~ the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

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

* * * *

**(4) Trial Preparation: Experts.**

~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(A)~~(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ depose any person who has been identified as an expert whose opinions may be presented at trial.

If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

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

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivisions ~~(b)(4)(A)(ii) and (b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision~~

~~(b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the court shall require~~,~~ the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the

movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ revealed or be ~~disclosed~~ revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

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

(d) ~~Sequence and~~ Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of

justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response ~~that was complete when made~~ is under ~~no~~ a duty to supplement or correct the disclosure or response to include information thereafter acquired, ~~except as follows~~ if ordered by the court or in the following circumstances:

(1) A party is under a duty ~~seasonably~~ to supplement ~~the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.~~ at appropriate intervals its disclosures under subdivision (a) if the party

learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns ~~obtains information upon the basis of which (A) the party knows~~ that the response ~~was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ is in some material

respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

~~(2) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(f) Meeting of Parties; Planning for ~~Discovery Conference.~~ ~~At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by

subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) ~~A statement of the issues as they then appear;~~ what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) ~~A proposed plan and schedule of discovery;~~ the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

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

(4) ~~A~~any other ~~proposed orders with respect to discovery~~ that should be entered by the court under subdivision (c) or under Rule 16(b) and (c). ~~; and~~

~~(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.~~

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if~~

~~any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.~~

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

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

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, ~~for~~

~~discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ the request, response, or objection is:

(~~1~~A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(~~2~~B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(~~3~~C) not unreasonable or unduly

burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

**COMMITTEE NOTES**

Subdivision (a). Through the addition of

paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if

the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed

to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as

will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then

reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number

and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make

their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise

protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as

substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in

order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert

reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the

deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be

disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule

16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the

conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are

tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and

discovery matters. Amended Rule 11 no longer applies to such violations.

**Rule 28. Persons Before Whom Depositions May Be Taken**

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(b) **In Foreign Countries.** ~~In a foreign country, d~~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~~ where 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 the 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 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~~ because it is not a verbatim transcript, because ~~or that~~ the testimony was not taken under oath, or ~~for~~ because of any similar departure from the requirements for depositions taken within the United States under these rules.

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**COMMITTEE NOTES**

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony

cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

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

**Rule 29. Stipulations Regarding Discovery Procedure**

Unless ~~the court orders~~ otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify ~~the procedures for other methods of~~ other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

**COMMITTEE NOTES**

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

**Rule 30. Depositions Upon Oral Examination**

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

(1) ~~After commencement of the action, any~~ party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take~~

~~a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

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

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

(B) the person to be examined

already has been deposed in the case; or

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

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

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be

served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) ~~Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.~~

~~If a party shows that when the party was served with notice under this subdivision~~

~~(b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.~~

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) ~~The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.~~ Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record

by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

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(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of

this rule and Rules 28(a), 37(a)(1), and 37(b)(1)~~, and 45(d)~~, a deposition taken by ~~telephone~~ such means is taken in the district and at the place where the deponent is to answer questions ~~propounded to the deponent~~.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other ~~means ordered in accordance with~~ method authorized by subdivision (b)(42) of this rule. ~~If requested by one of the parties the testimony shall be transcribed.~~ All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and any other objection~~

~~to~~ or to any other aspect of the proceedings~~,~~ shall be noted by the officer upon the record of the deposition~~. Evidence objected to shall be~~; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

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

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

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistently with Rule 26(b)(2) if needed

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

(3) At any time during ~~the taking of the~~ a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is

pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) ~~Submission to~~ Review by Witness; Changes; Signing. ~~When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with~~

~~the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~ If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

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

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

accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall ~~then~~ securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending ~~or send it by registered or certified mail to the clerk thereof for filing~~ or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity

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

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

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**COMMITTEE NOTES**

Subdivision (a). Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and

fourth sentences are relocated.

Paragraph (2) collects all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

Subdivision (b). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions

be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Subdivision (c). Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such

as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1).

In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

Subdivision (e). Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f). Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

**Rule 31. Depositions Upon Written Questions**

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

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

person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

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

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

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

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a

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

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

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**COMMITTEE NOTES**

Subdivision (a). The first paragraph of subdivision (a) is divided into two subparagraphs, with provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

**Rule 32. Use of Depositions in Court Proceedings**

**(a) Use of Depositions.**

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

**(A) that the witness is dead; or**

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

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

**(D) that the party offering the**

deposition has been unable to procure the attendance of the witness by subpoena; or

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

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

* * * *

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

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**COMMITTEE NOTES**

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when

the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Subdivision (c). This new subdivision, inserted at the location of a subdivision previously abrogated, is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b). Under this rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use nonstenographic deposition testimony as substantive evidence is required to provide other parties with a transcript in advance of trial.

**Rule 33. Interrogatories to Parties**

**(a) Availability; ~~Procedures for Use~~.** Without leave of court or written stipulation, a~~A~~ny party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave

to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i~~I~~nterrogatories may~~, without leave of court,~~ not be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ before the time specified in Rule 26(d).

**(b) Answers and Objections.**

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection ~~shall be stated in lieu of an answer~~ and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories~~, except that a defendant may~~

~~serve answers or objections within 45 days after service of the summons and complaint upon that defendant~~. ~~The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b~~c~~) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion

or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

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

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**COMMITTEE NOTES**

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

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated

as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that

unstated or untimely grounds for objection ordinarily are waived. Note also the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

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

Subdivisions (c) and (d). The provisions of former subdivisions (b) and (c) are renumbered.

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

* * * *

(b) Procedure. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ The request shall set forth, either by individual item or by category, the items to be inspected ~~either by individual item or by category~~, and describe each ~~item and category~~ with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request~~, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant~~. ~~The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection 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 request.

* * * *

**COMMITTEE NOTES**

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties' meeting. See Rule 81(c), providing that these rules govern procedures after removal.

**Rule 36. Requests for Admission**

**(a) Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for

inspection and copying. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney~~, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant~~. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth

in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

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**COMMITTEE NOTES**

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

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

(a) **Motion For Order Compelling Disclosure or Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) **Appropriate Court.** An application for an order to a party ~~may~~ shall be made to the court in which the action is pending~~, or, on matters relating to a deposition, to the court in the district where the deposition is being taken~~. An application for an order to a ~~deponent~~ person who is not a party shall be made to the court in the district where the ~~deposition is being taken~~ discovery is being, or is to be, taken.

(2) **Motion.**

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The

motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. ~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

(3) **Evasive or Incomplete Disclosure, Answer, or Response**. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

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

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing,~~ to be heard, require the party or deponent whose conduct necessitated the motion or the

party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the ~~opposition to the motion~~ opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the

making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * * *

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

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

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

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (~~1~~A) the request was held objectionable pursuant to Rule 36(a), or (~~2~~B) the admission sought was of no substantial importance, or (~~3~~C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (~~4~~D) there was other good reason for the failure to admit.

**(d) Failure of Party to Attend at Own**

**Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court

shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ a pending motion for a protective order as provided by Rule 26(c).

* * * *

**(g) Failure to Participate in the Framing of a Discovery Plan.** If a party or a party's attorney fails to participate in the development and submission ~~framing~~ of a proposed discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**COMMITTEE NOTES**

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a

motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the

fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

**Rule 38. Jury Trial of Right**

* * * *

**(b) Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand as required by Rule 5(d). Such demand may be

indorsed upon a pleading of the party.

* * * *

(d) **Waiver.** The failure of a party to serve and file a demand as required by this rule ~~and to file it as required by Rule 5(d)~~ constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

**COMMITTEE NOTES**

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

**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 on ~~with respect to~~ an issue and there is no legally sufficient evidentiary basis for a reasonable jury to ~~have found~~ find for that party on ~~with respect to~~ that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against

that party ~~on any~~ with respect to a claim~~,~~ ~~counterclaim, cross-claim, or third-party claim~~ or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

* * * *

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**COMMITTEE NOTES**

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

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

* * * *

**(c) Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on ~~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~~ with respect to a claim~~,~~ ~~counterclaim, cross-claim, or third-party claim~~ or defense 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 NOTES**

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

**Rule 53. Masters**

(a) **Appointment and Compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation

shall not apply when a United States magistrate judge is designated to serve as a master ~~pursuant to Title 28, U.S.C. § 636(b)~~. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

**(b) Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

* * * *

**(f) Application to Magistrate Judge.** A magistrate judge is subject to this rule only

when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Rule 54. Judgments; Costs**

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(d) **Costs; Attorneys' Fees.**

**(1) Costs Other than Attorneys' Fees.**

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such cCosts may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

**(2) Attorneys' Fees.**

(A) Claims for attorneys' fees and

related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing

on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

**COMMITTEE NOTES**

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine a fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

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

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. §

2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such

arrangements are agreed to. E.g., Rule 5 of United States District Court for the Eastern District of New York; cf. In re "Agent Orange" Product Liability Litigation (MDL 381), 611 F. Supp. 1452, 1464 (E.D.N.Y. 1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. Compare Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. See Note, Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records, 64 B.U.L. Rev. 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate

review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Conner in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 733 (1987) (O'Conner, J., concurring) (how particular markets compensate for contingency). Cf. Thompson v. Kennickell, 710 F. Supp. 1 (D.D.C. 1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

**Rule 56. Summary Judgment**

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

~~(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is~~

~~asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

(b) **Facts Not Genuinely in Dispute.** A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

**(c) Motion and Proceedings Thereon.** ~~The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is~~

~~entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~ A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response.

(1) The motion shall, without argument, (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) A response shall, without argument, (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing those facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be treated as having admitted that fact.

(3) If a motion for summary adjudication or response is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent

portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

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

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court ~~at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon~~ may enter ~~make~~ an order specifying the controlling law or the facts that ~~appear without substantial controversy~~ are not genuinely in dispute, including the extent to

which liability or the amount of damages or other relief is not ~~in controversy~~ a dispute for trial, and directing such further proceedings in the action as are just. ~~Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~ Unless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified and by treating the facts so specified as established. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).

(e) ~~Form of Affidavits; Further Testimony; Defense Required~~Matters to Be Considered. ~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or~~

~~opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

(1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the

extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.

(2) The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

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

(g) ~~**Affidavits Made in Bad Faith**~~**Conduct of**

**Proceedings.** ~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.~~ The court (1) may specify the period for filing motions for summary adjudication with respect to particular claims, defenses, or issues; (2) may enlarge or shorten the time for responding to motions for summary adjudication, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (3) may on its own initiative direct the parties to show cause within a reasonable period why summary adjudication based on specified facts should not be entered; and (4) may conduct a hearing to consider further arguments, rule on the admissibility of evidence, or receive oral testimony to clarify whether an asserted fact is

225 genuinely in dispute.

**COMMITTEE NOTES**

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

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

In various parts, the revision (1) eliminates ambiguities and inconsistencies within the rule; (2) expresses a single and consistent standard, as has been developed through case law, for determining when summary adjudication is permitted; (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, with the purpose of eliminating the need for local rules on this subject; and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

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

The revised language makes clear at the outset of

the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is permissible only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances. See 10A Wright, Miller & Kane, Federal Practice and Procedure § 2728 (1983). The purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.

The extent of this discretion to deny summary adjudication is affected by many factors and will vary from case to case. The court has broad discretion to reject summary resolution of non-dispositive issues or defenses that will not significantly affect the scope of discovery, the potential for settlement, or the length and complexity of trial. The court has less discretion when the requested summary judgment would resolve all claims made by or against a party. And there are some situations in which, typically because of substantive policies, the court may have little or no discretion to deny summary adjudication that satisfies the standards of this rule. For example, persons protected by official or qualified immunity are to be relieved from the burdens of trial and pretrial proceedings as soon as such defenses can be fairly established, and a denial of summary judgment in such cases is immediately appealable under current law. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense). Similar policies with respect to certain First Amendment issues may also effectively preclude the court from justifying its denial of summary judgment

as an exercise of discretion.

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

Subdivision (b). The standards stated in this subdivision for determining whether a fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). While no change in these standards is intended by the revision, the rule clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised Rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

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

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing

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

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

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

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

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

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

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

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are without genuine dispute and accordingly are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication (or granting of partial summary judgment) is ordinarily an interlocutory order not subject to the law-of-the-case doctrine; and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of developments in the case or changes of law. The rule is not intended to alter case law that permits immediate appeal of the denial of summary judgment in limited circumstances. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense).

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

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

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

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

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

Subdivision (e)(2) provides that the court is required to consider only the materials called to its attention by the parties. Subdivisions (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal. The failure of a movant to provide such references would justify denial of the motion.

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

Subdivision (g). The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under

Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of motions for summary adjudication. At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

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

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

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications. One such purpose would be to hear oral arguments supplementing the written submissions. Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony, as under Rule 43(e), to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the

court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

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

**Rule 58. Entry of Judgment**

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so

set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed ~~for the taxing of costs~~, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

**COMMITTEE NOTES**

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate

purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

**Rule 71A. Condemnation Of Property**

* * * *

(d) **Process.**

* * * *

(3) **Service of Notice.**

(~~i~~A) **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 whose residence is known and who resides within the United States or ~~its territories or insular possessions and whose residence is known~~ a territory subject to the administrative or judicial jurisdiction of the United States.

(~~ii~~B) **Service by Publication.**

* * * *

(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)~~.

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**COMMITTEE NOTES**

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

**Rule 72. Magistrates~~s~~ Judges; Pretrial Orders**

(a) **Nondispositive Matters.** A magistrate judge 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~~ judge'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~~ judge'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~~ judge's order found to be clearly erroneous or contrary to law.

(b) **Dispositive Motions and Prisoner**

**Petitions.** A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being

served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate ~~'s~~ judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Rule 73. Magistrates Judges; Trial by Consent and Appeal Options**

**(a) Powers; Procedure.** When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements

of Title 28, U.S.C. § 636(c)(7).

**(b) Consent.** When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate's judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

No A district judge, magistrate judge, or other court official shall attempt to persuade or induce a party to consent to a reference of a civil matter to a magistrate under this rule, nor shall may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. a A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral

of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's ~~motion~~ own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

**(c) Normal Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

**(d) Optional Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the ~~district~~ court and thereafter, by petition only, to the court of appeals.

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990. The Act requires that, when being reminded of the availability of a magistrate judge, the parties be advised that withholding of consent will have no "adverse substantive consequences." They may, however, be advised if the withholding of consent will

have the adverse procedural consequence of a potential delay in trial.

**Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)**

**(a) When Taken.** When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the

full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate judge which, if made by a district judge ~~of the district court~~, could be appealed under any provision of law, may be appealed to a district judge ~~of the district court~~ by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge ~~of the district court~~ under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.

Upon a showing of excusable neglect, the

magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

* * * *

**(c) Stay Pending Appeal.** Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.

* * * *

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)**

* * * *

**(b) Record on Appeal.**

**(1) Composition.** The original papers and exhibits filed with the clerk of the district court, the transcript of the

proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

(2) **Transcript.** Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, the

appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall promptly make arrangements for inclusion of all such parts unless the magistrate judge, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

**(3) Statement in Lieu of Transcript.** If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of a transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.

* * * *

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs**

**(a) Entry of Judgment.** When the parties have elected under Rule 73(d) to appeal from a

judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.

* * * *

(c) **Costs.** Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.

**COMMITTEE NOTES**

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

## APPENDIX OF FORMS

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

TO: _____(A)_____
[as _____(B)_____ of _____(C)_____]

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 the United States District Court for the _____(D)_____ and has been assigned docket number _____(E)_____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _____(F)_____ days after the date designated below as the date on which this Notice and Request is sent. 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 the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, as authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth 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 plaintiff, this __ day of _____, ___.

_____
Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:

A–Name of individual defendant (or name of officer or agent of corporate defendant)

B–Title, or other relationship of individual to corporate defendant

C–Name of corporate defendant, if any

D–District

E–Docket number of action

F–Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

**Form 1B. Waiver of Service of Summons**

TO: ____(name of plaintiff's attorney or unrepresented plaintiff)____

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)____ in the United States District Court for the _____(district)_____. I have also received a copy of the complaint in the action, two copies of this instrument, 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 of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections 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 acting) if an answer or motion under Rule 12 is not served upon you within 60 days after ____(date request was sent)____, or within 90

days after that date if the request was sent outside the United States.

Date _____ Signature _____

Printed/typed name: _____

[as _____]

[of _____]

*To be printed on reverse side of the waiver form or set forth at the foot of the form:*

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant who, after being notified of an action and asked to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the 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 its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

**COMMITTEE NOTES**

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

**Form 2. Allegation of Jurisdiction**

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its

principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ~~ten~~ fifty thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question ~~and amount in controversy~~.

The action arises under [the Constitution of the United States, Article ___, Section ___]; [the ___ Amendment to the Constitution of the United States, Section ___]; [the Act of ___, ___ Stat. ___; U.S.C., Title ___, § ___]; [the Treaty of the United States (here describe the treaty)][2] as hereinafter more fully appears. ~~The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.~~

* * * *

**COMMITTEE NOTES**

This form is revised to reflect amendments to 28 U.S.C. §§ 1331 and 1332 providing jurisdiction for federal questions without regard to the amount in controversy and raising the amount required to be in controversy in diversity cases to fifty thousand dollars.

**Form 18-A. [Abrogated]**

**COMMITTEE NOTES**

This form is superseded by Forms 1A and 1B in view of the revision of Rule 4.

**Form 33. Notice of ~~Right to Consent to the Exercise of Civil Jurisdiction by a Magistrate~~ Availability of a Magistrate Judge to Exercise Jurisdiction and Appeal Option**

In accordance with the provisions of Title 28, U.S.C. § 636(c), you are hereby notified that ~~the~~ a United States magistrate~~s~~ judge of this district court~~, in addition to their other duties, upon the consent of all parties in a civil case,~~ is available to exercise the court's jurisdiction and to conduct any or all proceedings in ~~a civil~~ this case including a jury or nonjury trial, and ~~order the~~ entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You ~~should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate must be entirely voluntary. Only if all parties to the case consent to the reference to a magistrate~~

~~will either the judge or magistrate to whom the case has been assigned be informed of your decision.~~ may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.

Copies of the Form for the "Consent to ~~Proceed Before~~ Jurisdiction by a United States Magistrate

Judge" and "Election of Appeal to a District Judge" are available from the clerk of the court.

**COMMITTEE NOTES**

This form, together with Form 34, is revised in light of the Judicial Improvements Act of 1990. Section 308 modified 28 U.S.C. § 636(c)(2) to enhance the potential of parties consenting to trial before a magistrate judge. While the exercise of jurisdiction by a magistrate judge remains dependent on the voluntary consent of the parties, the statute provides that the parties should be advised, and may be reminded, of the availability of this option and eliminates the proscription against judicial suggestions of the potential benefits of referral provided the parties are also advised that they "are free to withhold consent without adverse substantive consequences." The parties may be advised if the withholding of consent will result in a potential delay in trial.

**Form 34. Consent to ~~Proceed Before~~ Exercise of Jurisdiction by a United States Magistrate Judge, Election of Appeal to District Judge**

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

| | | |
|---|---|---|
| | Plaintiff, | |
| vs. | | Docket No. _____ |
| | Defendant. | |

CONSENT TO ~~PROCEED BEFORE~~ JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. § 636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily ~~waive their rights to proceed before~~

~~a judge of the United States district court and~~ consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

_____ _____
Date Signature

ELECTION OF APPEAL TO DISTRICT JUDGE

[Do not execute this portion of the Consent Form if ~~the parties~~ you desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.

_____ _____
Date Signature

Note: Return this form to the Clerk of the Court ~~only~~ if ~~all parties have consented~~ you consent to ~~proceed before~~ jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

**Form 34A**

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

| | | |
|---|---|---|
| Plaintiff, | ) | |
| vs. | ) | Docket No. _____ |
| Defendant. | ) | |

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate Judge _____ for all further proceedings and entry of judgment in accordance with Title 28, U.S.C. § 636(c) and the ~~foregoing~~ consent of the parties.

_____
U. S. District Judge

**Form 35. Report of Parties' Planning Meeting**

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on (date) at (place) and was attended by:
(name) for plaintiff(s)
(name) for defendant(s) (party name)
(name) for defendant(s) (party name)

2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by (date) ] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ___].

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

All discovery commenced in time to be completed by (date). [Discovery on (issue for early discovery) to be completed by (date).]

Maximum of ___ interrogatories by each party to any other party. [Responses due ___ days after service.]

Maximum of ___ requests for admission by each party to any other party. [Responses due ___ days after service.]

Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).

Each deposition [other than of _____] limited to maximum of ___ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by (date)
from defendant(s) by (date)

Supplementations under Rule 26(e) due (time(s) or interval(s)).

4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.

The parties request a pretrial conference in (month and year).

Plaintiff(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

Defendant(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

All potentially dispositive motions should be filed by (date).

Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution procedure: [_____

_____].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by _____(date)_____
from defendant(s) by _____(date)_____

Parties should have ___ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by ___(date)___ [and at this time is expected to take approximately ___(length of time)___].

[Other matters.]

Date: _____

**COMMITTEE NOTES**

This form illustrates the type of report the parties are expected to submit to the court under revised Rule 26(f) and may be useful as a checklist of items to be discussed at the meeting.

LEGISLATIVE AND JUDICIAL HISTORY:
The Background of the Reforms
JoAnn L. Vogt

I. INTRODUCTION. HOW DID WE GET HERE, AND WHY DO WE CARE?

II. CIVIL PROCEDURE FROM THE BEGINNING OF TIME TO 1938, IN A NUTSHELL.

A. Roman/Civil Law.

Relative lack of importance of procedure, pleadings, forms of action

B. England.

1. Evolution of common law courts and procedure.

Procedure by writ; necessity of staying within the bounds of the writ; technical pleadings; trial by jury

2. Court of chancery; equity.

Proceedings commenced by filing of petition or bill; availability of means for obtaining testimony and admissions; "equitable" doctrines and remedies

3. Consequences of parallel development

Difficulty in asserting all claims in one proceeding

C. The United States.

1. The colonies.

Informality; variations among colonies; gradual adoption of features of English system

2. Post-revolutionary America

3. Development of procedure in the states.

Legislative efforts; the Field Code of 1848

4. The federal courts.

On the equity side: uniform procedure - promulgation of rules by U.S. Supreme Court

On the "law" side: procedure of the forum state to be used; the "Conformity" Acts; confusion and inconsistency

III. THE FEDERAL RULES OF CIVIL PROCEDURE.

A. Reasons for their enactment.

Elimination of confusion, uncertainty, and lack of uniformity

B. What the rules achieved--purpose, principal characteristics.

Simplification, common "denominalization" of procedures; merger of law and equity; adoption of comprehensive discovery procedures and simplified, "notice" pleading

IV. PROCEDURAL REFORMS SINCE 1938.

A. Criticisms of/inadequacies in the Federal Rules.

Initial satisfaction, later criticisms - delay, expense, discovery abuse - inadequacies of Rules in new types of litigation

B. Efforts to address inadequacies.

1. Pre-1990

Increasing Congressional involvement amendments directed at increased judicial control of pretrial procedures

2. CJRA of 1990

Effort to achieve reform through local rules

V. THE 1993 AMENDMENTS

A. Genesis in the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S.

B. Supreme Court action, including views of dissenters.

4/22/93 transmission of proposed amendments to Congress - dissenters' objections to changes in Rule 11, Rule 26(a)

C. Proceedings in the House

Hearings in summer 1993 - compromises - unlikely allies united in opposing certain provisions - HR 2814 passed in November 1993

D. Proceedings in the Senate

No separate bill - compromises unraveled - filibuster threats - amendments became effective 12/1/93 without any changes by Congress

E. What's next?

INITIAL, SUPPLEMENTAL AND PRETRIAL DISCLOSURES

RELATED D.C. COLORADO LOCAL RULES

EFFECT OF RULE CHANGES ON PLEADING

WILLIAM E. MURANE
HOLLAND & HART

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## MANDATED DISCLOSURES

### RULE 26(a)

The most controversial and problematic of the new rules is 26(a)(1), which mandates disclosures without awaiting a discovery request. "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information." Committee Notes, Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (herein the "Advisory Committee Notes"). The drafters of the Rules envision paragraph (1) as the "functional equivalent of court-ordered interrogatories." Whether that goal can be achieved by the rule changes is disputed and problematic.

Disclosure under Rule 26(a)(1) is triggered by the meeting of the parties mandated by **Rule 26(f)**. Unless otherwise stipulated or directed by the Court, the disclosures must be made at or within 10 days after the conference.

Appendix **Form 35, Report of Parties' Planning Meeting**, also commits the parties to the exchange of information required by **Rule 26(a)(1)**.

**Rule 26(a)(1)(A)**. Requires disclosure of individuals likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information.

Critics of the new rule predict this requirement and the similar requirement of subparagraph (B) concerning disclosure of documents will result in additional time and expense litigating side issues over relevancy. One commentator has noted that: "This requirement places an impossible burden on attorneys to read the minds of their opponents, for what plaintiffs may consider crucial to their claims may not be relevant to defendants." [1]

**Rule 26(a)(1)(A) Disclosures regarding potential witnesses.** Requires identification of all individuals who, based on the information then reasonably available to the party, are

1 John C. Koski, ABA JOURNAL/FEBRUARY 1994, pages 85-87. See also Justice Scalia (dissenting statement) 61 U.S. Law Week 4365, 4393 (April 22, 1993); Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery _ The Rush to Reform, 27 GA.L.Rev.1 39-46 (1992).

likely to have discoverable information. Note that this requires disclosure of both potential favorable and unfavorable witnesses.

The last sentence of Rule 26(a)(1) provides that a party "is not excused from making its disclosures because it has not fully completed its investigation of the case, or because it challengesthe sufficiency of another party's disclosures, or because another party has not made its disclosures."

As has been noted, the disclosure requirement probably conflicts with historic notions of the work product privilege and a lawyer's duty to the client under our adversarial system.

In apparent response to criticism of an earlier version of the Rule, disclosure is required only of potential evidence "relevant to disputed facts alleged with particularly in the pleadings." According to the Advisory Committee Notes: "The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence."

While the rules do not specifically so provide, the Advisory Committee Notes state that their intent is for the parties to informally refine and clarify the issues during the meeting of the parties under Rule 26(f) and "that the disclosure obligations would be adjusted in light of these discussions." The Advisory Committee further admonishes litigants "not to indulge in gamesmanship with respect to the disclosure obligations."

**Rule 26(a)(1)(B) Disclosures with Respect to Documents.** Covers all documents, data, compilations and tangible things "that are relevant to disputed facts alleged with particularity in the pleadings." As with witnesses, the obligation applies to both favorable and unfavorable documents.

The drafters contemplate that the "disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information sufficiently to enable opposing parties" to make informed decisions of what needs to be examined and to frame document requests.

Note that a disclosing party has the option of furnishing either a copy or a description by category and location of such items.

The same concerns with regard to what is relevant apply here.

**Rules 26(a)(1)(C) Computation of Damages.** Unlike paragraph (B), requires the disclosing party to provide not only the damages computation but to make available for inspection and copying the documents or other evidentiary material on which the computation is based, "including materials bearing on the nature and extent of injuries suffered."

**Rule 26(a)(1)(D) Production of Any Insurance Policy that may Satisfy Part or All of a Judgment.** Replaces former Rule 26(b)(2).

As indicated, the last sentence of Rule 26(a)(1) requires all of these initial disclosures to be made based on information then reasonably available to the disclosing party.

**Other Mandated Disclosures.**

**Rule 26(a)(3).** Mandates that, in addition to the initial disclosures mandated by paragraph (a)(1) and expert testimony disclosures mandated by paragraph (a)(2), additional information must be provided regarding evidence to be presented at trial, other than solely for impeachment purposes. These are similar to the current requirements governing pretrial orders and obligate the parties to provide:

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

According to the Advisory Committee Notes:

> Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.
>
> (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

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

Unless otherwise directed, the disclosures are to made at least 30 days before trial. Objections to deposition testimony designations and admissibility of documents or other exhibits must be made within 14 days thereafter, unless a different time is specified by the Court. Objections not so disclosed, except under evidentiary Rule 402 (irrelevant information) and Rule 403 (exclusion of relevant information), are waived unless objected to.

**Subsequent disclosures required.**

**Rule 26(e) Duty to Supplement.** Governs both disclosures made under 26(a) and those in response to a request for discovery. A party is under a duty to supplement or correct prior disclosures or responses to include information thereafter acquired, if ordered by the court, or as follows: (1) The party is under a duty to supplement "at appropriate intervals" its initial disclosures if it learns the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Recognizing the inherent vagueness of this requirement, the Advisory Committee Notes indicate that supplementation need not be made as each new item of information is learned, but rather "at appropriate intervals during the discovery period, and with special promptness as the trial date approaches." The Advisory Committee offers the useful suggestion that the scheduling order issued under revised Rule 16(b) "specify the time or times when supplementation should be made."

Jeff Chase, in the next presentation, will cover the sanctions applicable to failure to make the required disclosures under Rule 26.

**Filing of Rule 26(a) Disclosures.**

**Rule 26(a)(4)** provides for the disclosures under paragraphs (1) through (3) to be made in writing, signed and served, and promptly filed with the court.

However, in the District of Colorado, an overriding revised Local Rule provides that the disclosures shall not be filed with the court except when directed by a judge or when and to the extent necessary in connection with a motion or response thereto or for use at trial. **Note also that revised Local Rule 31(B) now provides that notices of depositions and discovery subpoenas shall not be filed with the court, except when directed by a judge or in connection with a motion or response thereto.** This represents a departure from former Local Rule 31, pursuant to which deposition notices were filed with the court.

**Cases Excluded from Rule 26(a) by revised Local Rules.** New District of Colorado **Local Rule 26.1** exempts certain categories of cases from formal discovery under Rules 30-36, absent prior approval of a judge or written stipulation of the parties. (See revised Local Rule 26.1.A.) Paragraphs B. and C. of revised Local Rule 26.1 likewise exempt those categories of cases from the initial disclosures mandated by Rule 26(a)(1) and from the meeting of the parties required by Rule 26(f).

**Commentary.** It is difficult to predict whether the mandated disclosure rules will simplify or complicate the discovery and trial preparation process.

Critics predict everything from disputes at every turn over issues such as relevancy to burying the adverse party in paper.

Obviously, much will depend on the spirit with which the litigants approach the rules and the judiciary oversees their implementation. There are draconian sanctions available to deal with litigants who do not comply.

**EFFECT OF RULE CHANGES ON PLEADING**

Much of the criticism of earlier versions of the disclosure rules concerned fears of hide-the-ball litigation tactics which would have permitted coupling vague allegations of wrongdoing with a corresponding duty of the defendant to conjure up information that might be responsive thereto. See Bell, Varner and Gottschalk, supra. at 42. These concerns are

addressed in part by the requirement that information be disclosed only with respect to "disputed facts alleged with particularity."

Further, as noted, the Advisory Committee expresses the hope that the Rule 26(f) meeting of counsel will refine the issues as to which disclosure is required, although, as noted, the rules themselves do not mandate that result.

Recognizing that pleading with particularity requires greater disclosure by the pleader, the litigant who does so places a significant disclosure burden on the adverse party. The advantage here would appear to lie with the plaintiff or counterclaimant, although I foresee an increase in averments by a defendant designed to increase the disclosure requirements of a plaintiff.

**Impact of revised Rule 11(b),** about which you will be hearing more later. Suffice it to say that the opportunity to plead in greater detail upon information and belief that allegations "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" will result in more pleading with particularity.

I foresee an increase in complaints, counterclaims and crossclaims of statements to the effect that:

> Allegations made on information and belief are premised on the belief that the same are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

Depending upon the circumstances, doing so has the practical effect of placing a significantly greater disclosure burden on the other party.

**Notice Pleading.** Where all this leaves the notice pleading requirements of Rule 8 is hard to say. The subject is not addressed in the Advisory Committee Notes, perhaps in tacit recognition that, as a matter of practice, notice pleading has been rendered a quaint vestigial remnant of earlier reforms that have given us the often maligned and frequently abused discovery process.

# DISCOVERY UNDER THE 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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## I. THE DISCOVERY PLAN

A. "[A]s soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)," parties must meet (1) "to discuss the nature and basis of their claims and defenses and the possibilities of a prompt settlement or resolution of the case," (2) "to make or arrange for the disclosure required by" Rule 26(a)(1), and (3) "to develop a proposed discovery plan." Fed. R. Civ. P. 26(f).

B. Under Fed. R. Civ. P. 26(f), the discovery plan must indicate the parties' views and proposals concerning:

1. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a) [initial disclosure, expert disclosure and pretrial disclosure] or local rule, including a statement as to when disclosures under Rule 26(a)(1) [initial disclosure] were made or will be made;

2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

3. What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or by local rule, and what other limitations should be imposed; and

4. Any other orders that should be entered by the court under Rule 26(c) [protective orders] or under Rule 16(b) [scheduling orders] and 16(c) [pretrial conferences].

C. Rule 26(f) provides that the attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for:

1. Arranging and being present or represented at the meeting;

2. Attempting in good faith to agree on the proposed discovery plan; and

3. Submitting to the court within 10 days after the meeting a written report outlining the plan.

## II. PRESUMPTIVE LIMITS ON DISCOVERY

A. Limitations on Deposition Discovery

1. Under revised Rules 30(a)(2)(A) and 31(a)(2)(A), leave of court is required if more than 10 depositions (regular depositions or depositions upon written questions) are to be taken by the plaintiffs, the defendants or third-party defendants.

2. Leave of court is also required to depose someone confined in prison or a person who has already been deposed in the case. Fed. R. Civ. P. 30(a)(2), 30(a)(2)(B) and 31(a)(2)(B).

3. Leave of court is required to take a deposition before the initial meeting among counsel unless (as to an ordinary deposition only) the notice of deposition contains a certification, with supporting facts, that the witness is about to leave the country and will be unavailable for a later deposition in the United States. Fed. R. Civ. P. 30(a)(2)(C) and 31(a)(2)(B). But see Fed. R. Civ. P. 32(a)(3), which prohibits the use of such a deposition at trial against a party who demonstrates that it was unable through the exercise of diligence to obtain counsel to represent it at the deposition.

B. Limitations on Written Discovery

1. Leave of court is required to serve interrogatories, requests for production or requests for admission before the initial meeting among counsel. Fed. R. Civ. P. 33(a), 34(a) and 36(a).

2. Leave of court is also required to serve more than 25 written interrogatories (including subparts) on any other party. Fed. R. Civ. P. 33(a).

3. There are no presumptive limits on the number of requests for production or requests for admission.

C. Modification by Stipulation

1. Revised Rule 29 provides that "[u]nless otherwise directed by the court, the parties may by written stipulation" (1) agree to the manner of taking depositions, and (2) modify certain other procedures governing or limitations placed upon discovery. Accord Fed. R. Civ. P. 30(a)(2).

2. If stipulations extending the time provided in Rules 33, 34 and 36 for responses to discovery would interfere with any time set for completion of discovery, hearing of a motion or trial, such stipulations may be made only with the approval of the court. Fed. R. Civ. P. 29.

3. But see D.C. COLO. LR 7.1(M):

> No agreement of counsel to shorten or extend any time limitation provided by the federal rules of civil or criminal procedure or these rules will be recognized or enforced, nor will such an agreement be considered just cause for failing to perform within the time limits established by those rules. Only time variances specifically approved by court order

upon motion made within the time limits prescribed by those rules will be recognized as having any binding or legal effect.

III. **DISCOVERY PROCEDURES**

A. Timing and Sequence of Discovery

1. Unless otherwise permitted under the Federal Rules of Civil Procedure, local rule, order or agreement of the parties, a party may not seek discovery **from any source** before the parties have met and conferred as required by Rule 26(f). Fed. R. Civ. P. 26(d). This encompasses service of subpoenas on third parties, as well as service of discovery requests against parties.

2. Fed. R. Civ. P. 26(d) still provides that unless the court orders otherwise, methods of discovery may be used in any sequence and the fact that one party is conducting discovery shall not operate to delay any other party's discovery.

B. Claim of privilege or work product -- Rule 26(b)(5) now provides that if a party withholds otherwise discoverable information on the basis of privilege or work product, it must:

1. Make the claim expressly; and

2. Describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Query: Must this claim of privilege and description of documents withheld be made at the time of initial disclosure under Fed. R. Civ. P. 26(a)(1)(B)?

C. Duty to Supplement Discovery Responses

1. Fed. R. Civ. P. 26(e) provides that a party who has responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if so ordered by the court.

2. Under Fed. R. Civ. P. 26(e)(2), a party is also under a duty "seasonably" to amend a prior response to an interrogatory, request for production, or request for admission:

   a. If the party learns that the response is in some material respect incomplete or incorrect; and

   b. If the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

D. Certifications and Sanctions

1. Under the 1983 amendments to the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(g) provides that the signature of an attorney or party to a discovery request, response or objection constitutes a certification that to the best of the signer's knowledge, information and belief, **formed after a reasonable inquiry**, the request, response or objection is:

   a. Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law;

   b. Not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and

   c. Not unreasonable or unduly burdensome or expensive, given the needs of the case, the amount in controversy, and

the importance of the issues at stake in the litigation.

2. The 1993 amendments to Rule 26(g)(3) provide that:

> If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, **shall impose** upon the party who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, **an appropriate sanction**, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

3. If a party fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may "require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure." Fed. R. Civ. P. 37(g).

4. Rule 11 sanctions "do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." Fed. R. Civ. P. 11(d).

E. Interrogatories

1. The revised rules provide that a party must state the reason for any objection to an interrogatory and must answer the interrogatory to the extent it is not objectionable. Fed. R. Civ. P. 33(b)(1).

2. All grounds for objection to an interrogatory shall be stated **with specificity**. Any ground not stated in a timely objection is **waived**, unless excused by the court for good cause shown. Fed. R. Civ. P. 33(b)(4).

F. Requests for production

If objection is made to part of an item or category of documents requested, the part shall be specified **and inspection permitted of the remaining parts**. Fed. R. Civ. P. 34(b).

G. Methods of Taking Depositions

1. The 1993 amendment to Fed. R. Civ. P. 28(b) changes the persons before whom depositions may be taken in foreign countries so that such depositions may be taken pursuant to a treaty or convention or a letter of request. The revision apparently is intended to take advantage of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

2. Revised Rule 30(b)(2) provides that deposition testimony can now be recorded **by audio, video or stenographic means**. The notice of deposition must state the method by which the testimony may be recorded. Any party may arrange for a transcript to be prepared of a deposition recorded by nonstenographic means. Rule 30(b)(4) specifies that the appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques.

3. With prior notice to the deponent and other parties, any party (at its own expense) may arrange for an additional method of recording the deposition other than the method specified by the person taking the deposition. Fed. R. Civ. P. 30(b)(3).

4. If a party offers at trial a deposition in audio or video form, the party shall also provide the court with a transcript of the portions so offered. Furthermore, on request of any party in a jury trial, deposition testimony offered other than for impeachment purposes shall be presented in audio or video form, if available, unless the court for good cause orders otherwise. Fed. R. Civ. P. 32(c).

5. Unless otherwise agreed by the parties, the deposition still must be conducted before a person authorized to administer oaths (reporter). The reporter should begin by making a statement on the record that includes:

   a. The reporter's name and business address;

   b. The date, time and place of the deposition;

   c. The name of the deponent;

   d. The administration of the oath or affirmation to the deponent; and

   e. Identification of all persons present.

   This statement must be repeated at the beginning of each audiotape or videotape. At the end of the deposition, the reporter must state on the record that the deposition is complete and set forth any stipulations of counsel. Fed. R. Civ. P. 30(b)(4).

6. A deposition by telephone may be taken upon stipulation of the parties or order of the court. Such a deposition is deemed to take place in the district and at the place where the deponent is to answer questions. Fed. R. Civ. P. 30(b)(7).

7. Under revised Rule 30(c), deposition examination proceeds as at trial under the Federal Rules of Evidence except Rules 103 (rulings on evidence) and 615 (exclusion of witnesses).

8. The court can limit the time permitted for conducting a deposition. Fed. R. Civ. P. 30(d)(2).

9. A deposition may not be used at trial against "a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under

Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held." Fed. R. Civ. P. 32(a)(3). Cf. D.C. COLO. LR 30.1A ("reasonable notice" for the taking of depositions is generally not less than five business days); D.C. COLO. LR 30.1B (filing motion for protective order or to limit examination stays the discovery to which the motion is directed until further order of the court).

10. Rule 30(e) now provides that the record of the deposition is presented to the deponent for review only if so requested by the deponent or a party before completion of the deposition.

11. Rule 30(f)(1) still requires the sealing of the original deposition transcript or recording, but provides that the original may be sent to the attorney who arranged for the transcript or recording, who is under a duty to preserve it. The reporter is under a duty to keep a copy of the stenographic notes and any audio or video recording of the deposition. Fed. R. Civ. P. 30(f)(2).

H. Deposition Conduct

1. Objections to deposition questions must be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1).

2. A party may instruct a deponent not to answer only when necessary to preserve a privilege, enforce a limitation on evidence directed by the court or present a motion to terminate the deposition under Rule 30(d)(3). Fed. R. Civ. P. 30(d)(1).

3. The court can sanction inappropriate deposition behavior. Fed. R. Civ. P. 30(d).

4. This is essentially the approach previously adopted by the United States District Court for the District of Colorado in that abusive deposition conduct is defined in detail and prohibited by D.C. COLO. LR 30.1C. Abusive deposition conduct includes:

   a. Coaching the witness, instructing the witness concerning the way a response should be framed or suggesting an answer.

   b. Interrupting examination for an off-the-record conference between counsel and witness, except during recesses.

   c. Questioning that "unfairly embarrasses, humiliates, intimidates or harasses the deponent," or invades privacy absent a clear statement on the record as to how the answers will constitute or lead to admissible evidence.

I. Certification of Efforts to Resolve Discovery Disputes

   1. Motions to compel under Rule 37 and motions for protective order under Rule 26(c) must include a certification of good faith effort to confer and resolve the dispute without court action. Fed. R. Civ. P. 26(c); Fed. R. Civ. P. 37(a)(2)(A) and (B).

   2. This is similar to the certification required for all motions (other than motions under Fed. R. Civ. P. 12 or 56) under D.C. COLO. LR 7.1(A).

# THE IMPACT OF THE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE ON ISSUES INVOLVING EXPERT WITNESSES, DISCOVERY MOTIONS, SERVICE OF PROCESS AND JUDGMENTS

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## I. DISCOVERY RELATING TO EXPERT WITNESSES.

A. Rule 26 (General Provisions Governing Discovery; Duty of Disclosure) affects the discovery of experts by mandating disclosures without a formal discovery request, requiring the expert to produce a report and potentially exposing materials formerly protected by the work-product privilege to discovery.

B. Rule 26(a)(2) establishes the method and content of required disclosures relating to expert witnesses:

1. "[A] party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence." Rule 26(a)(2)(A) (emphasis added).

   a. The Rule defines "expert" to include a "witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony."

   b. The Rule does not appear to require a fact witness who otherwise might be considered an "expert" in a particular discipline to comply with the disclosure requirements of Rule 26(a)(2). For example, a treating physician can be deposed or testify at trial without first presenting a written report. Advisory Committee Notes, 146 F.R.D. at 635.

2. The disclosure of the expert's identity must "be accompanied by a written report prepared and signed by the witness." Rule 26(a)(2)(B).

a. The Committee Notes state that Rule 26(a)(2)(B) does not preclude counsel from assisting in the preparation of the report, provided that the report actually reflects the testimony to be given on direct examination and is signed by the witness. Advisory Committee Notes, 146 F.R.D. at 634.

C. The identity of the expert and a copy of his report must be disclosed at least 90 days before trial or, if the expert will offer rebuttal testimony, 30 days after disclosure by the other party. Rule 26(a)(2)(c).

1. Although the Rule establishes 90 days before trial as the absolute last date on which disclosures may occur, the Committee Notes clearly contemplate that disclosure will occur earlier--typically on dates established by the court in a scheduling order. Advisory Committee Notes, 146 F.R.D. at 633.

a. Proposed D. Colo. L.R. 29.1 provides that "[m]odifications for disclosure under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted" will be included in the scheduling order.

2. The party with the burden of proof on an issue should make its disclosures first. 146 F.R.D. at 633.

3. The timing constraints on submitting comprehensive expert reports demand an early decision as to whether to retain an expert, and force the expert to perform a significant amount of work earlier in the litigation.

D. The expert's report must include "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony, and a

listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Rule 26(a)(2)(B).

1. Rule 26(a)(2)(B) seeks substantially more explicit disclosures regarding the testimony the expert will present at trial and the reasons for that testimony than previously required. "The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness." Advisory Committee Notes, 146 F.R.D. at 634.

2. Rule 705 of the Federal Rules of Evidence has been amended to conform it with Rule 26(a)(2)(B). The former Rule 705 permitted experts to testify without disclosing the facts or data underlying their opinions, unless the court ordered disclosure.

E. The expert disclosure rule raises questions as to the level of protection to be accorded attorney work-product--including drafts and memoranda prepared by counsel--that the expert may have reviewed in preparing his report.

1. In requiring the expert's report to reveal "the data or other information considered by the witness in forming the opinions," Rule 26(a)(2)(B) compels counsel to screen carefully materials supplied to experts.

2. The Advisory Committee clearly intended to make war on the work-product privilege: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Advisory Committee Notes, 146 F.R.D. at 634.

3. Until the courts clarify the scope of the term "considered," counsel must assume that all information shared with an expert is fair game for discovery.

F. The requirement that the expert report disclose any exhibit "to be used" implies that the report include anticipated trial exhibits.

G. Rule 26(b)(4)(A) provides parties with the right to depose an expert whom the opposing party expects to call at trial, in contrast with the former rule which permitted expert depositions only upon court order. The deposition may be taken only after the report has been served.

1. The Committee anticipates that delaying the deposition until after the filing of the report will reduce the length of or entirely eliminate the need for depositions of expert witnesses. Advisory Committee Notes, 146 F.R.D. at 635. The Committee apparently did not consider the possibility that receiving a detailed written report before the deposition actually occurred might encourage the attorney to expand the scope of his questioning.

2. Postponing the expert deposition until after submission of the expert report may create a timing problem that escalates as trial approaches, particularly in those cases where the expert report is not submitted until 90 days before trial. The Rules fail to address how much time an attorney may have between receiving the report and taking the deposition. If the attorney delays too long in scheduling the deposition, the rebuttal expert may be hampered in his efforts to prepare a completely responsive report within 30 days.

3. The expert deposition counts toward the ten depositions permitted under Rule 30(a)(2).

4. An expert witness may attend the deposition of another witness unless the court orders exclusion. Rules 26(c)(5), 30(c); Advisory Committee Notes, 146 F.R.D. at 664.

H. Rule 26(b)(4)(B) restricts discovery relating to non-testifying experts to the report of the examining physician or psychologist pursuant to Rule 35(b), "or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions by other means."

I. Rule 26(e)(1) requires that discovery be supplemented at "appropriate intervals" if the party discovers that "in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." With respect to testifying experts who provide a written report, the duty to supplement extends both to the report and to the expert's deposition.

   1. The scheduling order may specify the "appropriate intervals" at which supplementation should be made. Advisory Committee Notes, 146 F.R.D. at 641.

   2. Supplementation must be made "with special promptness" as the trial date approaches. Advisory Committee Notes, 146 F.R.D. at 641.

   3. The date set forth in Rule 26(a)(3)--or 30 days before trial--establishes the cut-off for additions or other changes to the expert's information.

   4. Information may satisfy the requirements of the "made known" standard if it is revealed in the context of other discovery. For example, there is no obligation formally to supplement disclosures "when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report." Advisory Committee Notes, 146 F.R.D. at 640.

J. The Rules impose a severe penalty for failing to supplement disclosure: the party "shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Rule 37(c).

K. The disclosure requirements of Rule 26, by imposing on the attorney an affirmative obligation to make known to an opposing party information potentially damaging to his client's case and for which no request has been made, raise a conflict between the lawyer's duty to represent his client and to avoid assisting his adversary. "Requiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of his adversary." Scalia, J., 61 U.S.L.W. at 4393.

## II. DISCOVERY MOTIONS AND THE NEW RULES.

A. Discovery motions must be filed in the court in which the case is pending--revising the prior rule which allowed filing of discovery motions relating to depositions in the court in the district where the deposition was to be taken. Discovery motions relating to non-parties must be filed in the district where the discovery is to be taken. Rule 37(a)(1).

B. The Amendments expand the scope of motions to compel to include violations for failure to make disclosures under Rule 26(a). Rule 37(a)(2).

1. In providing for motions to compel in the disclosure context, the new Rule parallels the former rule dealing with failures to answer interrogatories. Advisory Committee Notes, 146 F.R.D. at 690.

2. A motion to compel "may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure." Advisory Committee Notes, 146 F.R.D. at 690.

3. Litigants must seek to resolve all discovery disputes, including failure to make Rule 26(a) disclosures, by informal means before filing a motion with the court--as D. Colo. L.R. 7.1 already requires. Rule 26(a)(2)(A), (B).

C. Under revised Rule 26(b)(3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to respond.

1. "Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a)." Advisory Committee Notes, 146 F.R.D. at 690.

D. If a motion to compel is granted, or if the disclosure is made or information provided after the motion is filed, the court shall order the reasonable expenses incurred in making the motion--unless the motion was filed without first conferring in good faith or the offending party's conduct was substantially justified. Rule 26(b)(4)(A).

E. If the motion to compel is denied, the court "may enter any protective order authorized under Rule 26(c)" and shall order the reasonable expenses occurred in opposing the motion--unless the moving party's conduct was substantially justified.

1. Rule 26(c) remains unchanged, except that it requires the movant to confer with the other parties before filing a motion for a protective order and includes disclosures pursuant to Rule 26(a) in its scope.

F. The court may consider motions to compel "on written submissions as well as on oral hearings." Advisory Committee Notes, 146 F.R.D. at 690.

G. Subsection (c) puts teeth into Rule 37 by providing for what the Committee Notes call a "self-executing" sanction: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." In addition to or in lieu of this sanction, the court may impose

other sanctions, including reasonable expenses and attorney fees caused by the failure to disclose, appropriate protective orders and informing the jury of the failure to make the disclosure.

1. A party need not file a motion to compel to avail itself of the remedies provided in Rule 37(c). Advisory Committee Notes, 146 F.R.D. at 691.

2. The preclusion sanction does not apply to evidence offered solely for impeachment. Id.

3. The exception to the preclusion sanction for "harmless" violations is intended to avoid unduly harsh penalties in certain situations including: "the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures." Advisory Committee Notes, 146 F.R.D. at 691.

4. The Committee anticipates that the sanctions that are not self-executing will be used in cases where the evidence preclusion sanction provides no incentive to compel disclosure, i.e., where the evidence is harmful to the non-disclosing party. 146 F.R.D. at 691-92. In those situations, the court may declare specified facts to be established, preclude the presentation of contradictory evidence or allow the jury to be informed of the fact of non-disclosure.

H. The pendency of a motion for a protective order may be offered as an excuse for a party's failure to attend his deposition or respond to other discovery requests. Rule 37(d). Once the court denies a motion for protective order, the party must comply with the pending discovery.

I. Rule 26(b)(5) covers situations where claims of privilege or protection of trial preparation materials are asserted.

1. "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

2. If a party fails to notify other parties that it is withholding materials on the basis of attorney-client privilege or work-product protection, the party may be subject to sanctions under Rule 37(b)(2) and the privilege may be waived.

3. The Committee expects the required privilege log to "reduce the need for in camera inspection of the documents." Advisory Committee Notes, 146 F.R.D. at 639.

4. The Rule makes no attempt to define what information a party must provide to support a claim of work product or privilege protection. The Committee Notes recognize that detailed descriptions of documents withheld may be appropriate if "only a few" items are involved, "but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." 146 F.R.D. at 639 (emphasis added). In cases where the description requirement is burdensome, the party may move for a protective order. Id.

5. "The obligation to provide pertinent information concerning privileged materials applies only to items 'otherwise discoverable.'" Advisory Committee Notes, 146 F.R.D. at 639-40. For example, the party need not provide Rule 26(b)(5) information for documents objectionable on grounds of overbreadth.

J. Rule 26(g) requires signatures on disclosures, paralleling the signature requirement for discovery requests, responses and objections.

K. Misconduct in connection with a certification of disclosures or discovery requests is punishable under Rule 26(g)(3), which provides for an award of attorney fees and costs.

1. D. Colo. L.R. 30.1C establishes sanctions for deposition misconduct, including an award of attorney fees and costs where counsel "unreasonably has interrupted, delayed or prolonged any deposition." These sanctions presumably supplement those available under amended Rule 26(g)(2).

L. Rule 11 no longer applies to discovery misconduct.

## III. THE EFFECT OF THE AMENDMENTS ON THE RULES REGARDING SERVICE OF PROCESS.

A. Rule 4: shifting the burden and cost of service of process through waiver of service.

1. Amended Rule 4 places a duty on the person to be served to eliminate unnecessary costs of service.

2. To initiate the cost-shifting mechanism, the plaintiff must mail to the defendant a copy of the complaint and a request for waiver of service.

a. The complaint must be addressed directly to a person qualified to receive service. For example, a corporate mailroom cannot be required to identify the appropriate individual recipient for an institutional summons. Advisory Committee Notes, 146 F.R.D. at 564.

b. The request for waiver must be sent via first-class mail "or other reliable means." Rule 4(d)(2)(B). The Committee suggests using messenger services or facsimile transmission to effect dispatch. "[T]he sender should maintain a record of the transmission to assure

proof of transmission if receipt is denied." Advisory Committee Notes, 146 F.R.D. at 564.

c. The request for waiver must inform the defendant, using the text of the form contained in the Rules, of the consequences of failure to comply with the request.

d. The request must be dated.

e. The defendant receives "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 that date if the defendant is addressed outside any judicial district of the United States." Rule 4(d)(2)(F).

f. An extra copy of the notice and request must be provided, along with a prepaid means of return.

3. "If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff within the United States, the courts shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." Rule 4(d)(2).

a. The circumstances constituting "good cause" for failure to waive service are rare, according to the Committee. Advisory Committee Notes, 146 F.R.D. at 564. The unjust nature of the claim or the court's lack of jurisdiction do not rise to the level of "good cause," but lack of receipt of the request or inability to speak English fall within the Committee's definition of that term. Advisory Committee Notes, 146 F.R.D. at 564.

b. A foreign defendant need not show good cause for its failure to waive service. Id.

4. Voluntary compliance with the new waiver of service provision operates only as a waiver of objections as to insufficient service and insufficient process. Voluntary waiver of service does not deprive the defendant of venue or personal jurisdiction objections.

5. By waiving service, the defendant extends the time for answering the complaint from the 20 days specified in Rule 12 to 60 days from the date it was sent--90 days if the defendant is outside any judicial district of the United States. Rule 4(d)(3).

6. The waiver form is filed with the Court and no other proof of service is required. Rule 4(d)(4).

   a. If the waiver is not returned and filed, the limitations period is not tolled. The action cannot proceed until formal service of process is effected. Advisory Committee Notes, 146 F.R.D. at 565.

   b. In cases where the statute of limitations is about to expire, the plaintiff should use a formal method of service. Id.

   c. The waiver procedure should not be used where the 120-day period for effecting service under subdivision (m) will expire before the date in which the waiver must be returned. Id.

7. Rule 4(b)(5) establishes a cost-shifting mechanism in cases where a request to waive service is refused. The costs imposed on the defendant include the costs of effecting formal service, such as process server fees, and the costs (including attorney fees) of "any motion required to collect the costs of service."

   a. The Committee Notes make clear that the recoverable costs are limited to those incurred after the time expires for the defendant to return the waiver. Advisory Committee Notes, 146 F.R.D. at 566.

8. In cases where service of process is not waived, service may be accomplished in accordance with the law of the forum or of the state where the complaint is served. Rule 4(e)(1).

   a. Rule 26(k)(2) permits the court to exercise jurisdiction--without relying on state law--over any defendant who is the subject of a federal claim and "who is not subject to the jurisdiction of the courts of general jurisdiction of any state."

9. Rule 4(f)(1) authorizes the use of the Hague Convention procedures for service on foreign defendants, where applicable.

   a. If the Hague Convention procedures do not apply, then service may be effected (1) in the manner prescribed by the law of the foreign country; (2) as directed by the foreign authority after a letter of request; or, (3) if not prohibited by law, by personal delivery (except for corporations), by mail with return receipt requested or by any other means directed by the court. Rule 4(f)(2).

10. Service on infants or incompetent persons continues to be governed by the laws of the state in which service is effected. Rule 4(g). The service rule for infants and incompetents in foreign countries tracks the requirements set forth in Rule 4(f)(2).

11. Formal service on corporate defendants shall be effected "in the manner prescribed for individuals by subdivision (e)(1)." Rule 4(h)(1). Foreign corporations may be served "in any manner prescribed for individuals by subdivision (f)", except personal delivery. Rule 4(h)(2).

12. The plaintiff may not use the notice and request procedure when the United States is a defendant. Rule 4(i)(1).

a. The Rule amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. Id.

b. The authorized mail service must be addressed to the civil process clerk at the office of the United States attorney. Id.

c. Rule 4(i)(c) attempts to preserve the plaintiff's substantive rights because of failure to comply with the multiple service requirement. The Rule allows "a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States."

13. Rule 4(l) eliminates the time requirement for filing returns of service.

14. The court may allow additional time for service if the plaintiff shows "good cause" for his failure to effect service within 120 days following the filing of the complaint. Rule 4(m). "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service." Advisory Committee Notes, 146 F.R.D. at 573.

15. Rule 4(n) allows the court to exercise jurisdiction over property, as provided by a statute of the United States, or the defendant's assets, "by seizing the assets 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 is located."

B. Amended Rule 4.1(a) lifts the language from former Rule 4 relating to service of process, other than a summons or subpoena, by United

States marshalls. Subdivision (b) is a new rule dealing with enforcement of orders in civil contempt proceedings.

1. Rule 4.1(b) provides for nationwide service of orders of civil commitment enforcing decrees or injunctions issued to compel compliance with federal law. Other orders in contempt proceedings must be served in the state issuing the order or within 100 miles of the place at which the order was issued.

2. "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." Advisory Committee Notes, 146 F.R.D. at 575.

## IV. RECOVERY OF ATTORNEY FEES PURSUANT TO RULE 54.

A. Revised Rule 54(d)(1) clarifies that attorney fees are not to be included in the "costs" awarded with a judgment.

B. Claims for attorney fees and "related nontaxable expenses" shall be made by motion served no later than 14 days following the entry of judgment. Rule 54(d)(2)(B).

1. The motion "must specify the judgment and the statute, rule or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought." Id.

2. At the time of filing, the moving party need not submit evidence in support of the fee claim. The court may establish a schedule for submission of relevant evidence. Advisory Committee Notes, 146 F.R.D. at 701.

3. The court may direct the moving party to disclose a fee agreement. Rule 54(d)(2)(B).

C. The court may determine liability for fees before receiving submissions bearing on issues of evaluation of services. Rule 54(d)(2)(C).

1. "The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought." Advisory Committee Notes, 146 F.R.D. at 702.

2. In "rare" cases, the court may order discovery in connection with fee motions. Id.

D. Because they are subject to appellate review, fee awards should be made in the form of a separate judgment under Rule 58. Id.

E. The court may establish procedures to aid in the resolution of fee claims by means of local rules. The establishment of schedules "reflecting customary fees or factors affecting fees within the community" is an appropriate subject for a local rule. Advisory Committee Notes, 146 F.R.D. at 703.

F. Rule 54(d)(2)(D) permits issues to be referred relating to value of services to a special master and motions for attorney fees to be referred to a magistrate judge.

G. Rule 54(d)(2)(E) excludes claims for fees and expenses as sanctions for violations of the Federal Rules or under 28 U.S.C. § 1927.

H. "Filing a motion for fees under [revised Rule 54(d)(2)] does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees." Advisory Committee Notes, 146 F.R.D. at 701.

# COORDINATION AND TIME LINES UNDER THE FEDERAL AND LOCAL RULES

Edward T. Lyons, Jr.

I. THE COMMENCEMENT OF THE ACTION.

A. By Service of Summons:

1. In form specified by Rule 4(a). (Forms available from clerk's office).

2. Clerk's office issues in form prepared by plaintiff's attorney, at or after filing complaint. Rule 4(b). Civil cover sheet must be filed with complaint. LR 3.1.

3. Summons must be served with copy of complaint. Rule 4(c).

a. Service within U.S. must be completed within 120 days after filing the complaint. Rule 4(m).

b. Special provisions for service in a foreign country. Rule 4(f) and (j)(1).

B. By Notice and Request for Waiver:

1. Plaintiff mails Notice and Waiver of Service in forms prescribed in Form 1A and Form 1B of Appendix to Rules, accompanied by copy of complaint. Rule 4(d)(2)(A)-(G).

2. Defendant given 30 days (60 days if request sent outside U.S.) to return the waiver. Rule 4(d)(2)(F).

3. Use of notice-waiver results in different time lines than service of summons:

a. Defendant who returns executed waiver gains additional time for answer - i.e. 60 (or outside U.S. 90) days, from date notice sent, instead of 20 days after service of summons. Rule 4(d)(3).

b. The action proceeds as if a summons and complaint had been served on the date the plaintiff files the executed waiver. Rule 4(d)(4).

c. This may delay tolling a statute of limitations when applicable law requires service of process to toll the statute. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984).

4. The notice-waiver option is not available in actions against the United States, for which special service of summons requirements apply. Rule 4(i).

II. DEFENSES AND OBJECTIONS - WHEN PRESENTED.

A. When jurisdiction is acquired by service of summons and unless a different time is prescribed by statute, the answer of a defendant other than the United States is due within 20 days after service. Rule 12(a)(1)(A).

1. The exception in Former Rule 12(a) ("when service is made under Rule 4(e) and a different time is prescribed...in the statute or rule of court of the state"), which resulted in 30 days to answer when service was made outside Colorado under the state long-arm statute and rule, has been deleted. Thus, all summonses, including those to be served outside Colorado, are now returnable within 20 days.

2. The United States and its agencies have 60 days after service to answer. Rule 12(a)(3).

B. If jurisdiction is acquired by the request for waiver option, the answer is due within 60 days (90 days if the request is sent outside U.S.) after the request for waiver is sent. Rule 12(a)(1)(B).

C. Alteration of time periods by motions. A motion specifically permitted under Rule 12(b), (e) or (f) alters the time to answer as follows:

1. If the motion is denied or a ruling thereon is postponed until the trial, the answer is due 10 days after notice of the court's action. Rule 12(a)(4)(A).

2. If the court grants a Rule 12(e) motion for a more definite statement, the answer is due 10 days after the service of the more definite statement. Rule 12(a)(4)(B).

III. SCHEDULING ORDERS AND INITIAL MANDATORY DISCLOSURES.

A. Rule 16(b) requires a scheduling order and contemplates, but doesn't require, a scheduling conference; however, LR 29.1 makes both the conference and the order a requirement in all but certain exempt cases.

1. The time limit for entry of the scheduling order is extended from 120 days after filing complaint under former Rule 16(b), to 90 days after appearance of the defendant or 120 days after service of the summons. Rule 16(b).

2. Although the scheduling order can be entered earlier, the amendments to Rule 16 and Rule 26 will ordinarily mean a somewhat more extended time line for holding the scheduling conference and the entry of the scheduling order than under the prior rule.

B. The scheduling conference will be convened by a Magistrate Judge or District Judge. LR 29.1

1. The order convening the scheduling conference will require counsel to meet (at least 14 days before the date set for the scheduling conference) and attempt to agree on a scheduling order. The proposed order must be filed at least five days before the date set for the scheduling conference. The minimum matters to be included in the proposed scheduling order are specified in LR 29.1.

2. Appendix A hereto contains the form of order it is anticipated the Magistrate Judges will use to convene conferences in cases referred to them for the entry of scheduling orders.

a. District Judges who do not refer cases to Magistrate Judges for entry of scheduling orders may issue orders containing different instructions.

C. Except in cases exempted by local rule, counsel for the parties shall, as soon as practicable and in any event at least 14 days before the scheduling conference, meet in accordance with Rule 26(f) to:

1. Discuss the nature and basis of the claims and defenses;

2. Consider the possibilities of a prompt settlement;

3. Make or arrange for the automatic disclosures required by Rule 26(a)(1); and

4. Develop a proposed discovery plan. The plan shall address:

a. Changes that should be made in the timing, form or requirements for disclosures under Rule 26(a)(1), including a statement as to when such disclosures were made or will be made;

b. Subjects on which discovery will be needed, when discovery should be completed, and whether it should be conducted in phases or be limited to certain issues;

c. Changes that should be made in the limitations on discovery imposed under the rules, and what other limitations should be imposed; and

d. Any other orders that should be entered relating to discovery or under Rule 16(b) and (c) (i.e., in the scheduling order or pretrial order).

5. The parties shall file a written report outlining their proposed discovery plan within ten days after their Rule 26(d)

meeting. This requirement appears to be in addition to the requirement to file a proposed scheduling order five days before the scheduling conference.

a. Except when "otherwise ordered," Rule 26(f) contemplates that counsel will file a plan containing their "views and proposals" on a broad range of matters including "any other orders that should be entered by the Court under subdivision (c) [relating to protective orders] or under Rule 16(b) and (c) [relating to scheduling, case management and pretrial procedures generally]."

b. To some extent, however, it may be "otherwise ordered" by the standard Appendix A form of order used by the Magistrate Judges to convene scheduling conferences - e.g., the parties "shall comply" with the mandatory 10-day Rule 26(a)(1) disclosures. (Rule 26(f)(1) would otherwise allow the parties' plan to propose a different schedule for disclosure.)

c. Nevertheless, LR 26.1C states that unless otherwise ordered "in a particular case," the Rule 26(f) requirement of a "meeting" and "report" applies in all civil actions except those exempted in the rule.

6. Counsel should therefore file both a Rule 26(f) report and a proposed scheduling order. The report may contain suggested case management provisions not contemplated by the standard form of order. The Rule 26(f) report affords counsel an opportunity to advise the Court of special circumstances that might warrant a departure from the standard form of scheduling order. Counsel should welcome and take full advantage of the expanded case management role that Rule 26 (f) affords.

D. Pursuant to LR 26.1, the requirement for the Rule 26(f) meeting applies in all civil actions except:

1. Appeals from the bankruptcy court;

2. Appeals from decisions of administrative agencies;

3. Other cases in which the authority of the court is limited to reviewing a record;

4. Habeas corpus proceedings;

5. Pro se prisoner cases;

6. Forfeiture proceedings;

7. Government collection actions;

8. IRS, SEC, HHS and other government agency administrative proceedings;

9. Actions to enforce or register judgments;

10. Proceedings to enforce/contest summons, subpoenas and deposition proceedings pending in other districts;

11. Cases consolidated with a case in which parties have held a Rule 26(f) meeting, or in which a scheduling order has been entered; and

12. Cases transferred or consolidated with cases transferred under 28 U.S.C. 1407, or subject to potential transfer thereunder pursuant to a pending motion.

E. Scheduling orders shall comply with Rule 16(b). LR 16.2. In addition, LR 29.1 specifies specific matters which must be included in the scheduling order.

1. The scheduling order will be entered at the scheduling conference. The proposed scheduling order must be filed no later than five days before the scheduling conference.

2. Appendix B hereto contains the form of scheduling order it is anticipated the Magistrate Judges will use in cases referred to them for the entry of such orders.

F. Under Rule 26(a)(1) counsel must at or within 10 days after the Rule 26(f) meeting make initial disclosures of:

1. Identity of persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings;

2. Copies of or a description by category and location of all documents relevant to disputed facts, etc.;

3. A computation of each category of damages, making available the supporting documents or other evidence; and

4. Any insurance agreement providing coverage.

a. The foregoing Rule 26(a)(1) disclosures are mandatory - i.e., the equivalent of court-ordered interrogatories.

b. The "unless otherwise stipulated" qualifi cation of the 10-day time limit for making disclosures in Rule 26(a)(1) will probably not be available in this district. Compare the "parties shall comply" language in the Appendix A order which will be used by the Magistrate Judges.

c. These disclosures should not be filed. LR 31.

5. The Initial Compulsory Disclosures of Rule 26(a)(1) apply in all civil actions except the exempt cases listed in III.D. above. LR 26.1B.

IV. FORMAL DISCOVERY TIME LINES AND LIMITATIONS.

A. Formal discovery under Rules 30-36 may not be commenced until after the Rule 26(f) meeting of the parties. Rule 26(d)

B. Presumptive limits apply to the use of depositions and interrogatories:

1. Not more than 10 depositions per side. Rule 30(a)(2)(A).

2. Not more than 25 interrogatories, including subparts. Rule 33(a).

C. In practice, the scheduling order will set limits on the use of discovery which may be different than the presumptive limits, and may include limits on requests for production and admissions as well. The scheduling order will also set a schedule for discovery and a discovery cutoff date and contain other provisions relating to the timing and use of discovery. See, e.g., Appendix B, Sec. VII.A., B. and C.

D. Except with prior approval of court or upon the written stipulation of the parties, discovery under Rules 30-36 is not permitted in the first ten of the categories of exempt cases listed in III.D. above. LR 26.1A.

E. Reasonable notice for taking depositions is now 11 instead of five days (as computed under Rule 6(a) and (e)). LR 30.1A.

F. Pending resolution of a motion for protective order under Rule 26(c) or 30(d), no party, attorney or witness is required to appear at a deposition to which the motion is directed. The motion stays the discovery to which it is directed until further order of the court. LR 30.1B.

V. ADDITIONAL MANDATORY DISCLOSURES.

A. Expert witness disclosures. Rule 26(a)(2).

1. Each party must identify experts who may be presented at trial. Rule 26(a)(2)(A).

2. Except as "otherwise directed" by the court, each party shall also, with respect to persons engaged to provide expert testimony and employees whose duties regularly involve giving expert testimony, serve a complete written report signed by the expert containing:

   a. A complete statement of all opinions and the basis and reasons therefor;

   b. The data or other information considered by the witness in forming the opinions;

   c. Any exhibits to be used to summarize or support the opinions;

   d. The qualifications of the witness, including all publications authored by the witness within the past ten years;

   e. The compensation to be paid; and

   f. A list of all cases in which the witness has testified during the preceding four years. Rule 26(a)(2)(B).

3. The opposing party may designate rebuttal experts and serve their written reports containing all of the same information specified in 2. above. Rule 26(a)(2)(C).

4. In the absence of "other directions" from the court, the expert disclosures required under 2. above shall be made at least 90 days before trial or the date the case is to be "ready for trial" and the rebuttal expert disclosures permitted by 3. above shall be made within 30 days after the disclosure made by the other party. Rule 26(a)(2)(C).

   a. In this district, the expert disclosures will ordinarily be made before the 90-days-before-trial trigger date specified in Rule 26 (a)(2)(C). The "other directions"

will usually be established in the scheduling order, which will typically provide for the sequential disclosure of expert reports and a deadline for completing expert discovery before the pretrial conference. This is in accordance with the general view in this district that a case is ready for trial when the final pretrial order is entered.

b. In drafting proposed scheduling orders, it is suggested that a requirement that the expert reports contain all of the information required by Rule 26(a)(2)(B) should be made explicit.

5. The expert disclosures are not filed with the court. LR 3.1.

B. Additional automatic pretrial disclosures are also required. Rule 26(a)(3).

1. Unless "otherwise directed" by the court, at least 30 days before trial, each party shall disclose:

a. Names and addresses of witnesses, separately identifying who will and who may be called;

b. Designation of deposition testimony to be presented; and

c. All exhibits, separately identifying what will and may be offered.

2. Within 14 days thereafter, the opposing party may file objections to the use of the designated depositions or the admissibility of any exhibit. Objections not made, other than FRE 402 and 403 objections, are deemed waived. Rule 26(a)(3).

3. In this district, expect that parties will typically be "otherwise directed" by the scheduling order to disclose names and addresses of witnesses and a list of

exhibits as well as a time for filing objections thereto before the date of the pretrial conference. LR 29.1. See, e.g., Appendix B, Sec. VII.B.3.

a. Suggest including an additional provision in the proposed scheduling order requiring designation of deposition testimony to be presented at trial and a time for objecting in accordance with Rule 26(a)(3) before the date of the pretrial conference.

b. LR 29.1 (item 13) provides for modifications of times for disclosure under Rule 26(a) to be included in the scheduling order.

C. Duty to supplement disclosures. A party has a continuing duty:

1. To supplement or correct at "appropriate intervals" its Rule 26(a) disclosures to include information thereafter acquired. Rule 26(e)(1).

2. To update expert reports and information provided through a deposition of the expert to reflect all changes or additions. Rule 26(e)(1).

a. The update of expert reports is to be provided at or before the time of the additional Rule 26(a)(3) disclosures described in B.1. above. Rule 26(e)(1).

b. By implication, this should occur earlier consistent with the usual scheduling order acceleration of the Rule 26(a)(3) disclosures. It is therefore suggested that an additional provision be included in the scheduling order requiring updates of expert reports before the date of the pretrial conference, with time for additional expert discovery allowed, if needed. LR 29.1 (item

13) expressly contemplates that modification of the time for Rule 26(e)(1) supplementation may be included in the scheduling order.

3. To "seasonably amend" a prior response to an interrogatory, request for production, or request for admission if the response is otherwise in some material respect incomplete or incorrect. Rule 26(e)(2).

4. Although in the absence of local rule, all disclosures under Rule 26(a)(1)-(3) would be promptly filed with the court (Rule 26(a)(4)), in this district the disclosures are treated like other discovery materials and are not filed. LR 31.C. They may be filed only (a) when directed by a judge, or (b) when and to the extent needed by a party in connection with a motion, or for use at trial. LR 31C.

VI. THE FINAL PRETRIAL ORDER AND OTHER CASE MANAGEMENT PROVISIONS.

A. Settlement and Status Conferences.

1. The court has discretion to convene conferences at any time to expedite the disposition of the action, simplify issues, improve the quality of the trial through more thorough preparation, facilitate settlement and deal with other matters affecting management of the case. Rule 16(a) and (c).

a. The scheduling order will ordinarily provide for a settlement conference and one or more status conferences. LR 29.1. See, e.g., Appendix B, Sec. IX.

B. Alternate Dispute Resolution ("ADR").

1. Rule 16(c)(9) contemplates the discretionary use of ADR in case management. At any stage of the proceeding, on a District Judge's own

motion or pursuant to a motion or stipulation of the parties, the court may direct the parties to engage in ADR. LR 53.2.

a. The court may stay the action in whole or in part during a time certain or until further order.

b. Relief from an ADR or stay order may be granted for good cause. LR 53.2.

C. The final pretrial order.

1. The pretrial order is customarily entered at the pretrial conference at the time set in the scheduling order.

a. The scheduling order ordinarily requires counsel to file a proposed pretrial order at least five days before the pretrial conference. See, e.g., Appendix B, Sec. IX.

b. The provision for a "uniform" pretrial order previously prescribed under LR 16.1 has been abolished by deletion of the rule.

i. Appendix C hereto contains the instructions currently used by Magistrate Judges in cases referred to them for entry of pretrial orders.

ii. Individual District Judges who do not refer cases to Magistrate Judges will adopt their own forms of pretrial orders.

2. The pretrial orders will, in any event, control the subsequent course of the action and the trial; the pleadings are deemed merged therein and the order may not be amended except by consent of the parties and approval of the court or by order of the court to prevent manifest injustice. Rule 16(e).

D. Final trial preparation conference.

The pretrial order may provide for a final trial preparation conference which is usually held approximately 30 days before the trial date. The court may at that time consider motions in limine on particular issues and other matters to expedite the trial. See, e.g., Appendix C., Sec. XII.

## APPENDICES

A. Sample Order Setting Scheduling/Planning Conference.

B. Sample Scheduling Order.

C. Instructions used by Magistrate Judges for Preparation of Pretrial Orders.

D. Timetable of a Civil Action.

E. Time Lines Diagram.
Courtesy of William E. Murane, Holland & Hart.

Appendix A

Sample Order Setting Scheduling/Planning Conference

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

Plaintiff(s),

v.

Defendant(s).

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ORDER SETTING
SCHEDULING/PLANNING CONFERENCE

---

The above-captioned case has been referred to Magistrate Judge _____ pursuant to the Order of Reference entered by Judge _____ on _____.

Pursuant to the Order of Reference referred to above, it is hereby

ORDERED that a Scheduling/Planning Conference pursuant to Fed.R.Civ.P. 16(b) shall be held on _____ at _____ o'clock ____ in Chambers ____ of the United States Courthouse, Denver. If this date is not convenient for any counsel, he/she should confer with opposing counsel and my secretary to reschedule the conference to a more convenient date. Absent exceptional circumstances, no request for rescheduling will be entertained unless made within five days of the date of this Order. The plaintiff shall notify all parties who have not entered an appearance of the date and time of the Scheduling/Planning Conference.

IT IS ORDERED that counsel for the parties in this case are to hold a pre-scheduling conference meeting and prepare a proposed Scheduling Order in accordance with Fed.R.Civ.P. 26(f), as amended, on or before 14 days before the scheduling conference. Pursuant to Fed.R.Civ.P. 26(d), as amended, no discovery shall be submitted until after the pre-scheduling conference meeting. No later than 5 days before the Scheduling/Planning Conference, counsel shall

submit their proposed Scheduling Order to the **Magistrate Judge assigned.** In addition, on or before 10 days after the pre-scheduling conference meeting, the parties shall comply with the mandatory disclosure requirements of Fed.R.Civ.P. 26(a)(1), as amended.

**The parties shall prepare the proposed Scheduling Order in accordance with the form enclosed with this Order.**

IT IS FURTHER ORDERED that at least five days before the Scheduling/Planning Conference, counsel for each party shall submit a brief Confidential Settlement statement to the Magistrate Judge **ONLY,** outlining the facts and issues involved in the case, and the possibilities for settlement, including any settlement authority from the client. The confidential statements should **NOT** to be filed with the Clerk, but are to be submitted to the Magistrate Judge in Room _____ of the United States Courthouse, and copies need not be supplied to opposing counsel. Counsel should be prepared to discuss settlement at the Scheduling/Planning Conference and should obtain settlement authority from the client, or have the client available either in person or by telephone.

All out-of-state counsel shall comply with D.C.COLO.LR 83.5(C) before the Scheduling/Planning Conference.

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the United States Magistrate Judge assigned to this case.

DATED at Denver, Colorado this _____ day of _____, 19___.

BY THE COURT:

_____
United States Magistrate Judge

Appendix B

Sample Scheduling Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

Plaintiff/s,

v.

Defendant/s.

---

SCHEDULING ORDER

---

ORDER ENTERED BY MAGISTRATE JUDGE _____ PURSUANT TO D.C.COLO.LR 29.1:

I. **Date and Appearances**

The scheduling conference in the above case was held on_____, 199__.
Appearing for the parties were:

II. **Claims and Defenses:**

A. Claims of Plaintiff/s:

B. Defenses and Claims (Counterclaims, Third-Party Claims, Cross-Claims) of Defendant/s:

C. Defenses and Claims of Third-Party Defendants:

III. **Statement of Undisputed Facts:**

The parties state that following facts are undisputed:

IV. **Joinder of Parties and Amendment of Pleadings:**

Motions to amend the pleadings and motions for joinder of additional parties shall be filed not later than _____, 199 __ . (This portion of

the Scheduling Order applies to timing only. It does not eliminate the necessity for filing an appropriate motion or otherwise complying with F.R.Civ.P. 15.)

V. **Damages:**

A. Plaintiff/s hereby states that claimed damages are $_____, and the method for calculation of the damages is as follows:

B. Defendant/s hereby states that claimed damages on the counterclaim are $_____, and the method for calculation of the damages is as follows:

C. Defendant/s hereby states that claimed damages on the counterclaim are $_____, and the method for calculation of the damages is as follows:

VI. **Agreements for Informal Discovery and Settlement:**

The parties hereby state that the following informal discovery has been agreed upon: (provide information as to joint interviews, exchange of documents, and joint meetings with clients)

a. Joint interviews of the following Witnesses:

b. Joint meetings with clients regarding settlement (parties must report results of such meetings to the Magistrate Judge within 10 days of meeting)

VII. **Discovery Limitations, Deadlines, and Scheduling:**

**A. Discovery Limitations:**

1. Each party shall be limited to _____ depositions.

2. The following depositions may be taken by (video/telephone/tape recording):

3. Written discovery shall be limited in the following manner:

a. Each party shall be limited to _____ sets of interrogatories, without leave of court.

b. Each party shall be limited to a total of _____ interrogatories, including subparts, without leave of court.

c. Each party shall be limited to _____ sets of requests for production of documents, without leave of court.

d. Each party shall be limited to _____ requests for admissions, including subparts, without leave of court.

**B. Discovery Deadlines:**

1. Discovery will be needed on the following subjects:

   a. Subject

   b. Type of discovery needed on subject

   c. From whom the discovery is needed

2. The discovery cutoff date for fact witness is to be _____, 199__.

3. Final list of witnesses and exhibits under Rule 26(a)(3) shall be provided as follows:

   a. From plaintiff(s) by _____
   b. From defendant(s) by _____

   The parties shall have until _____ to file objections to the lists of witnesses and exhibits under Rule 26(a)(3).

4. Plaintiff(s) shall designate all experts and provide opposing counsel with all information identified in F.R.Civ.P. 26(a)(2) on or before _____, 19__.

5. Defendant(s) shall designate all experts and provide opposing counsel with all

information identified in F.R.Civ.P. 26(a)(2) on or before _____, 19__.

6. Plaintiff(s) shall designate all rebuttal experts and provide opposing counsel with all information identified in F.R.Civ.P. 26(a)(2) on or before _____, 19__.

7. The discovery cutoff date for expert witness is to be _____, 19__.

8. All potential dispositive motions shall be filed by _____, 19__.

**C. Discovery Scheduling:**

1. The following individuals will be deposed in accordance with the schedule set forth below:

   a. Depositions scheduled by Plaintiff(s):

   b. Depositions scheduled by Defendant(s):

   c. Depositions scheduled by Third-Party Defendant(s):

2. The following schedule shall apply for interrogatories and requests for production of documents:

VIII. **Expert Witnesses:**

A. Plaintiff states the following as to expert witnesses: (statement as to need for expert witnesses, areas of expertise, and names of potential expert witnesses)

B. Defendant states the following as to expert witnesses: (statement as to need for expert witnesses, areas of expertise, and names of potential expert witnesses)

C. Third-Party Defendant states the following as to expert witnesses: (statement as to need for expert witnesses, areas of expertise, and names of potential expert witnesses)

D. Each party shall be limited to _____ expert witnesses.

IX. **Desirability of Convening Status Conferences and a Pre-Trial Conference: (The following dates will be set by the Court at the Scheduling Conference)**

A. A settlement conference will be held on _____, at _____ o'clock, ___.m.

( ) Attorneys only need be present.

( ) Attorneys and client representatives with authority to settle must be present. (NOTE: This requirement is not fulfilled by the presence of counsel. If an insurance company is involved, an adjuster authorized to enter into settlement must also be present).

( ) Each party shall submit a Confidential Settlement Statement to the Court on or before _____ outlining the facts and issues in the case and the party's settlement position.

B. Status conferences will be held in this case on the following dates and times:

C. A pretrial conference will be held in this case on _____, 19__, at _____ o'clock __.m. A pretrial order shall be prepared by the parties and submitted to the Court no later than five days before the pretrial conference.

X. **Out-of-State Counsel**

( ) We hereby certify that all out-of-state counsel have complied with D.C.COLO.LR 83.5(C).

XI. **Other Matters Warranting Attention:**

The parties state that the following additional issues or matters need to be brought to the Court's attention: (list any special issues of law which the court may wish to consider before trial, or other matters which may require the Court's attention).

**IN ADDITION TO FILING AN APPROPRIATE NOTICE WITH THE CLERK'S OFFICE, COUNSEL MUST FILE A COPY OF ANY NOTICE OF WITHDRAWAL, NOTICE OF SUBSTITUTION OF COUNSEL, OR NOTICE OF CHANGE OF COUNSEL'S ADDRESS OR TELEPHONE NUMBER WITH THE CLERK OF THE UNITED STATES MAGISTRATE JUDGE ASSIGNED TO THIS CASE.**

**WITH RESPECT TO DISCOVERY DISPUTES, PARTIES MUST COMPLY WITH D.C.COLO.LR 7.1. PARTIES OPPOSING A DISCOVERY MOTION SHALL HAVE 11 DAYS IN WHICH TO FILE A RESPONSIVE BRIEF. NO REPLY BRIEFS WILL BE ACCEPTED WITHOUT LEAVE OF COURT. DISCOVERY MOTIONS OR BRIEFS RELATING THERETO SHALL NOT EXCEED 10 PAGES IN LENGTH (NOT INCLUDING ATTACHMENTS OR APPENDICES).**

**THE PARTIES FILING MOTIONS FOR EXTENSION OF TIME OR FOR CONTINUANCES MUST COMPLY WITH D.C.COLO.LR 7.1(C) BY SUBMITTING PROOF THAT A COPY OF THE MOTION HAS BEEN SERVED UPON THE MOVING ATTORNEY'S CLIENT, ALL ATTORNEYS OF RECORD AND ALL PRO SE LITIGANTS.**

DATED this _____ day of _____, 199__.

BY THE COURT:

_____
United States Magistrate Judge

Approved:

_____
Attorney for Plaintiff (or Plaintiff pro se)

_____
Attorney for Defendant (or Defendant pro se)

(Use more than one signature line if multiple parties or counsel for the parties)

Appendix C

Instructions Used by Magistrate Judges
for Preparation of Pretrial Orders

**INSTRUCTIONS USED BY MAGISTRATE JUDGES FOR PREPARATION OF PRETRIAL ORDERS**

IT IS ORDERED that the parties shall use the following form in preparation of the pretrial order:

INSTRUCTIONS FOR PREPARATION AND SUBMISSION OF PRETRIAL ORDERS

Unless otherwise ordered, counsel for plaintiff is responsible for preparing the pretrial order.

Counsel are directed to meet in advance of the pretrial conference and develop jointly the contents of the proposed pretrial order. The proposed pretrial order shall be presented for court approval at the pretrial conference.

Listed below are matters to be included in the pretrial order. For convenience of court and counsel, it is suggested that the following sequence and terminology be used in the preparation of the pretrial order, with each of the items listed below capitalized as a heading:

I. DATE AND APPEARANCE

Date of the pretrial conference and appearance for the parties.

II. JURISDICTION

A statement of the basis for subject matter jurisdiction with appropriate statutory citations. If jurisdiction is denied, give the specific reason for the denial.

III. CLAIMS AND DEFENSES

Summarize the claims and defenses of all parties, including the respective versions of the facts and legal theories. Do not copy the Pleadings. Identify the specific relief sought.

IV. STIPULATIONS

Set forth all stipulations concerning facts, evidence, and the applicability of statutes, regulations, rules, ordinances, etc.

V. PENDING MOTIONS

List any pending motion to be decided before trial, giving the dates of filing. Include any motions on which the court postponed ruling until trial on the merits. If there are no pending motions, please state "none."

VI. WITNESSES

List the witnesses to be called by each party in a accordance with Rule 26(a)(3), Fed.R.Civ.P. List separately:

(a) non-expert witnesses
(b) expert witnesses

Parties shall provide the following information:

(1) name
(2) indicate will call or may call
(3) address
(4) short statement as to the purpose of the witness' testimony
(5) whether the witness will be present in person or by deposition.

VII. EXHIBITS

List the exhibits to be offered by each party in accordance with Rule 26(a)(3), Fed.R.Civ.P. Objections to witnesses or exhibits pursuant to Rule 26(a)(3) shall be set forth by the parties. Additional witnesses or exhibits may be added no later than sixty days before trial upon showing of just cause and approval of the court.

VIII. DISCOVERY

Set forth applicable language: Discovery has been completed. OR: Discovery is to be completed by _____. OR: Further discovery is limited to _____. OR: The following provisions were made for discovery: (Specify).

IX. SPECIAL ISSUES

List any unusual issues of law which the court may wish to consider before trial. If none, please state "none."

X. OFFER OF JUDGMENT

The following paragraph shall be included in the pretrial order:

Counsel acknowledge familiarity with the provision of Rule 68, Federal Rules of Civil Procedure (Offer of Judgment), and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRETRIAL ORDER

The following paragraph shall be included in the pretrial order:

(a) Counsel acknowledge familiarity with the provisions of Rule 16, Federal Rules of Civil Procedure (Pretrial Procedure; Formulating Issues).

(b) This order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and, approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the records of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL AND ESTIMATED TRIAL TIME: STATUS CONFERENCE

State whether trial to court or jury, estimated trial time and any other orders pertinent thereto. The following paragraph shall be included in the pretrial order:

A trial status conference may be held by the court before the trial date. At this status conference counsel are directed to file final lists of all exhibits and witnesses in accordance with Rule 26(a)(3). The court may also consider motions in limine, if any, on particular issues and other matters to expedite the trial.

The following format and language shall be used in the pretrial order:

DATED at Denver, Colorado this ____ day of_____, 199_.

BY THE COURT:

_____

Pretrial Order Approved:

(Provide signature lines listing name, address, and phone number of counsel. Signature of counsel are to be affixed before submission of the pretrial order to the District Judge or Magistrate Judge.

* * * INFORMATION NOTE TO ATTORNEYS * * *

Some practices among the Judges vary with respect to the time for submission of jury instructions, voir dire questions, trial briefs, proposed findings of fact, conclusions of law, and other matters. Individual Judges may cover these items in an addendum, the pretrial order, or in other court orders.

Appendix D

Coordination and Time Lines Under the Federal Rules
Edward T. Lyons, Jr.

## TIMETABLE OF A CIVIL ACTION

| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Commencement of action | By service of summons. Rule 4(a)-(c)<br>By mailing Notice and Request for Waiver of Service. Rule 4(d) | Civil cover sheet required at time of filing complaint. LR 3.1 |
| Completion of service | Must be completed within 120 days. Rule 4(m) | Motions for appointment of special process servers pursuant to Rule 4(c) will be granted by the clerk. LR 4.1 |
| Time for answer | 20 days after date summons served. Rule 12(a)(1)(A)<br>60 days after date request for waiver sent (90 days if request sent outside U.S.). Rule 12(a)(1)(B) | A motion seeking not more than 20 additional days to answer may be granted by the clerk. LR 7.1 B |
| Alteration of time for answer when motion filed under Rule 12(b), (e) or (f) | 10 days after notice of court's action, or if Rule 12(e) motion is granted, 10 days after service of more definite statement. Rule 12(a) | No agreement of counsel to extend any time limit under F.R.C.P. will be recognized unless approved by Court upon motion made within time prescribed. LR 7.1 M |
| Order convening scheduling conference | A scheduling conference is contemplated but not required. Rule 16(a)-(b) | Required by local rule. A Magistrate Judge or a District Judge will convene a scheduling conference. LR 29.1 |

## TIMETABLE OF A CIVIL ACTION

| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Mandatory meeting of counsel | At least 14 days prior to scheduling conference, counsel must meet to discuss claims/defenses, settlement possibilities, making disclosures under Rule 26(a)(1), and to develop a proposed discovery plan covering specified matters. Rule 26(f) | The order convening the scheduling conference will also require counsel to attempt to agree on a proposed scheduling order. LR 29.1 Unless otherwise ordered, certain types of cases are exempt from the required meeting of counsel. LR 26.1 C 1 |
| Report and discovery plan | Within 10 days after Rule 26(f) meeting, counsel must file a report outlining their proposed discovery plan. Rule 26(f) | Unless otherwise ordered, certain types of cases are exempt from the plan-filing requirement. LR 26.1 C 1 |
| Initial mandatory disclosures | Within 10 days after the Rule 26(f) meeting, parties must disclose identifies of persons with knowledge of relevant facts in dispute; documents relevant to disputed facts; damage calculation; and insurance policies. Rule 26(a)(1) | Disclosures should not be filed. LR 31 B |

## TIMETABLE OF A CIVIL ACTION

| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Scheduling conference and order | The scheduling order, the basic tool of case management, must be entered not later than 90 days after appearance of any defendant or 120 days after service of summons.<br><br>The scheduling order will be entered at the scheduling conference and can be modified only for good cause. Rule 16(b) | The order convening the scheduling conference will require the proposed order to be filed at least 5 days prior to scheduling conference; expect changes by court, including limits on discovery. LR 29.1<br><br>Scheduling orders for discovery, joinder and amendment of pleadings are unnecessary in exempt cases listed in LR 16.2 B. |
| Discovery under Rules 30 - 36<br>• Initial stay<br>• Limitations<br>• Reasonable notice of depositions<br>• Effect of motions for protective orders | No discovery can be started until after the Rule 26(f) meeting of counsel has been held Rule 26(d).<br><br>Presumptive limits apply unless court grants relief:<br>1. Not more than 10 depositions per side. Rule 30(a)(2)(A)<br>2. Not more than 25 interrogatories per side. Rule 33(a) | Except with prior approval of court or upon stipulation of the parties, discovery cannot be used in exempt cases listed in Rule 26.1 A<br><br>Expect court to place other limitations on discovery in scheduling order. LR 29.1<br><br>Reasonable notice for taking depositions is now 11 days instead of 5 days. LR 30.1 A<br><br>A motion for protective order under Rule 26(c) or 30(d) stays the discovery to which the motion is directed. LR 30.1 B |

## TIMETABLE OF A CIVIL ACTION

| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Additional mandatory disclosures | Except as "otherwise directed" by the court:<br>1. Expert witness reports must be disclosed by each party no later than 90 days prior to trial or date case is to be "ready for trial."<br>2. Rebuttal expert reports served by opposing parties within 30 days thereafter. Rule 26(a)(2)(C)<br>3. At least 30 days before trial, each party shall disclose:<br>a. Names and addresses of all witnesses<br>Rule 26(a)(3)(A)<br>b. Deposition testimony to be presented<br>Rule 26(a)(3)(B)<br>c. Complete list of exhibits<br>Rule 26(a)(3)(C) | Other directions by the court will typically be contained in the scheduling order which may set dates for disclosing expert reports, completing expert discovery, and exchanging lists of witnesses and exhibits prior to the date of the final pretrial conference. LR 29.1<br><br>The disclosures should not be filed. LR 31 B |
| Supplementation of disclosures and discovery responses | A party has a continuing duty:<br>1. To supplement, at "appropriate intervals," its prior Rule 26(a)(1) disclosures.<br>Rule 26(e)(1)<br>2. Also, by the time of making Rule 26(a)(3) disclosures, to provide any changes in expert testimony. Rule 26(e)(1)<br>3. To "seasonably amend" prior responses to interrogatories and requests for production or admission<br>Rule 26(e)(2) | The scheduling order may modify the times for disclosure. LR 29.1 (Item 13)<br><br>The disclosures and supplementation should not be filed. LR 31 B |

## TIMETABLE OF A CIVIL ACTION

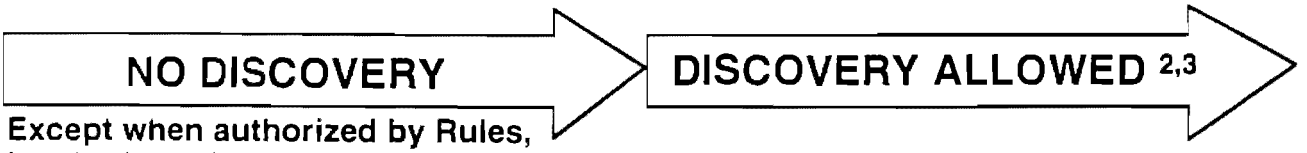
| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Settlement and status conferences | Court has discretion to convene at any time<br>Rule 16(a) | Scheduling order will ordinarily set a settlement conference and one or more status conferences<br>LR 29.1 |
| Alternative dispute resolution | Case management under Rule 16 contemplates use of ADR when authorized by statute or local rule.<br>Rule 16(c)(9) | At any stage of the proceedings, the court may direct the parties to engage in ADR and may stay the action in whole or part<br>LR 53.2 |
| Dispositive motions | The use of Rule 56 to avoid or reduce the scope of trial is a tool of case management.<br>Rule 16(c)(5) | Scheduling order will ordinarily set a filing deadline<br>LR 29.1 (Item 12) |
| Final pretrial conference and order | A final pretrial conference is ordinarily held pursuant to the scheduling order. This pretrial conference should be held as close to the time of trial as reasonable under the circumstances. Rule 16(d)<br><br>The final pretrial order controls the subsequent course of the action and will be modified only to prevent manifest injustice.<br>Rule 16(e) | The scheduling order requires counsel to submit a proposed pretrial order at least 5 days prior to the Pretrial Conference<br><br>The "uniform" pretrial order form of LR 16.1 has been abolished. Magistrate Judges and individual District Court Judges will adopt their own orders. |

## TIMETABLE OF A CIVIL ACTION

| SUBJECT | AMENDED F.R.C.P. | LOCAL RULES |
|---|---|---|
| Trial status conference | Rule 16 provides for continuing case management and additional conferences in discretion of court Rule 16(a) and (c) | The pretrial order will often provide for a final trial preparation conference approximately 30 days before trial. Final lists of witnesses and exhibits may be required at this time, if not previously disclosed per the pretrial order, and the court may consider motions in limine. The practices of individual District Court Judges vary. |
| Trial | Trial as scheduled by pretrial order or subsequent order of court Rules 38 - 53 | LR 40.1 - 53.2 |

# FEDERAL RULES OF CIVIL PROCEDURE
# TIME LINE
# (TRIGGERED BY DEFENDANT'S APPEARANCE)

| ANSWER DUE | PLANNING MEETING OF PARTIES[1] | INITIAL DISCLOSURE; DISCOVERY PLAN [2,3] | SCHEDULING ORDER |
|---|---|---|---|
| 20 days from service (R.12(a)) or 60 days from mailing of waiver if accepted [Trigger Date] R.4(d)(3) | At least 14 days before R.16(b) Scheduling Order/ Conference --i.e. 75 days after Trigger Date. R.26(f) | 10 days after planning meeting. R.26(a)(1) and R.26(f) | 90 days from Defendant's entry of appearance and within 120 days after the complaint has been served on a defendant. R.16(b) |




Except when authorized by Rules, local rule, order or agreement of parties R.26(d)

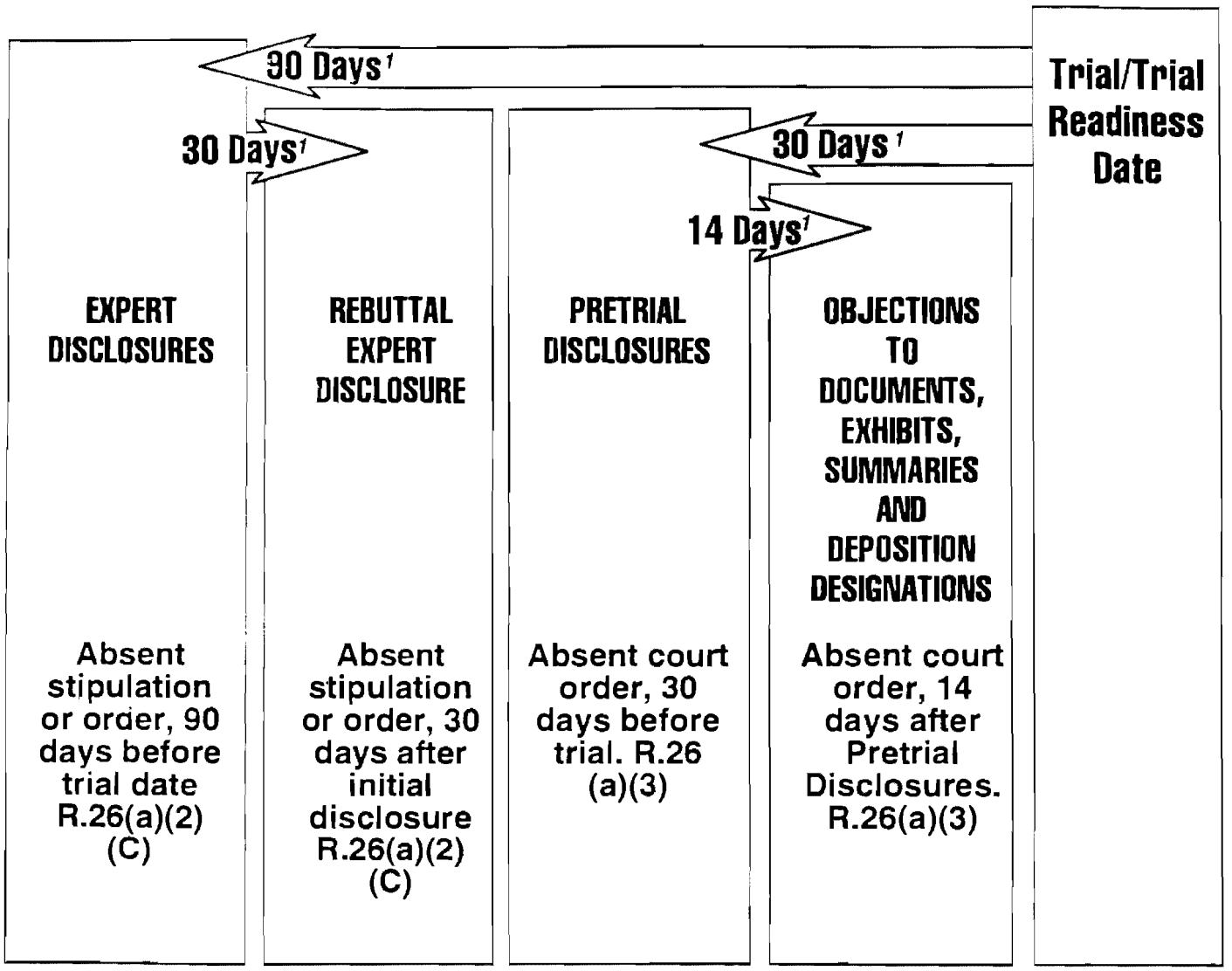
1 Rule 26(f) planning meeting of parties is mandatory. Appendix Form 35 provides format for report thereon.

2 Absent stipulation, order or local rule per R. 26(b)(2), only 10 depositions (R.30(a)(2)(A) and R.31(a)(2)(A)) and 25 interrogatories (R.33(a)) are allowed.

3 Parties have continuing duty to supplement/amend initial disclosure, interrogatory responses, production responses and admissions (R.26(e)).

William E. Murane
Holland & Hart

# TIME LINE - KEYED TO TRIAL DATE




[1] Different time lines for disclosures may be specified in the scheduling order issued under F.R.C.P. 16(b) and D.C. Colo. LR 16.2 and 29.1

**Russell E. Yates**

**Rule 11**
Sanctions and Ethical Considerations

I. Purpose of the Rule

A. Principal of the rule is to secure the just, speedy and **inexpensive** determination of every action.

B. Obligations of the attorney and pro se litigant to the court to refrain from conduct that frustrates the aim of Rule 11.

II. Additional Authority

A. Colorado Rules of Professional Conduct.

1. Rule 3.1: Meritorious claims and contentions.

a. Duty to use legal procedure for benefit of client's cause, but not to abuse the legal system.

2. Rule 3.3: Candor Towards the Tribunal.

a. Not limited to the filing of "papers"

B. 28 U.S.C. T 1927.

C. Local Rules of Practice for the United States District Court for the District of Colorado.

1. Rule 83.6 et seq.

III. Rule Changes

A. Overview

1. Placed greater constraints on the imposition of sanctions.

2. Should reduce the number of motions filed.

3. Applicable only to assertions contained in **papers** filed with or submitted to the court.

*The author would like to acknowledge the valuable assistance of Suzanne C. Pysher, a second-year student at the University of Denver Law School, who is currently interning at the law firm of Patton, Boggs & Blow.

4. Requires party seeking Rule 11 sanctions to give notice (major change).

5. Provides opportunity to respond.

6. Applies to attorneys, litigants and law firms.

   a. Chevron, USA v. Hand, 763 F.2d 1184 (10th Cir. 1988).

B. Signatures: subdivision (a)

1. Individual pleading, motions and "other papers".

2. Corrections permitted.

C. Representation to the Court: subdivision (b)

1. By submitting pleadings, motions or "other papers" to the court, you certify that they meet the statutory criteria to your best "knowledge, information and belief, formed after an inquiry reasonable under the circumstances".

   a. Expands the responsibilities of litigants to the court.

   b. However, it also provides more flexibility in dealing with infractions of the rule.

   c. Use "stop-and-think" approach.

   d. With respect to allegations and other factual contentions, the amended rule recognizes that sometimes you may have a good reason to believe that a fact is true or false, but need discovery to confirm the evidentiary basis for the allegation.

i. This does not relieve litigants of the obligation to conduct an appropriate investigation into the fact.

ii. If there is no evidence, a party has the duty not to persist with the contention.

e. No duty formally to amend claim, but a party cannot advocate the unsubstantiated claim.

f. While party cannot deny an allegation it knows to be true, it does not have a duty to admit an allegation due to a lack of contradictory evidence.

g. Claims under (b)(2) evaluated using "non- frivolous" standard.

i. Amount of research conducted.

ii. What are minority authorities?

D. Sanctions: subdivision (c)

1. Notice requirements.

2. Opportunity to respond.

a. Cooter and Gell v. Hartmax Corp., 496 U.S. 384, 110 S.Ct. 2447 (1990).

b. Within discretion of the court; lawyer, litigant, law firm.

3. By motion.

a. Made specially.

b. Specific conduct to be deterred, disciplined.

c. Served under Rule 5 but not filed.

d. Twenty-one day "safe harbour": (formal or informal withdrawal, correction).

i. Do not file with court.

ii. Griffen v. City of Oklahoma City, 3 F.3d 336 (10th Cir. 1993).

4. By court's initiative.

a. Order.

i. Describing specific conduct.

ii. Directing party to show cause.

5. Nature of Sanctions/Limitations.

a. Deterrence.

i. Dodd Insurance, Inc. v. Royal Insurance Co. of America, 935 F.2d 1152 (10th Cir. 1991).

ii. White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990).

b. Example for others.

6. Sanctions available.

a. Monetary.

i. To court.

ii. Attorney's fees and costs.

b. Nonmonetary.

i. Striking the offending plea.

ii. Issuing admonition, reprimand, censure.

iii. Require participation in seminar- - educational purposes.

iv. Ordinary fine payable to the court.

v. Refer to disciplinary authority. (see Local Rule 83.6 et seq.).

vi. Others--within the discretion of the court.

7. Order required by the court.

8. Rule is inapplicable to Discovery.

i. Rule 26(g), F.R.Civ.P.

ii. Rule 37, F.R.Civ.P.

## § 1926. Court of Customs and Patent Appeals

Fees and costs in the Court of Customs and Patent Appeals shall be fixed by a table of fees adopted by such court and approved by the Supreme Court. The fees and costs so fixed shall not, with respect to any item, exceed the fees and costs charged in the Supreme Court, and shall be accounted for and paid over to the Treasury. June 25, 1948, c. 646, 62 Stat. 957.

**Library references:** Patents ⇐114.24; C.J.S. Patents § 142(8).

### Historical and Revision Notes

**Reviser's Note.** Based on Title 28 U.S.C. 1940 ed., § 304 (Mar. 3, 1911, c. 231, § 191, 36 Stat. 1144).

For distribution of other provisions of section 304 of Title 28, U.S.C. 1940 ed., see Distribution Table.

Changes were made in phraseology. 80th Congress House Report No. 308.

## § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

### Historical and Revision Notes

**Reviser's Note.** Based on Title 28 U.S.C., 1940 ed., § 829 (R.S. § 982).

Word "personally" was inserted upon authority of Motion Picture Patents Co. v. Steiner et al., 1912, 201 F. 63, 119 C.C.A. 401. Reference to "proctor" was omitted as covered by the revised section.

See definition of "court of the United States" in section 451 of this title.

Changes were made in phraseology. 80th Congress House Report No. 308.

### Federal Rules of Civil Procedure

Costs, see Rules 11 and 54.

### Notes of Decisions



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**Library references**

Federal Civil Procedure ⇐2731.
C.J.S. Federal Civil Procedure § 1278.

**1. Construction**

The word "costs" in former section 829 of this title included expenses and taxable disbursements. Motion Picture Patents Co. v. Yankee Film Co., D.C.N.Y.1912, 192 F. 134, modified on other grounds 201 F. 63, 119 C.C.A. 401.

**2. Discretion of court**

In suit by trustee in bankruptcy to set aside transfer of realty by bankrupt, placing primary liability for costs on rehearing on trustee and secondary liability on transferee was not abuse of discretion. Brislin v. Killanna Holding Corporation, C.C.A.N.Y.1936, 85 F.2d 667.

**3. Persons liable**

Former section 829 of this title applied only to an attorney, proctor, or other per-

son admitted to practice in federal courts, and could be invoked only when such attorney, proctor, or other person multiplied the proceedings in the cause, so as to increase costs unreasonably and vexatiously. Motion Picture Patents Co. v. Steiner, N.Y.1912, 201 F. 63, 119 C.C.A. 401.

**4. Liability for excess costs**

In view of former section 829 of this title plaintiff, who delayed dismissal until the eve of trial, could not be taxed with expenditures by defendant to procure necessary expert witnesses, and defendant was entitled to only the usual witness fees. Bone v. Walsh Const. Co., D.C.Iowa 1916, 235 F. 901.

Court could impose costs on an attorney for unreasonably and vexatiously prolonging the taking of depositions by the adverse party. Toledo Metal Wheel Co. v. Foyer Bros. & Co., Ohio 1915, 223 F. 350, 138 C.C.A. 612.

Former section 829 of this title did not authorize a federal court, on dismissing a bill, to grant an extra allowance against the unsuccessful party, because the successful party was put to annoyance and expense by the prolonged examination of witnesses by his adversary's counsel. Motion Picture Patents Co. v. Steiner, N. Y.1912, 201 F. 63, 119 C.C.A. 401.

It was only the excess of costs occasioned by this misconduct which could be taxed against the attorney. Id.

Former section 829 of this title authorizing taxing of such excess of costs as arise from unreasonable conduct of attorney, to the attorney, did not create any penalty in favor of prevailing party, and did not sanction taxing of any additions over regular costs. In re Realty Associates Securities Corporation, D.C.N.Y. 1943, 53 F.Supp. 1013, 55 Am.Bankr.Rep. N.S. 837.

In suit for infringement of eight patents involving 55 patent claims, court would not determine before trial liability of attorneys of plaintiffs under this section. Coyne & Delany Co. v. G. W. Onthank Co., D.C.Iowa 1950, 10 F. R.D. 435.

**5. Reopening hopeless case**

Where four unsuccessful litigatory attempts had been made by beneficiary to collect proceeds of National Service Life Insurance which had lapsed for nonpayment of premiums before death of insured, further vexatious litigation to reopen hopeless case may subject counsel personally to costs, under this section, providing that any attorney who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required to satisfy personally such excess costs. Weiss v. U. S., C.A.2, 1955, 227 F.2d 72, certiorari denied 76 S.Ct. 308, 350 U.S. 936, 100 L.Ed. 817, rehearing denied 76 S.Ct. 431, 350 U.S. 977, 100 L.Ed. 847.

## § 1928. Patent infringement action; disclaimer not filed

Whenever a judgment is rendered for the plaintiff in any patent infringement action involving a part of a patent and it appears that the patentee, in his specifications, claimed to be, but was not, the original and first inventor or discoverer of any material or substantial part of the thing patented, no costs shall be included in such judgment, unless the proper disclaimer has been filed in the Patent Office prior to the commencement of the action. June 25, 1948, c. 646, 62 Stat. 957.

### Historical and Revision Notes

**Reviser's Note.** Based on Title 28 U.S.C., 1940 ed., § 821 (R.S. § 973).

Word "action" was substituted for "any suit at law or in equity" to conform with rule 2 of the Federal Rules of Civil Procedure.

Words "or decree" were omitted after "judgment," because a judgment under Rule 54(a) of the Federal Rules of Civil Procedure by definition includes a decree.

Changes were made in phraseology. 80th Congress House Report No. 308.

### Cross References

Costs where disclaimer not filed in patent infringement action, see section 288 of Title 35, Patents.

The parties do not dispute the basic nature of their oral agreement. Mrs. Robertson planned to pay Mr. Harris for his work by giving him some type of interest in the mining claims. Appellants claim that *only* a percentage of production was to be used as payment. Mr. Harris was willing to do the work in exchange for a participatory role in the GOCE venture. The record reveals evidence of a skeletal partnership between Mrs. Robertson and Mr. Harris. They both agreed to contribute labor, equipment and effort in return for future profits. Mr. Harris gave the GOCE claims a large amount of labor and time ten years prior to this trial. The court determined that this effort earned Mr. Harris a share of the only asset the GOCE owners had to contribute—undivided interests in the 51 claims.

We conclude the court's finding concerning Mr. Harris' interest was tailored to fit the facts before the court and was reasonable under the circumstances and supported by the record.

The court determined Sam Roberts owned a 2% undivided interest and a ½% royalty interest in the GOCE claims. Mr. Roberts entered three documents into evidence as proof of his interests: an assignment of a 1% undivided interest; an assignment of a 1% undivided interest; and an assignment of a ½% royalty interest. The interests acquired are examined in chronological order according to the date of execution. Appellants argue that Sam Roberts failed to give the GOCE Corporation adequate consideration in return for the interests. The evidence showing the work performed was sufficient to support the court's findings.

As stated herein the trial court is affirmed as to its conclusion that appellants' notice protected all owners under 43 U.S.C. § 1744.

It is also affirmed as to the finding that Mrs. Jennings had a valid assignment of a one percent undivided interest in the claims as of July 1967. The interest was subject to forfeiture for nonpayment of a share of assessment work if notice was sent.

The trial court determined that Mr. Boatright had a two percent interest in the claims. This is affirmed and it is again noted that this could also be subject to forfeiture.

We must reverse the trial court's conclusion that the notices for contribution were not effective because not given by a co-owner. Since the notices of forfeiture were given by a "co-owner" under the Act, it is necessary on remand to determine whether the notices were received, and when, in order to decide whether they were effective and when effective, and to determine whether some appellees did assessment work themselves in 1980. The current ownership as a consequence of any automatic forfeitures can be so ascertained.

REVERSED and REMANDED.

CHEVRON, U.S.A., INC.,
**Plaintiff-Appellee,**

v.

**Beth HAND, now known as Beth Hand Charles, Defendant-Appellant.**

No. 84-1954.

United States Court of Appeals,
Tenth Circuit.

June 7, 1985.

The United States District Court for the District of New Mexico, Juan G. Burciaga, J., denied motion to set aside stipulation by parties dismissing lawsuit, and movant appealed. The Court of Appeals, McKay, Circuit Judge, held that: (1) by failing to proffer rebuttal evidence or closing argument, movant waived right to introduce such evidence or make such argument, and (2) having found that motion was brought solely for purpose of delay, imposition of attorney fees upon movant was proper.

Affirmed.



**1. Federal Courts ⇐870**

Where findings and decision on motion under Federal Civil Rule 60(b) to set aside stipulation by parties dismissing lawsuit was based on credibility of witnesses in proceeding, such findings and decision would not be disturbed unless there was injustice in hearing. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

**2. Federal Civil Procedure ⇐2662**

In hearing on motion under Federal Civil Rule 60(b) to set aside stipulation by parties dismissing lawsuit, it would have been abuse of discretion for district court to have refused rebuttal evidence had it been proffered. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

**3. Federal Civil Procedure ⇐2662**

By failing to point out to district court that she had rebuttal evidence to proffer in hearing on motion under Federal Civil Rule 60(b) to set aside stipulation by parties dismissing lawsuit, defendant waived her right to introduce such evidence. Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

**4. Federal Courts ⇐621**

Party may not sit idly by, watching error being committed, and then raised claimed error on appeal without having accorded trial court opportunity to correct its action.

**5. Federal Civil Procedure ⇐2662**

By failing to proffer closing argument in hearing on motion under Federal Civil Rule 60(b) to set aside stipulation by parties dismissing lawsuit, defendant waived whatever right she may have had to make closing argument. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

**6. Federal Civil Procedure ⇐926**

Where motion under Federal Civil Rule 60(b) to set aside stipulation by parties dismissing lawsuit was brought solely for purpose of delay, trial court had discretion, under Federal Civil Rule 11 governing signing of motions, to include in sanction both costs and attorney fees. Federal Rules Civ.Proc.Rules 11, 60(b), 28 U.S.C.A.

**7. Attorney and Client ⇐24**
**Federal Civil Procedure ⇐926**

In given case, sanction under Federal Civil Rule 11 governing signing of motions may fall upon attorney, client or both. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**8. Federal Civil Procedure ⇐926**

Imposition of attorney fees for interposing frivolous motion, under Federal Civil Rule 11 governing signing of motions, properly fell on movant where evidence was sufficient to support assumption that she was catalyst behind such motion. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

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Benjamin M. Sherman of Sherman and Sherman, P.C., Deming, N.M., for defendant-appellant.

Jeffrey R. Brannen and Galen M. Buller of Montgomery & Andrews, P.A., Santa Fe, N.M., for plaintiff-appellee.

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This is an appeal from the district court's denial of the defendant Beth Hand Charles' 60(b) motion seeking to set aside a stipulation by the parties dismissing the lawsuit purportedly entered into on the defendants' behalf by their attorneys of record.

The district court found that the attorneys had been authorized by all of the defendants to enter the stipulation and that the motion to set aside the stipulation was brought frivolously and for the purpose of delay. Therefore, the district court both denied the defendants' motion and entered an order assessing costs and attorneys' fees against defendants for having brought the motion.

The lawsuit was brought by Chevron, Inc. against defendant Ed Babers, Inc. for

collection of a debt, and against the defendants Kenneth Hand and Beth Charles as guarantors of the Ed Babers, Inc. liabilities. After extended negotiations, attorneys for Chevron and attorneys for the defendants entered into a stipulation and dismissal that was filed on February 27, 1984. Defendants Ed Babers, Inc. and Kenneth Hand supported the stipulation as having been authorized by them and did not join in defendant Charles' 60(b) attack on the stipulation. At the hearing on the motion Ms. Charles testified that she had never given authority to her attorney to sign a stipulation on her behalf. She did, however, testify that the terms of the agreement were most favorable but that she simply could not live with the agreement at that time. On the other hand, Ms. Charles' attorney testified that he had met with his client the day before he signed the stipulation. In that meeting she informed him that she agreed that the stipulation was a good agreement and that he was authorized to sign the stipulation, but that in order to delay its entry until she was able to find another source of supply, she would hire another attorney to attempt to have the stipulation set aside. In addition to this evidence, both defendant Hand and his attorney testified that they had met with Ms. Charles on February 15th and had fully explained all of the provisions of the stipulation to her at that time. Ms. Charles admitted attending the February 15th and February 20th meetings but, as noted above, her version of what transpired at those meetings is somewhat different from that of the other witnesses.

[1] Based on this evidence, the district court was faced with a factual issue that turned exclusively on the credibility of the witnesses in the proceeding. This court would be hard-pressed to reverse the district court's findings of fact in this situation. We have recently been instructed by the Supreme Court that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. City of Bessemer City*, — U.S. —, —, 105 S.Ct. 1504, 1513, 84 L.Ed.2d 518 (1985). Therefore, unless there was some injustice in the 60(b) hearing, the district court's findings and decision will not be disturbed.

Defendant claims that she was denied due process in the 60(b) hearing. She asserts that her counsel was denied the opportunity to introduce rebuttal evidence after Chevron's case and, in a similar vein, she claims her attorney was denied the opportunity to make a closing argument. Defendant attempts to support this claim merely by pointing out that at the end of Chevron's case the district court, without asking whether defendant had any rebuttal evidence to offer, announced to the parties that he was ready to make his judgment. The court then proceeded to make findings of fact and conclusions of law. At no time, however, did defendant's attorney request an opportunity to introduce rebuttal evidence or to make a closing argument.

[2–5] Defendant cites several state court cases that stand for nothing more than the proposition that a trial court should not deny the opportunity to introduce evidence to a party that is ready and willing to do so. While we agree with the defendant that she was entitled to offer rebuttal evidence and that it would have been an abuse of discretion for the district court to have refused such evidence had it been proffered, we find that by failing to point out to the district court that she had rebuttal evidence to proffer, defendant waived her right to introduce that evidence. It is well established in this circuit that "a party may not sit idly by, watching error being committed, and then raise the claimed error on appeal without having accorded the trial court the opportunity to correct its action." *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir.1984). Ms. Charles was represented by three attorneys in the hearing below, and on several occasions during the hearing the attorney handling her case interrupted the trial court to ask additional questions of a witness after having relinquished the examination. In each of these instances the trial court freely allowed the attorney to proceed. There is no reason to credit defendant's argument that an attempt to offer rebuttal evidence would have been futile because the court would have refused to hear it. We therefore find that defendant waived her right to offer rebuttal evidence. Similar analysis leads us to conclude that she waived whatever right she may have had to make a closing argument. There was no fundamental error in the hearing that deprived the defendant of due process. We therefore conclude that the district court's decision cannot be reversed.

[6–8] With respect to the award of attorney's fees under Rule 11, we find that the district court did not abuse its discretion. Defendant's reliance upon the American rule—that attorney's fees are not ordinarily recoverable—is misplaced. Put simply, this is not the ordinary case. The recently amended Rule 11 of the Federal Rules of Civil Procedure provides that the person signing any pleading, motion or other paper certifies that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of this rule, the court "shall" impose upon the person who signed it, or the represented party, or both, appropriate sanctions, which may include an order to pay the other party the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The present case could have been decided in two ways. The district court could have credited the testimony of Ms. Charles and found that the stipulation had never been authorized by her, or he could—as he did—credit the testimony of Ms. Charles' attorney and find that the stipulation had indeed been authorized by her and that the 60(b) motion was therefore brought solely for the purpose of causing delay. Under the clear language of Rule 11, the posture of this case required the district court to enter an appropriate sanction. He had the discretion to include in that sanction both costs and attorney's fees. In this decision the district court was clearly justified. Rule 11 directs that the sanction should fall upon the individual responsible for the filing of the offending document. In a given case this could be the attorney, the client, or both. In this case the evidence was sufficient to support the district court's implicit assumption that Ms. Charles was the catalyst behind this frivolous motion. The sanction therefore properly falls on her.

The decision of the district court is in all respects affirmed.



**Marvin FRANCOIS, Petitioner-Appellant,**

**v.**

**Louie L. WAINWRIGHT, Respondent-Appellee.**

No. 83–5775.

United States Court of Appeals, Eleventh Circuit.

May 28, 1985.

Joel N. Rosenthal, Miami, Fla., for petitioner-appellant.

Calvin Fox, Asst. Atty. Gen., Miami, Fla., for respondent-appellee.

On Appeal from the United States District Court for the Southern District of Florida; SIDNEY M. ARONOVITZ, Judge.

diction." Indeed, if this argument had merit, the State of Wisconsin could overrule our decision in Felder v Casey, 487 US 131, 101 L Ed 2d 123, 108 S Ct 2302 (1988), by simply amending its notice-of-claim statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that.

[32] Respondents' argument that Congress did not intend to abrogate an immunity with an ancient common-law heritage is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity, see Wood v Strickland, 420 US 308, 43 L Ed 2d 214, 95 S Ct 992 (1975); Scheuer v Rhodes, 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 (1974); Pierson v Ray, 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213 (1967), and in excluding States and arms of the State from the definition of person, see Will v Michigan Dept. of State Police, 491 US 58, 105 L Ed 2d 45, 109 S Ct 2304 (1989); Ngiraingas v Sanchez, 495 US 182, 109 L Ed 2d 163, 110 S Ct 1737 (1990); see also Quern v Jordan, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979). But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.

The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.



[496 US 384]

COOTER & GELL, Petitioner

v

HARTMARX CORPORATION, et al.

496 US 384, 110 L Ed 2d 359, 110 S Ct 2447

[No. 89-275]

Argued February 20, 1990. Decided June 11, 1990.

**Decision:** Federal Civil Procedure Rule 11 sanctions imposed after involuntary dismissal upheld, and abuse-of-discretion review of sanctions held proper, but Rule 11 held not to authorize award of attorney's fees incurred on appeal of sanctions.

**SUMMARY**

A retailer of men's clothing filed an antitrust complaint against a manufacturer of men's clothing, alleging a nationwide conspiracy to fix prices and to eliminate competition. The manufacturer, alleging that the retailer's allegations had no basis in fact, moved to dismiss the complaint and moved for sanctions under Rule 11 of the Federal Rules of Civil Procedure, which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an "appropriate sanction," which may include an order to pay the other party's expenses, including a reasonable attorney's fee, incurred "because of the filing" of the pleading. After the retailer voluntarily dismissed the complaint, pursuant to Rule 41(a)(1)(i) of the Rules, which authorizes voluntary dismissal of an action at any time before service by the adverse party of an answer or of a motion for summary judgment, the United States District Court for the District of Columbia imposed, under Rule 11, monetary sanctions against the retailer and the law firm that had represented the retailer in its antitrust action. The United States Court of Appeals for the District of Columbia Circuit, affirming the District Court's imposition of Rule 11 sanctions, held that (1) the retailer's voluntary dismissal of the antitrust complaint did not divest the District Court of jurisdiction to rule upon the Rule 11 motion, (2) the

Briefs of Counsel, p 771, infra.

District Court had properly held that the retailer's law firm had violated Rule 11, and (3) a party who successfully defended a Rule 11 award on appeal was entitled to recover its attorney's fees incurred on that appeal (875 F2d 890). The Court of Appeals remanded the case to the District Court for determination of the amount of reasonable attorney's fees that the manufacturer had incurred on appeal and for entry of an appropriate award.

On certiorari, the United States Supreme Court affirmed in part and reversed in part. In an opinion by O'CONNOR, J., expressing the unanimous view of the court with respect to points 2 and 3 below, and joined by REHNQUIST, Ch. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., with respect to point 1 below, it was held that (1) the voluntary dismissal of the retailer's complaint did not deprive the District Court of jurisdiction to impose Rule 11 sanctions, because (a) nothing in the language of Rule 41(a)(1)(i) or Rule 11, or of any other federal rule, or of any statute terminated a District Court's authority to impose sanctions after such a dismissal, (b) rather than being a judgment on the merits of an action, the imposition of a Rule 11 sanction required the determination of a collateral issue, and (c) the policies and language of Rules 41(a)(1) and 11 were completely compatible; (2) a Federal Court of Appeals should apply an abuse-of-discretion standard in reviewing all aspects of a District Court's determination regarding Rule 11, because (a) in directing the District Court to impose an "appropriate" sanction, Rule 11 itself indicated that the District Court was empowered to exercise its discretion, and (b) a Court of Appeals must defer to a District Court's legal conclusions in Rule 11 proceedings, since Rule 11 requires a court to consider issues rooted in factual determinations, and the District Court is better situated than the Court of Appeals to apply the legal standard mandated by Rule 11; and (3) Rule 11 did not authorize the District Court to award attorney's fees incurred by the manufacturer in defending against the retailer's appeal, because (a) the expenses incurred on appeal were not incurred "because of the filing" initially made in the District Court, and (b) Rule 38 of the Federal Rules of Appellate Procedure authorizes a Court of Appeals to award damages and single or double costs to the appellee if the Court of Appeals determines that an appeal is frivolous.

STEVENS, J., concurring in part and dissenting in part, joined the court's opinion with respect to points 2 and 3 above, and expressed the view that (1) the filing of a frivolous complaint which is voluntarily withdrawn, under Rule 41(a)(1), imposes a burden on the court in which the complaint is filed only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden, and (2) Rule 11 is designed to deter parties from abusing judicial resources, not from filing complaints.





## TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error §§ 702-704; 20 Am Jur 2d, Costs § 74; 32A Am Jur 2d, Federal Practice and Procedure § 1216; 61A Am Jur 2d, Pleading § 339

8 Federal Procedure, L Ed, Courts and Judicial System § 20:279; 27 Federal Procedure, L Ed, Pleadings and Motions §§ 62:108, 62:109

2 Am Jur Proof of Facts 233, Attorneys' Fees

USCS Court Rules, Federal Rules of Civil Procedure, Rules 11, 41(a)(1)(i)

US L Ed Digest, Costs and Fees § 33; Courts § 538.11; Pleading § 7

Index to Annotations, Attorneys' Fees; Civil Procedure Rules; Dismissal, Discontinuance, and Nonsuit; Frivolous Actions; Pleadings

**Auto-Cite®:** Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

## ANNOTATION REFERENCES

Supreme Court's views as to requisites for award of attorneys' fees. 77 L Ed 2d 1540.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud. 97 ALR Fed 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment. 96 ALR Fed 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation. 95 ALR Fed 181.

General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed 107.

What constitutes substantial justification of government's position so as to prohibit award of attorneys' fees against government under Equal Access to Justice Act (28 USCS § 2412(d)(1)(A)). 69 ALR Fed 130.

Award of damages or costs under 28 USCS § 1912 or Rule 38 of Federal Rules of Appellate Procedure, against appellant who brings frivolous appeal. 67 ALR Fed 319.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

**Courts §§ 538.11, 538.12; Judgment §§ 87, 101; Pleading § 7 — signature of complaint — voluntary dismissal — sanctions — collateral issue — federal procedural rules — construction and effect**

1a-1g. A voluntary dismissal under Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, which authorizes voluntary dismissal of an action at any time before service by the adverse party of an answer or of a motion for summary judgment, does not deprive a Federal District Court of jurisdiction to impose, against the party who has brought and dismissed the action, and against the law firm that has represented the party in the action, sanctions under Rule 11 of the Rules—which requires that an attorney who signs a pleading filed in a District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and which provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—because (1) nothing in the language of Rule 41(a)(1)(i) or Rule 11, or of any other federal rule, or of any statute terminates a District Court's authority to impose sanctions after a dismissal under Rule 41(a)(1)(i); (2) a federal court may consider collateral issues after an action is no longer pending; (3) rather than being a judgment on the merits of an action, the imposition of a Rule 11 sanction requires the determination of a collateral issue, and thus the imposition of such a sanction after a voluntary dismissal does not deprive the party who has brought the action of the right, under Rule 41(a), to dismiss the action without prejudice; (4) Rule 41(a)(1) was not designed to give a party who has brought an action in a District Court any benefit other than the right to take one dismissal without prejudice; (5) both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible; and (6) if a litigant could purge a violation of Rule 11 merely by taking a dismissal, the litigant would lose all incentive to stop, think, and investigate more carefully before serving and filing papers. (Stevens, J., dissented from this holding.)

**Appeal §§ 1367, 1473 — Federal Civil Procedure Rule 11 — sanctions — negligence — standard of review**

2a-2g. A Federal Court of Appeals should apply an abuse-of-discretion standard in reviewing all aspects of a Federal District Court's determination regarding Rule 11 of the Federal Rules of Civil Procedure—which requires that an attorney who signs a pleading filed in a District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and which provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an "appropriate" sanction—because (1) in directing the District Court to impose an "appropriate" sanction, Rule 11 itself indicates that the District Court is empowered to exercise its discretion; (2) Rule 52(a) of the Rules





provides that findings of fact shall not be set aside unless clearly erroneous; (3) when a Court of Appeals reviews a District Court's factual findings, the abuse-of-discretion and "clearly erroneous" standards are indistinguishable; and (4) a Court of Appeals must defer to a District Court's legal conclusions in Rule 11 proceedings, since (a) rather than mandating an inquiry into purely legal questions, Rule 11 requires a court to consider issues rooted in factual determinations, (b) the considerations involved in the Rule 11 context are similar to those involved in determining negligence, which is generally reviewed deferentially, (c) being familiar with the issues and litigants, the District Court is better situated than the Court of Appeals to apply the legal standard mandated by Rule 11, (d) a District Court's legal determinations regarding Rule 11 are fact specific and involve fact-intensive close calls, (e) the District Court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence, and (f) deference to the determinations of courts on the front lines of litigation will streamline the litigation process.

**Appeal §§ 1679, 1716; Courts §§ 538.11, 538.12; Pleading § 7 — sanctions — signature — attorney's fees — federal procedural rules — construction and effect**

3a-3e. Rule 11 of the Federal Rules of Civil Procedure—which requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and which provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction, which may include an order to pay the other party's attorney's fees incurred "because of the filing"—does not authorize a District Court to award attorney's fees incurred in defending against the appeal of Rule 11 sanctions, because (1) neither Rule 11's language nor its Advisory Committee note suggests that Rule 11 may require payment for any activities outside the context of District Court proceedings, where the expenses incurred in defending against the appeal of Rule 11 sanctions are directly caused by the District Court's sanction and the appeal of that sanction, and are not incurred "because of the filing" initially made in the District Court, (2) Rule 11 should be read together with Rule 38 of the Federal Rules of Appellate Procedure—which authorizes a Federal Court of Appeals to award damages and single or double costs to the appellee if the Court of Appeals determines that an appeal is frivolous—as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction that has been upheld on appeal can ultimately be traced to a baseless filing in a District Court, (3) if parties appealing District Courts' imposition of Rule 11 sanctions were routinely compelled to shoulder the appellees' attorneys' fees, valid challenges to District Court decisions would be discouraged, and (4) as Rule 11 is not a fee-shifting statute, the policies for allowing District Courts to require the losing party to

pay appellate, as well as District Court, attorneys' fees are not applicable to Rule 11; thus, the United States Supreme Court will reverse that portion of a Court of Appeals' judgment remanding a case to a District Court for determination and awarding of reasonable attorney's fees incurred by a men's clothing manufacturer in defending against the appeal of monetary sanctions imposed, under Rule 11, by a District Court upon a men's clothing retailer and the law firm that represented the retailer in the action that has been determined by the District Court to subject the retailer and law firm to Rule 11 sanctions.

**Appeal §§ 1087.5(2), 1118 — defense not raised below or in certiorari petition**

4a, 4b. On certiorari to determine issues concerning the imposition of sanctions, under Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—on a men's clothing retailer and the law firm that represented the retailer in the complaint that would be the basis for the imposition of the sanctions, the United States Supreme Court will decline to consider the argument that Rule 11 sanctions may be imposed against only the two attorneys who signed the complaint, where the law firm has not raised that argument, either in the District Court or in the Federal Court of Appeals to which the sanctions were appealed, or in the law firm's petition for certiorari to the Supreme Court.

**Courts § 538.11 — construction of procedural rule**

5. The United States Supreme Court will interpret Rule 11 of the Federal Rules of Civil Procedure—which requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and which provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—according to its plain meaning, in light of the scope of the congressional authorization under the Rules Enabling Act (28 USCS § 2072), where (1) the Act authorizes the Supreme Court to prescribe general rules of practice and procedure for cases in District Courts, but provides that the Supreme Court has no authority to enact rules that abridge, enlarge, or modify any substantive right; and (2) pursuant to its authority, the Supreme Court has promulgated the Federal Rules of Civil Procedure to govern the procedure in the District Courts in civil suits.

**Courts § 538.11; Pleading § 7 — signature — purpose of procedural rule**

6. The central purpose of Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—is to deter baseless filings in District Courts and thus streamline the administration and procedure of the federal courts; although Rule 11 must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, any interpretation must give effect to Rule 11's central goal of deterrence.





**Costs and Fees § 33; Judgment § 87 — attorney's fees — collateral proceedings**

7. Even years after the entry of a judgment on the merits, a federal court may consider an award of attorney's fees, because motions for costs or attorney's fees are independent proceedings supplemental to the original proceeding, and not requests for modification of the original decree.

**Contempt § 21 — procedure**

8. A criminal contempt charge is a separate and independent proceeding at law that is not part of the original action; a court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.

**Judgment § 102 — complaint not legally tenable — dismissal without prejudice — res judicata**

9. Even if, after the voluntary dismissal of a complaint without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure, which authorizes voluntary dismissal of an action at any time before service by the adverse party of an answer or of a motion for summary judgment, a Federal District Court indicates that the complaint was not legally tenable or factually well founded for purposes of Rule 11 of the Rules—which (1) requires that an attorney who signs a pleading filed in a District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—the resulting Rule 11 sanction will nevertheless not preclude the refiling of a complaint, because, under Rule 41(a)(1), dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits, and thus does not have a res judicata effect.

**Judgment § 101 — voluntary dismissal**

10. Rule 41(a)(1) of the Federal Rules of Civil Procedure, which authorizes voluntary dismissal of an action at any time before service by the adverse party of an answer or of a motion for summary judgment, is designed to curb abuses of nonsuit rules, where prior to the promulgation of the Rules, liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right up until the entry of the verdict or judgment.

**Courts § 538.11; Pleading § 7 — Federal Civil Procedure Rule 11 — deadline for imposition of sanctions — construction of rule**

11. Although Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief

that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—does not establish a deadline for the imposition of sanctions, the Advisory Committee note on Rule 11 indicates that it was anticipated that the sanctions issue under Rule 11 normally will be determined at the end of the litigation in the case of pleadings, and at the time the motions are decided or shortly thereafter in the case of motions; District Courts may adopt local rules establishing timeliness standards for filing and deciding Rule 11 motions.

**Courts § 538.11; Pleading § 7 — signature — construction of procedural rule — issues considered**

12. In determining whether an attorney has violated Rule 11 of the Federal Rules of Civil Procedure—which requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and is "warranted by existing law or a good faith argument" for changing the law, and which provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—a District Court must (1) consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper, (2) determine legal issues in considering (a) whether a pleading is "warranted by existing law or a good faith argument" for changing the law, and (b) whether the attorney's conduct violated Rule 11, and (3) exercise its discretion to tailor an "appropriate sanction."

**Appeal § 1452 — review of facts — credibility**

13. For purposes of appellate review, issues involving credibility are normally considered factual matters.

**Appeal § 1367 — Federal Civil Procedure Rule 11 — abuse of discretion**

14. The fact-dependent legal standard mandated by Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and is "warranted by existing law or a good faith argument" for changing the law, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—does not preclude a Federal Court of Appeals' correction of a District Court's legal errors—such as determining, in improper circumstances, that Rule 11 sanctions may be imposed upon the signing attorney's law firm, or relying on a materially incorrect view of the relevant law in determining that a pleading was not "warranted by existing law or a good faith argument" for changing the law—because a Court of Appeals would be justified in concluding that, in making such errors, the District Court has abused its discretion.

**Costs and Fees § 16 — recovery against United States — substantially justified position**

15. The Equal Access to Justice Act (28 USCS § 2412(d))—which authorizes courts to award to a prevailing party, other than the United States, the fees and other expenses incurred in a civil action brought against the United States, where the position of the Unites States is not "substantially justified"—requires an inquiry as to whether a pleading is well grounded in fact and legally tenable, because a position is "substantially justified" if it has a reasonable basis in law and fact.





**Appeal § 1367 — procedural rule — abuse of discretion**

16. For purposes of an abuse-of-discretion standard of appellate review, a Federal District Court necessarily abuses its discretion if it bases its ruling concerning Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

**Courts § 538.11 — procedural rule — construction in light of other procedural rule**

17. The provisions of Rule 11 of the Federal Rules of Civil Procedure—which (1) requires that an attorney who signs a pleading filed in a Federal District Court must, after a reasonable inquiry, have formed a belief that the pleading is well grounded in fact and legally tenable, and (2) provides that if a pleading is signed in violation of this requirement, the District Court shall impose upon the attorney or the attorney's client an appropriate sanction—allowing a court to include as a sanction an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper must be interpreted in light of Rule 1 of the Rules, which indicates that the Rules govern only the procedure in District Courts.

**Costs and Fees § 33 — attorney's fee — recoverability**

18. Under the American Rule, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser.

**SYLLABUS BY REPORTER OF DECISIONS**

Respondents, the defendants in a District Court suit instituted by petitioner law firm on behalf of a client, filed a motion to dismiss the complaint as having no basis in fact and a motion for sanctions under Federal Rule of Civil Procedure 11 on the ground that the firm had not made sufficient prefiling inquiries to support the complaint's allegations. Rule 11—after specifying, inter alia, that an attorney's signature on a pleading constitutes a certificate that he has read it and believes it to be well grounded in fact and legally tenable—provides that, if a pleading is signed in violation of the Rule, the court "shall" impose upon the attorney or his client "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee." Following petitioner's notice of voluntary dis-

missal of the complaint under Rule 41(a)(1)(i), the court held that petitioner's prefiling inquiries were grossly inadequate and imposed monetary sanctions upon it and its client. The Court of Appeals affirmed, holding that the voluntary dismissal did not divest the District Court of jurisdiction to rule upon the Rule 11 motion; that that court's determination that petitioner had violated Rule 11 was substantially justified; and that an appellant that successfully defends a Rule 11 award is entitled to recover its reasonable attorney's fees on appeal. The court therefore remanded the case for the District Court to determine the amount of such fees and to enter an appropriate award.

*Held:*

1. A voluntary Rule 41(a)(1)(i) dismissal does not deprive a district court of jurisdiction over a Rule 11 motion. This view is consistent with Rule 11's purposes of deterring baseless filings and streamlining federal court procedure and is not contradicted by anything in that Rule or Rule 41(a)(1)(i).

(a) Rule 41(a)(1) permits a voluntary dismissal without prejudice only if the plaintiff files a notice of dismissal before the defendant files an answer or summary judgment motion and the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has responded to the complaint, the plaintiff may dismiss only by stipulation or by order "upon such terms and conditions as the court deems proper." Moreover, a dismissal "operates as an adjudication on the merits" if the plaintiff has previously dismissed the claim.

(b) The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the action's merits and the Rule 11 motion arising from that filing. As the Rule 11 violation is complete when the paper is filed, a voluntary dismissal does not expunge the violation. In order to comply with the Rule's requirement that it "shall" impose sanctions, the court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal.

(c) The language of Rules 11 and 41(a)(1) is compatible. Like the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's termination. Because such a sanction does not signify a merits determination, its imposition does not deprive the plaintiff of his Rule 41(a) right to dismiss without prejudice.

(d) Because both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, their policies are completely compatible. Rule 41(a)(1) was designed to limit a plaintiff's ability to dismiss an action in order to curb abuses of pre-existing state and federal procedures allowing dismissals as a matter of right until the entry of the verdict or judgment. It does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. If a litigant could purge his Rule 11 violation merely by taking a dismissal, he would lose all incentive to investigate more carefully before serving and filing papers.

2. A court of appeals should apply an abuse-of-discretion standard in





reviewing all aspects of a district court's decision in a Rule 11 proceeding. Petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review—a clearly erroneous standard for findings of historical fact, a de novo standard for the determination that counsel violated Rule 11, and an abuse-of-discretion standard for the choice of sanction—is rejected.

(a) Appellate courts must review the selection of a sanction under an abuse-of-discretion standard, since, in directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that that court is empowered to exercise its discretion. Moreover, in the absence of any language in the Rule to the contrary, courts should adhere to their usual practice of reviewing the district court's findings of fact under a deferential standard. In the present context, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous. Furthermore, the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings, since those conclusions are rooted in factual determinations rather than purely legal inquiries, and the district court, familiar with the issues and litigants, is better situated to marshal the pertinent facts and apply the necessary fact-dependent legal standard. If the district court based its conclusion on an erroneous view of the law, the appellate court would be justified in concluding that it had abused its discretion.

(b) Pierce v Underwood, 487 US 552, 101 L Ed 2d 490, 108 S Ct 2541 —which held that a District Court's determination under the Equal Access to Justice Act that "the position of the United States was substantially justified" should be reviewed for an abuse of discretion—strongly supports applying a unitary abuse-of-discretion standard to all aspects of a Rule 11 proceeding.

(c) Adoption of an abuse-of-discretion standard is also supported by Rule 11's policy goals of deterrence and streamlining the judicial process. The district court is best situated to determine whether a sanction is warranted in light of the local bar's litigation practices, and deference to that court's determination will enhance its ability to control litigants, free appellate courts from the duty of reweighing evidence, and discourage litigants from pursuing marginal appeals.

(d) The Court of Appeals' determination that the District Court "applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation" was consistent with the deferential standard of review adopted here.

3. Rule 11 does not authorize a district court to award an attorney's fee incurred on appeal.

(a) Neither the language of the Rule's sanctions provision—when read in light of Rule 1's statement that the Rules only govern district court procedure—nor the Advisory Committee Note suggests that the Rule could require payment for appellate proceedings. Respondents' interpretation that the provision covers any and all expenses incurred "because of the filing" is overbroad. A more sensible reading permits an award only of those expenses directly caused by the filing—logically, those at the trial level—and consid-

ers the expenses of defending the award on appeal to arise from the award itself and the taking of the appeal, not from the initial filing of the complaint.

(b) Federal Rule of Appellate Procedure 38—which authorizes courts of appeals to "award just damages and single or double costs to the appellee" upon determining that an appeal is frivolous—places a natural limit on Rule 11's scope. If a Rule 11 appeal is frivolous, as it often will be given the district court's broad discretion to impose sanctions, Rule 38 gives the appellate court ample authority to award expenses. However, if the appeal is not frivolous, Rule 38 does not require the appellee to pay the appellant's attorney's fees.

(c) Limiting Rule 11's scope to trial court expenses accords with the policy of not discouraging meritorious appeals, since many valid challenges might not be filed if unsuccessful appellants were routinely required by the very courts which originally imposed sanctions to shoulder the appellee's fees. Moreover, including such fees in a Rule 11 sanction might have the undesirable effect of encouraging additional satellite litigation, since a losing party subjected to fees on remand might again appeal the award. Even if disallowing a Rule 11 appellate attorney's fees award would discourage litigants from defending the award when appellate expenses were likely to exceed the sanction's amount, the risk of expending the value of one's award while defending it is a natural concomitant of the American Rule, i. e., that the prevailing litigant is ordinarily not entitled to collect an attorney's fee.

277 US App DC 333, 875 F2d 890, affirmed in part and reversed in part.

O'Connor, J., delivered the opinion for a unanimous Court with respect to Parts I, II, IV, and V, and the opinion of the Court with respect to Part III, in which Rehnquist, C. J., and Brennan, White, Marshall, Blackmun, Scalia, and Kennedy, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part.

APPEARANCES OF COUNSEL

**Stephen A. Saltzburg** argued the cause for petitioner.

**Richard J. Favretto** argued the cause for respondents.

Briefs of Counsel, p 771, infra.

OPINION OF THE COURT

[496 US 388]

Justice **O'Connor** delivered the opinion of the Court.

**[1a, 2a, 3a, 4a]** This case presents three issues related to the application of Rule 11 of the Federal Rules of Civil Procedure: whether a district court may impose Rule 11 sanctions on a plaintiff who has voluntarily dismissed his complaint pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure; what constitutes the appropriate standard of appellate review of a district court's imposition of Rule 11 sanctions; and whether Rule 11 authorizes awards of attorney's fees incurred on appeal of a Rule 11 sanction.*

* **[4b]** Because petitioner did not raise the argument that Rule 11 sanctions could only be imposed against the two attorneys who signed the complaint, see Pavelic & LeFlore v Marvel Entertainment Group, 493 US 120, 107 L Ed 2d 438, 110 S Ct 456 (1990), either in the courts below or in its petition for certiorari here, we decline to consider it. See, e.g., Browning-Ferris Industries v Kelco Disposal, Inc. 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909 (1989).





I

In 1983, Danik, Inc., owned and operated a number of discount men's clothing stores in the Washington, D.C., area. In June 1983, Intercontinental Apparel, a subsidiary of respondent Hartmarx Corp., brought a breach-of-contract action against Danik in the United States District Court for the District of Columbia. Danik, represented by the law firm of Cooter & Gell (petitioner), responded to the suit by filing a counterclaim against Intercontinental, alleging violations of the Robinson-Patman Act, 49 Stat 1526, 15 USC § 13 [15 USCS § 13]. In March 1984, the District Court granted summary judgment for Intercontinental in its suit against Danik, and, in February 1985, a jury returned a verdict for Intercontinental on Danik's counterclaim. Both judgments were affirmed on appeal. Danik, Inc. v Intercontinental Apparel, Inc. 245 US App DC 233, 759 F2d 959 (1985) (judgment order); Intercontinental Apparel, Inc. v Danik, Inc. 251 US App DC 327, 784 F2d 1131 (1986) (judgment order).

While this litigation was proceeding, petitioner prepared two additional antitrust complaints against Hartmarx and its

[496 US 389]

two subsidiaries, respondents Hart, Schaffner & Marx and Hickey-Freeman Co. One of the complaints, the one giving rise to the Rule 11 sanction at issue in this case, alleged a nationwide conspiracy to fix prices and to eliminate competition through an exclusive retail agent policy and uniform pricing scheme, as well as other unfair competition practices such as resale price maintenance and territorial restrictions. App 3-14.

Petitioner filed the two complaints in November 1983. Respondents moved to dismiss the antitrust complaint at issue, alleging, among other things, that Danik's allegations had no basis in fact. Respondents also moved for sanctions under Rule 11. In opposition to the Rule 11 motion, petitioner filed three affidavits setting forth the prefiling research that supported the allegations in the complaint. Id., at 16-17, 22-23, 24-27. In essence, petitioner's research consisted of telephone calls to salespersons in a number of men's clothing stores in New York City, Philadelphia, Baltimore, and Washington, D.C. Petitioner inferred from this research that only one store in each major metropolitan area nationwide sold Hart, Schaffner & Marx suits.

In April 1984, petitioner filed a notice of voluntary dismissal of the complaint, pursuant to Rule 41(a)(1)(i). The dismissal became effective in July 1984, when the District Court granted petitioner's motion to dispense with notice of dismissal to putative class members. In June 1984, before the dismissal became effective, the District Court heard oral argument on the Rule 11 motion. The District Court took the Rule 11 motion under advisement.

In December 1987, 3½ years after its hearing on the motion and after dismissal of the complaint, the District Court ordered respondents to

submit a statement of costs and attorney's fees. Respondents filed a statement requesting $61,917.99 in attorney's fees. Two months later, the District Court granted respondents' motion for Rule 11 sanctions, holding that petitioner's prefiling inquiry was grossly inadequate.

[496 US 390]

Specifically, the District Court found that the allegations in the complaint regarding exclusive retail agency arrangements for Hickey-Freeman clothing were completely baseless because petitioner researched only the availability of Hart, Schaffner & Marx menswear. In addition, the District Court found that petitioner's limited survey of only four Eastern cities did not support the allegation that respondents had exclusive retailer agreements in every major city in the United States. Accordingly, the District Court determined that petitioner violated Rule 11 and imposed a sanction of $21,452.52 against petitioner and $10,701.26 against Danik.

The Court of Appeals for the District of Columbia Circuit affirmed the imposition of Rule 11 sanctions. Danik, Inc. v Hartmarx Corp. 277 US App DC 333, 875 F2d 890 (1989). Three aspects of its decision are at issue here.

First, the Court of Appeals rejected petitioner's argument that Danik's voluntary dismissal of the antitrust complaint divested the District Court of jurisdiction to rule upon the Rule 11 motion. After reviewing the decisions of other Circuits considering the issue, the Court of Appeals concluded that "the policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case." Id., at 337, 875 F2d, at 894. The court reasoned that because Rule 11 sanctions served to punish and deter, they secured the proper functioning of the legal system "independent of the burdened party's interest in recovering its expenses." Id., at 338, 875 F2d, at 895. Accordingly, the court held that such sanctions must "be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit." Ibid.

Second, the Court of Appeals affirmed the District Court's determination that petitioner had violated Rule 11. Petitioner's arguments failed to "cal[l] into doubt" the two fatal deficiencies identified by the District Court. Rather, petitioner's

[496 US 391]

"account of [its] efforts d[id] no more than confirm these shortcomings." Ibid.

Third, the Court of Appeals considered respondents' claim that petitioner should also pay the expenses respondent incurred in defending its Rule 11 award on appeal. Relying on Westmoreland v CBS, Inc. 248 US App DC 255, 770 F2d 1168 (1985), the Court of Appeals held that an appellant that successfully defends a Rule 11 award is entitled to recover its attorney's fees on appeal and remanded the case to the District Court to determine the amount of reasonable attorney's fees and to enter an appropriate award.

## II

**[5]** The Rules Enabling Act, 28 USC § 2072 [28 USCS § 2072], authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before Magistrates thereof) and courts of appeals." The Court has no authority to enact





rules that "abridge, enlarge or modify any substantive right." Ibid. Pursuant to this authority, the Court promulgated the Federal Rules of Civil Procedure to "govern the procedure in the United States district courts in all suits of a civil nature." Fed Rule Civ Proc 1. We therefore interpret Rule 11 according to its plain meaning, see Pavelic & LeFlore v Marvel Entertainment Group, 493 US 120, 123, 107 L Ed 2d 438, 110 S Ct 456 (1989), in light of the scope of the congressional authorization.

Rule 11 provides, in full:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of

[496 US 392]

> an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

An interpretation of the current Rule 11 must be guided, in part, by an understanding of the deficiencies in the original version of Rule 11 that led to its revision. The 1938 version of Rule 11 required an attorney to certify by signing the pleading "that to the best of his knowledge, information, and belief there is good ground to support [the pleading]; and that it is not interposed for delay . . . or is signed with intent to defeat the purpose of this rule." 28 USC, pp 2616-2617 (1940 ed). An attorney who willfully violated the rule could be "subjected to appropriate disciplinary action." Ibid. Moreover, the pleading could "be stricken as sham and false and the action [could] proceed as though the pleading had not

[496 US 393]

been served." Ibid. In operation, the Rule did not have the deterrent effect expected by its drafters. See Advisory Committee Note on Rule 11, 28 USC App, pp 575-576 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 11]. The

Advisory Committee identified two problems with the old Rule. First, the Rule engendered confusion regarding when a pleading should be struck, what standard of conduct would make an attorney liable to sanctions, and what sanctions were available. Second, courts were reluctant to impose disciplinary measures on attorneys, see ibid., and attorneys were slow to invoke the rule. Vairo, Rule 11: A Critical Analysis, 118 FRD 189, 191 (1988).

[6] To ameliorate these problems, and in response to concerns that abusive litigation practices abounded in the federal courts, the Rule was amended in 1983. See Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 FRD 181 (1985). It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. See Advisory Committee Note on Rule 11, 28 USC App, p 576 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 11]. Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and "not interposed for any improper purpose." An attorney who signs the paper without such a substantiated belief "shall" be penalized by "an appropriate sanction." Such a sanction may, but need not, include payment of the other parties' expenses. See ibid. Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, ibid., any interpretation must give effect to the Rule's central goal of deterrence.

## III

We first address the question whether petitioner's dismissal of its antitrust complaint pursuant to Rule 41(a)(1)(i)

[496 US 394]

deprived the District Court of the jurisdiction to award attorney's fees. Rule 41(a)(1) states:

> "(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, "upon such terms and conditions as the court deems proper," Rule 41(a)(2). If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice.





Petitioner contends that filing a notice of voluntary dismissal pursuant to this Rule automatically deprives a court of jurisdiction over the action, rendering the court powerless to impose sanctions thereafter. Of the Courts of Appeals to consider this issue, only the Court of Appeals for the Second Circuit has held that a voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings. See Johnson

[496 US 395]

Chemical Co. v Home Care Products, Inc. 823 F2d 28, 31 (1987).

[1b] The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). See Szabo Food Service, Inc. v Canteen Corp. 823 F2d 1073, 1076-1079 (CA7 1987), cert dism'd, 485 US 901, 99 L Ed 2d 229, 108 S Ct 1101 (1988); Greenberg v Sala, 822 F2d 882, 885 (CA9 1987); Muthig v Brant Point Nantucket, Inc. 838 F2d 600, 603-604 (CA1 1988). The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing. As the "violation of Rule 11 is complete when the paper is filed," Szabo Food Service, Inc. supra, at 1077, a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. In our view, nothing in the language of Rule 41(a)(1)(i), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal.

[1c, 7, 8] It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 USC § 1919 [28 USCS § 1919]. This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." Sprague v Ticonic National Bank, 307 US 161, 170, 83 L Ed 1184, 59 S Ct 777 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. White v New Hampshire Dept. of

[496 US 396]

Employment Security, 455 US 445, 451, n 13, 71 L Ed 2d 325, 102 S Ct 1162 (1982). A criminal contempt charge is likewise "'a separate and independent proceeding at law'" that is not part of the original action. Bray v United States, 423 US 73, 75, 46 L Ed 2d 215, 96 S Ct 307 (1975), quoting Gompers v Bucks Stove & Range Co. 221 US 418, 445, 55 L Ed 797, 31 S Ct 492 (1911). A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. See United States v Mine Workers, 330 US 258, 294, 91

L Ed 884, 67 S Ct 677 (1947) ("Violations of an order are punishable as criminal contempt even though . . . the basic action has become moot"); Gompers v Bucks Stove & Range Co., supra, at 451, 55 L Ed 797, 31 S Ct 492 (when main case was settled, action became moot, "of course without prejudice to the power and right of the court to punish for contempt by proper proceedings"). Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

[1d, 9] Because a Rule 11 sanction does not signify a district court's assessment of the legal merits of the complaint, the imposition of such a sanction after a voluntary dismissal does not deprive the plaintiff of his right under Rule 41(a)(1) to dismiss an action without prejudice. "[D]ismissal . . . without prejudice" is a dismissal that does not "operat[e] as an adjudication upon the merits," Rule 41(a)(1), and thus does not have a res judicata effect. Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint. Indeed, even if the Rule 11 sanction imposed by the court were a prohibition against refiling the complaint (assuming that would be an "appropriate sanction" for Rule 11 purposes), the preclusion of refiling would be neither a consequence of the

[496 US 397]

dismissal (which was without prejudice) nor a "term or condition" placed upon the dismissal (which was unconditional), see Rule 41(a)(2).

[1e, 10] The foregoing interpretation is consistent with the policy and purpose of Rule 41(a)(1), which was designed to limit a plaintiff's ability to dismiss an action. Prior to the promulgation of the Federal Rules, liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right until the entry of the verdict, see, e.g., NC Code § 1-224 (1943), or judgment, see, e.g., La Code Prac Ann, Art 491 (1942). See generally Note, The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice, 37 Va L Rev 969 (1951). Rule 41(a)(1) was designed to curb abuses of these nonsuit rules. See 2 American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 350 (1938) (Rule 41(a)(1) was intended to eliminate "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure") (remarks of Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure); id., at 309; see also 9 C. Wright & A. Miller, Federal Practice and Procedure § 2363, p 152 (1971). Where state statutes and common law gave plaintiffs expansive control over their suits Rule 41(a)(1) preserved a narrow slice: It allowed a plaintiff to dismiss an action without the permission of the adverse party or the court only during the brief period before the defendant had made a significant commitment of time and money. Rule 41(a)





(1) was not designed to give a plaintiff any benefit other than the right to take one such dismissal without prejudice.

Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible. Rule 41(a)(1) limits a litigant's power to dismiss actions, but allows one dismissal without prejudice. Rule 41(a)(1) does not codify any policy

[496 US 398]

that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. As noted above, a voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing cuts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers." Amendments to Federal Rules of Civil Procedure, 97 FRD 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules) (Mar. 9, 1982).

[1f, 11] We conclude that petitioner's voluntary dismissal did not divest the District Court of jurisdiction to consider respondent's Rule 11 motion. Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate that there would be a lengthy delay prior to their imposition, such as occurred in this case. Rather, "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter." Advisory Committee Note on Rule 11, 28 USC App, p 576 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 11]. District courts may, of course, "adopt local rules establishing timeliness standards," White v New Hampshire Dept. of Employment Security, 455 US, at 454, 71 L Ed 2d 325, 102 S Ct 1162, for filing and deciding Rule 11 motions.

[496 US 399]

## IV

[2b, 12] Petitioner further contends that the Court of Appeals did not apply a sufficiently rigorous standard in reviewing the District Court's imposition of Rule 11 sanctions. Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is "warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an "appropriate sanction."

The Court of Appeals in this case

did not specify the applicable standard of review. There is, however, precedent in the District of Columbia Circuit for applying an abuse-of-discretion standard to the determination whether a filing had an insufficient factual basis or was interposed for an improper purpose, but reviewing de novo the question whether a pleading or motion is legally sufficient. See, e.g., International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Airline Div.) v Association of Flight Attendants, 274 US App DC 370, 373, 864 F2d 173, 176 (1988); Westmoreland v CBS, Inc. 248 US App DC, at 261, 770 F2d, at 1174-1175. Petitioner contends that the Court of Appeals for the Ninth Circuit has adopted the appropriate approach. That Circuit reviews findings of historical fact under the clearly erroneous standard, the determination that counsel violated Rule 11 under a de novo standard, and the choice of sanction under an abuse-of-discretion standard. See Zaldivar v Los Angeles, 780 F2d 823, 828 (1986). The majority of Circuits follow neither approach; rather, they apply a deferential standard to all issues raised by a Rule 11 violation. See Kale v Combined Ins. Co. of America, 861 F2d 746, 757-758 (CA1 1988); Teamsters Local Union No. 430 v Cement Express, Inc. 841 F2d

[496 US 400]

66, 68 (CA3), cert denied, 488 US 848, 102 L Ed 2d 101, 109 S Ct 128 (1988); Stevens v Lawyers Mutual Liability Ins. Co. of North Carolina, 789 F2d 1056, 1060 (CA4 1986); Thomas v Capital Security Services, Inc. 836 F2d 866, 872 (CA5 1988) (en banc); Century Products, Inc. v Sutter, 837 F2d 247, 250 (CA6 1988); Mars Steel Corp. v Continental Bank N. A., 880 F2d 928, 933 (CA7 1989); Adamson v Bowen, 855 F2d 668, 673 (CA10 1988).

[2c] Although the Courts of Appeal use different verbal formulas to characterize their standards of review, the scope of actual disagreement is narrow. No dispute exists that the appellate courts should review the district court's selection of a sanction under a deferential standard. In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. See also Advisory Committee Note on Rule 11, 28 USC App, p 576 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 11] (suggesting that a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

The Circuits also agree that, in the absence of any language to the contrary in Rule 11, courts should adhere to their usual practice of reviewing the district court's findings of fact under a deferential standard. See Fed Rule Civ Proc 52(a) ("Findings of fact . . . 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"). In practice, the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. See, e.g., Anderson v Bessemer City, 470 US 564, 573-574, 84 L Ed 2d 518, 105 S Ct 1504 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it





been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice

[496 US 401]

between them cannot be clearly erroneous"); Inwood Laboratories, Inc. v Ives Laboratories, Inc. 456 US 844, 857-858, 72 L Ed 2d 606, 102 S Ct 2182 (1982). When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.

The scope of disagreement over the appropriate standard of review can thus be confined to a narrow issue: whether the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings. A number of factors have led the majority of Circuits, see supra, at 399-400, 110 L Ed 2d 377-378, as well as a number of commentators, see, e.g., C. Shaffer & P. Sandler, Sanctions: Rule 11 and Other Powers 14-15 (2d ed 1988) (hereinafter Shaffer & Sandler); American Judicature Society, Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, pp 45-49 (Burbank, reporter 1989), to conclude that appellate courts should review all aspects of a district court's imposition of Rule 11 sanctions under a deferential standard.

[2d, 13, 14] The Court has long noted the difficulty of distinguishing between legal and factual issues. See Pullman-Standard v Swint, 456 US 273, 288, 72 L Ed 2d 66, 102 S Ct 1781 (1982) ("Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion"). Making such distinctions is particularly difficult in the Rule 11 context. Rather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations. For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a

[496 US 402]

few days before the statute of limitations runs. In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters. See Fed Rule Civ Proc 52; see also United States v Oregon State Medical Society, 343 US 326, 332, 96 L Ed 978, 72 S Ct 690 (1952). The considerations involved in the Rule 11 context are similar to those involved in determining negligence, which is generally reviewed deferentially. See Mars Steel Corp. v Continental Bank N. A., supra, at 932; see also 9 C. Wright & A. Miller, Federal Practice and Procedure § 2590 (1971); McAllister v United States, 348 US 19, 20-22, 99 L Ed 20, 75 S Ct 6 (1954) (holding that the District Court's findings of negligence were not clearly erroneous). Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and ap-

ply the fact-dependent legal standard mandated by Rule 11. Of course, this standard would not preclude the appellate court's correction of a district court's legal errors, e.g., determining that Rule 11 sanctions could be imposed upon the signing attorney's law firm, see Pavelic & LeFlore v Marvel Entertainment Group, 493 US 120, 107 L Ed 2d 438, 110 S Ct 456 (1989), or relying on a materially incorrect view of the relevant law in determining that a pleading was not "warranted by existing law or a good faith argument" for changing the law. An appellate court would be justified in concluding that, in making such errors, the district court abused its discretion. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." Pullman-Standard v Swint, supra, at 287, 72 L Ed 2d 66, 102 S Ct 1781. See also Icicle Seafoods, Inc. v Worthington, 475 US 709, 714, 89 L Ed 2d 739, 106 S Ct 1527 (1986) ("If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment").

[496 US 403]

[15] Pierce v Underwood, 487 US 552, 101 L Ed 2d 490, 108 S Ct 2541 (1988), strongly supports applying a unitary abuse of discretion standard to all aspects of a Rule 11 proceeding. In Pierce, the Court held a District Court's determination under the Equal Access to Justice Act (EAJA), 28 USC § 2412(d) (1982 ed) [28 USCS § 2412(d)], that "the position of the United States was substantially justified" should be reviewed for an abuse-of-discretion. As a position is "substantially justified" if it "has a reasonable basis in law and fact," 487 US, at 566, n 2, 101 L Ed 2d 490, 108 S Ct 2541, the EAJA requires an inquiry similar to the Rule 11 inquiry whether a pleading is "well grounded in fact" and legally tenable. Although the EAJA and Rule 11 are not completely analogous, the reasoning in Pierce is relevant for determining the Rule 11 standard of review.

[2e] Two factors the Court found significant in Pierce are equally pertinent here. First, the Court indicated that "'as a matter of the sound administration of justice,'" deference was owed to the "'judicial actor . . . better positioned than another to decide the issue in question.'" 487 US, at 559-560, 101 L Ed 2d 490, 108 S Ct 2541, quoting Miller v Fenton, 474 US 104, 114, 88 L Ed 2d 405, 106 S Ct 445 (1985). Because a determination whether a legal position is "substantially justified" depends greatly on factual determinations, the Court reasoned that the district court was "better positioned" to make such factual determinations. See 487 US, at 560, 101 L Ed 2d 490, 108 S Ct 2541. A district court's ruling that a litigant's position is factually well grounded and legally tenable for Rule 11 purposes is similarly fact specific. Pierce also concluded that the district court's rulings on legal issues should be reviewed deferentially. See id., at 560-561, 101 L Ed 2d 490, 108 S Ct 2541. According to the Court, review of legal issues under a de novo standard would require the courts of appeals to invest time and energy in the unproductive task of determining "not what the law now is, but what the Government was substantially justified in believing it to have been." Ibid. Likewise, an appellate court reviewing





legal issues in the Rule 11 context would be required to determine whether, at the time the attorney filed the

[496 US 404]

pleading or other paper, his legal argument would have appeared plausible. Such determinations "will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process" by establishing circuit law in "a most peculiar, secondhanded fashion." Id., at 561, 101 L Ed 2d 490, 108 S Ct 2541.

Second, Pierce noted that only deferential review gave the district court the necessary flexibility to resolve questions involving "'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" Id., at 561-562, 101 L Ed 2d 490, 108 S Ct 2541. The question whether the Government has taken a "substantially justified" position under all the circumstances involves the consideration of unique factors that are "little susceptible . . . of useful generalization." Ibid. The issues involved in determining whether an attorney has violated Rule 11 likewise involve "fact-intensive, close calls." Shaffer & Sandler 15. Contrary to petitioner's contentions, Pierce v Underwood is not distinguishable on the ground that sanctions under Rule 11 are mandatory: That sanctions "shall" be imposed when a violation is found does not have any bearing on how to review the question whether the attorney's conduct violated Rule 11.

Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Although district courts' identification of what conduct violates Rule 11 may vary, see Schwarzer, Rule 11 Revisited,

[496 US 405]

101 Harv L Rev 1013, 1015-1017 (1988); Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale LJ 901 (1988), some variation in the application of a standard based on reasonableness is inevitable. "Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise." Mars Steel Corp. v Continental Bank N. A. 880 F2d, at 936; see also Shaffer & Sandler 14-15. An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law. See Pierce, supra, at 560-561, 101 L Ed 2d 490, 108 S Ct 2541.

[2f, 16] In light of our consideration of the purposes and policies of Rule 11 and in accordance with our analysis of analogous EAJA provisions, we reject petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review. Rather, an appellate court should apply an abuse-

of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Here, the Court of Appeals determined that the District Court "applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation." 277 US App DC, at 339, 875 F2d, at 896. Its affirmance of the District Court's liability determination is consistent with the deferential standard we adopt today.

V

Finally, the Court of Appeals held that respondents were entitled to be reimbursed for attorney's fees they had incurred in defending their award on appeal. Accordingly, it remanded to the District Court "to determine such expenses and, ultimately, to enter an appropriate award." Id., at 341, 875 F2d, at 898. This ruling accorded with the decisions of the Courts of Appeals for the First and Seventh Circuits, see

[496 US 406]

Muthig v Brant Point Nantucket, Inc. 838 F2d, at 607, and Hays v Sony Corp. of America, 847 F2d 412, 419-420 (CA7 1988), and conflicted with the decisions of the Fourth and Ninth Circuits, see Basch v Westinghouse Electric Corp. 777 F2d 165, 175 (CA4 1985), cert denied, 476 US 1108, 90 L Ed 2d 365, 106 S Ct 1957 (1986), and Orange Production Credit Assn. v Frontline Ventures Ltd. 801 F2d 1581, 1582-1583 (CA9 1986).

[3b, 17] On its face, Rule 11 does not apply to appellate proceedings. Its provision allowing the court to include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee" must be interpreted in light of Federal Rule of Civil Procedure 1, which indicates that the rules only "govern the procedure in the United States district courts." Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings.

[3c] Respondents interpret the last sentence of Rule 11 as extending the scope of the sanction to cover any expenses, including fees on appeal, incurred "because of the filing." In this case, respondents argue, they would have incurred none of their appellate expenses had petitioner's lawsuit not been filed. This line of reasoning would lead to the conclusion that expenses incurred "because of" a baseless filing extend indefinitely. Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 41, p 264 (5th ed 1984) ("In a philosophical sense, the consequences of an act go forward to eternity. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability" (footnote omitted)). Such an interpretation of the Rule is overbroad. We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level. A plaintiff's filing requires the defendant

[496 US 407]

to take the necessary steps to defend against the suit in district court; if the filing was baseless, attorneys' fees incurred in that defense were triggered by the Rule 11 violation. If the district court imposes Rule 11 sanctions on the plaintiff, and the plaintiff appeals, the expenses incurred in defending the award on appeal are directly caused by the district court's sanction and the appeal of that sanction, not by the plaintiff's initial filing in district court.





The Federal Rules of Appellate Procedure place a natural limit on Rule 11's scope. On appeal, the litigants' conduct is governed by Federal Rule of Appellate Procedure 38, which provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." If the appeal of a Rule 11 sanction is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses. Indeed, because the district court has broad discretion to impose Rule 11 sanctions, appeals of such sanctions may frequently be frivolous. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 238.03[2], pp 38-13, 38-14 (2d ed 1989) ("[W]here an appeal challenges actions or findings of the district court to which an appellate court gives deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant's arguments are frivolous"). If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees. Respondent's interpretation of Rule 11 would give a district court the authority to award attorney's fees to the appellee even when the appeal would not be sanctioned under the appellate rules. To avoid this somewhat anomalous result, Rules 11 and 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court.

[496 US 408]

Limiting Rule 11's scope in this manner accords with the policy of not discouraging meritorious appeals. If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal. See Webster v Sowders, 846 F2d 1032, 1040 (CA6 1988) ("Appeals of district court orders should not be deterred by threats [of Rule 11 sanctions] from district judges"). Moreover, including appellate attorney's fees in a Rule 11 sanction might have the undesirable effect of encouraging additional satellite litigation. For example, if a district court included appellate attorney's fees in the Rule 11 sanction on remand, the losing party might again appeal the amount of the award.

[3d, 18] It is possible that disallowing an award of appellate attorney's fees under Rule 11 would discourage litigants from defending the award on appeal when appellate expenses are likely to exceed the amount of the sanction. There is some doubt whether this proposition is empirically correct. See American Judicature Society, Rule 11 in Transition,

The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, p 51 (Burbank, reporter 1989). The courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38—which they may do, as we have noted, when the appellant had no reasonable prospect of meeting the difficult standard of abuse of discretion. Beyond that protection, however, the risk of expending the value of one's award in the course of defending it is a natural concomitant of the American Rule, i.e., that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 247, 44 L Ed 2d 141, 95 S Ct 1612 (1975). Whenever

[496 US 409]

damages awards at the trial level are small, a successful plaintiff will have less incentive to defend the award on appeal. As Rule 11 is not a fee-shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable. "A movant under Rule 11 has no entitlement to fees or any other sanction, and the contrary view can only breed appellate litigation." American Judicature Society, supra, at 49.

**[1g, 2g, 3e]** We affirm the Court of Appeals' conclusion that a voluntary dismissal does not deprive a district court of jurisdiction over a Rule 11 motion and hold that an appellate court should review the district court's decision in a Rule 11 proceeding for an abuse of discretion. As Rule 11 does not authorize a district court to award attorney's fees incurred on appeal, we reverse that portion of the Court of Appeals' judgment remanding the case to the district court for a determination of reasonable appellate expenses. For the foregoing reasons, the judgment of the court below is affirmed in part and reversed in part.

It is so ordered.

**SEPARATE OPINION**

Justice **Stevens**, concurring in part and dissenting in part.

Rule 11 and Rule 41(a)(1) are both designed to facilitate the just, speedy, and inexpensive determination of cases in federal court. Properly understood, the two Rules should work in conjunction to prevent the prosecution of needless or baseless lawsuits. Rule 11 requires the court to impose an "appropriate sanction" on a litigant who wastes judicial resources by filing a pleading that is not well grounded in fact and warranted by existing law or a good-faith argument for its extension, modification, or reversal. Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and avoid further proceedings on the basis of that complaint. The Court today, however, refuses

[496 US 410]

to read the two Rules together in light of their limited, but valuable, purposes. By focusing on the filing of baseless complaints, without any attention to whether those complaints will result in the waste of judicial resources, the Court vastly expands the contours of Rule 11, eviscerates Rule 41(a)(1), and creates a federal common law of malicious prosecution inconsistent with





the limited mandate of the Rules Enabling Act.

Prior to the adoption of Rule 41(a)(1), a plaintiff in federal court could dismiss an action at law up until the entry of the verdict or judgment. Under that practice, an unscrupulous plaintiff could harass a defendant by filing repetitive baseless lawsuits as long as each was dismissed prior to an adverse ruling on the merits. The Rule is designed to further the just decision of cases in two significant ways. First, by providing that a second voluntary dismissal is an adjudication on the merits, and that the first such dismissal is without prejudice only if the dismissal precedes the filing of an answer or a motion for summary judgment, Rule 41(a)(1) satisfies the interest in preventing the abusive filing of repetitious, frivolous lawsuits. Second, and of equal importance, by giving the plaintiff the absolute, unqualified right to dismiss his complaint without permission of the court or notice to his adversary, the framers of Rule 41(a)(1) intended to preserve the right of the plaintiff to reconsider his decision to file suit "during the brief period before the defendant had made a significant commitment of time and money." Ante, at 397, 110 L Ed 2d, at 376. The Rule permits a plaintiff to file a complaint to preserve his rights under a statute of limitations and then reconsider that decision prior to the joinder of issue and the commencement of litigation.

In theory, Rule 11 and Rule 41(a)(1) should work in tandem. When a complaint is withdrawn under Rule 41(a)(1), the merits of that complaint are not an appropriate area of further inquiry for the federal court. The predicate for the imposition of sanctions, the complaint, has been eliminated

[496 US 411]

under the express authorization of the Federal Rules before the court has been required to take any action on it, and the consideration of a Rule 11 motion on a dismissed complaint would necessarily result in an increase in the judicial workload. When a plaintiff persists in the prosecution of a meritless complaint, however, or the defendant joins issue by filing an answer or motion for summary judgment, Rule 11 has a proper role to play. The prosecution of baseless lawsuits and the filing of frivolous papers are matters of legitimate concern to the federal courts and are abuses that Rule 11 was designed to deter.

The Court holds, however, that a voluntary dismissal does not eliminate the predicate for a Rule 11 violation because a frivolous complaint that is withdrawn burdens "courts and individuals alike with needless expense and delay." Ante, at 398, 110 L Ed 2d, at 377. That assumption is manifestly incorrect with respect to courts. The filing of a frivolous complaint which is voluntarily withdrawn imposes a burden on the court only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden. By definition, a voluntary dismissal under Rule 41(a)(1) means that the court has not had to consider the factual allegations of the complaint or ruled on a motion to dismiss its legal claims.

The Court's observation that individuals are burdened, even if correct, is irrelevant. Rule 11 is designed to deter parties from abusing judicial resources, not from filing complaints. Whatever additional costs in reputation or legal expenses the defendant might incur, on top of those that are the product of being

in a dispute,[1] are likely to be either minimal or noncompensable.[2] More fundamentally, the fact that the

[496 US 412]

filing of a complaint imposes costs on a defendant should be of no concern to the rulemakers if the complaint does not impose any costs on the judiciary: the Rules Enabling Act does not give us authority to create a generalized federal common law of malicious prosecution divorced from concerns with the efficient and just processing of cases in federal court. The only result of the Court's interpretation will be to increase the frequency of Rule 11 motions and decrease that of voluntary dismissals.

I agree that dismissal of an action pursuant to Rule 41(a)(1) does not deprive the district court of jurisdiction to resolve collateral issues.[3] A court thus may impose sanctions for contempt on a party who has voluntarily dismissed his complaint or impose sanctions under 28 USC § 1927 [28 USCS § 1927] against lawyers who have multiplied court proceedings vexatiously. A court may also impose sanctions under Rule 11 for a complaint that is not withdrawn before a responsive pleading is filed or for other pleadings that are not well grounded and find no warrant in the law or arguments for the law's extension, modification or reversal. If a plaintiff files a false or frivolous affidavit in response to a motion to dismiss for lack of jurisdiction, I have no doubt that he can be sanctioned for that filing. In those cases, the action of the party constitutes an abuse of judicial resources. But when a plaintiff has voluntarily dismissed a complaint pursuant to Rule 41(a)(1), a collateral proceeding to examine whether the complaint is well grounded will stretch out the matter long beyond the time in which either the plaintiff or the defendant would otherwise want to litigate the merits of the claim. An interpretation that can only have the unfortunate consequences of encouraging the filing of sanction motions and discouraging voluntary dismissals cannot be a sensible interpretation of Rules that are designed "to secure the just, speedy, and inexpensive

[496 US 413]

determination of every action." Fed Rule Civ Proc 1.

Despite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation. Filing unmeritorious pleadings inevitably tarnishes that asset. Those who do not understand this simple truth can be dealt with in appropriate disciplinary proceedings, state-law actions for malicious prosecution or abuse of process, or, in extreme cases, contempt proceedings. It is an unnecessary waste of judicial resources and an unwarranted perversion of the Federal Rules to hold such lawyers liable for Rule 11 sanctions in actions in federal court.

1. It is telling that the primary injury that the respondents point to is the injury to their reputation caused by the public attention that lawsuit attracted. Brief for Respondents 19.

2. In those rare cases in which the defendant properly incurs great costs in preparing a motion to dismiss a frivolous complaint, he can lock in the right to file a Rule 11 motion by answering the complaint and making his motion to dismiss in the form of a Rule 12(c) motion for judgment on the pleadings.

3. I also join Parts I, II, IV, and V of the Court's opinion.



# OPM v RICHMOND

(1990) 496 US 414, 110 L Ed 2d 387, 110 S Ct 2465

[496 US 414]

OFFICE OF PERSONNEL MANAGEMENT, Petitioner

v

CHARLES RICHMOND

496 US 414, 110 L Ed 2d 387, 110 S Ct 2465

[No. 88-1943]

Argued February 21, 1990. Decided June 11, 1990.

**Decision:** Erroneous advice given by Federal Government employee concerning claimant's eligibility for disability benefits held not to estop government from denying benefits not otherwise permitted by law.

## SUMMARY

Under 5 USCS § 8337(a), disabled federal employees who have completed 5 years of service are eligible for a disability annuity. Section 8337(d) provides that entitlement to disability annuity payments will end if the retired employee is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement. Prior to 1982, § 8337(d) provided that an individual was deemed restored to earning capacity if, in each of 2 succeeding calendar years, his or her income from wages or self-employment equaled at least 80 percent of the current rate of pay of the position occupied at the time of retirement. In 1982, the statute was amended to provide that earning capacity is deemed restored if the 80-percent figure is equaled in any single calendar year. An employee at a Navy Public Works Center retired in 1981 and was deemed eligible for a disability annuity by the Office of Personnel Management (OPM). The employee subsequently undertook part-time work and from 1982 to 1985 earned an average of $12,494, leaving him under the 80-percent limit for entitlement to annuity payments. In 1986, he had an opportunity to earn more money by working overtime. To find out how much he could earn without exceeding the 80-percent limit, he consulted the personnel department at his former place of employment and was erroneously informed by an employee relations specialist that his eligibility for continued payments would be determined under the pre-1982 2-year rule. The specialist also gave the employee a copy of an OPM publication which stated the 2-

**SUBJECT OF ANNOTATION**

Beginning on page 773, infra

Supreme Court's construction and application of Federal Constitution's appropriations clause (Art I, § 9, cl 7)

Briefs of Counsel, p 772, infra.

**Maya GRIFFEN; Jackie A. Dunsworth; Joanne Porter; Penny Sims; Dan Murdock and all others similarly situated, Plaintiffs-Appellees,**

v.

**The CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendant-Appellant.**

**No. 92-6335.**

United States Court of Appeals, Tenth Circuit.

Aug. 10, 1993.

Employees and former employees of city jail brought action in state court against city arising out of alleged exposure to asbestos. City removed action. Following entry of summary judgment for city, the United States District Court for the Western District of Oklahoma, Lee R. West, J., denied city's motion for sanctions, and city appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) district court could not impose Rule 11 sanctions on employees for complaint filed in state court prior to removal; (2) Rule 11 did not impose continuing obligation on employees to update complaint; (3) district court could impose sanctions for complaint under state counterpart to Rule 11; and (4) district court's failure to make findings or give explanation for its denial of defendants' motion for sanctions under Oklahoma counterpart to Rule 11, for Rule 11 sanctions for filings after removal, and for sanctions under statute providing for sanctions for multiplying "proceedings in case unreasonably and vexatiously" warranted remand.

Reversed and remanded.

**1. Federal Civil Procedure ⇐2760**

Under Rule 11, act of signing pleading, motion, or other paper provides certification that action is not frivolous, and, therefore, sanctions are only appropriate if pleading, motion, or paper is signed in contravention of rule. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**2. Federal Civil Procedure ⇐2760**

Pleading or paper is signed in contravention of Rule 11 only if signer is subject to Federal Rules of Civil Procedure at time of signing. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**3. Federal Civil Procedure ⇐2778**

Pleading signed in state court proceeding cannot be signed in violation of Rule 11 and, therefore, federal court may not impose Rule 11 sanctions against signer of paper filed in state court based solely on that paper's frivolousness. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**4. Federal Civil Procedure ⇐2785**

Rule 11 does not impose continuing obligation on signer to update previously filed pleadings. Fed.Rules Civ.Proc.Rules 11, 11 note, 28 U.S.C.A.

**5. Federal Civil Procedure ⇐2778**

No Rule 11 sanctions can be imposed in action that is removed to federal court, unless party files sanctionable pleadings, motions, or papers in federal court. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**6. Federal Civil Procedure ⇐2778**

Plaintiffs' filing of complaint in state court could not subject them to Rule 11 sanctions, even though action was removed to federal court; plaintiffs were not subject to Federal Rules of Civil Procedure at time complaint was signed, and plaintiffs had no continuing obligation under Rule 11 to update complaint. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**7. Federal Courts ⇐813**

Court of Appeals reviews all aspects of district court's Rule 11 determination for abuse of discretion. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**8. Federal Civil Procedure ⇐2830**

Specific findings are not required when reasons for denying Rule 11 motion are apparent from record or when justification for district court's Rule 11 decision is readily discernable. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.



**9. Federal Civil Procedure ⇐2830**

When faced with serious Rule 11 motion, district court must make findings or give explanation for its denial of motion; such findings must be detailed enough to assist in appellate review, help assure litigants that decision was product of thoughtful deliberation, and enhance deterrent effect of ruling. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**10. Federal Courts ⇐941**

District court's failure to make findings or give explanation for its denial of defendants' colorable motion for Rule 11 sanctions warranted remand. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**11. Federal Civil Procedure ⇐2756.1**
**Federal Courts ⇐133**

In order to prevent party from escaping sanctions for its improper conduct, as defined by state law, while in state court, upon removal, federal court may impose sanctions under state-law counterpart to Rule 11 for such conduct. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**12. Federal Courts ⇐941**

District court's failure to make findings or give explanation for its denial of defendants' motion for sanctions under Oklahoma counterpart to Rule 11 for plaintiffs' filing of complaint in Oklahoma court, prior to removal, warranted remand. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**13. Federal Courts ⇐813, 830**

Court of Appeals reviews district court's decision with respect to motion for attorney fees, costs, and sanctions under statute providing for imposition of sanctions for multiplying "proceedings in case unreasonably and vexatiously" for abuse of discretion. 28 U.S.C.A. § 1927.

**14. Federal Civil Procedure ⇐2830**
**Federal Courts ⇐813**

Requirement that district court make finding or give explanation for its denial of motion for Rule 11 sanctions applies to district court's denial of sanctions under statute providing for sanctions for multiplying "proceedings in case unreasonably and vexatiously," even though Rule 11 requires sanctions if document is signed in violation of that rule, while statute merely permits sanctions; determinations under both Rule 11 and statute are subject to abuse of discretion standard of review. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; 28 U.S.C.A. § 1927.

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James F. Davis, William D. Watts, Gretchen A. Harris, Michelle Johnson, of Andrews Davis Legg Bixler Milsten & Price, Oklahoma City, OK, for defendant-appellant.

Michael Gassaway, David P. Henry, Oklahoma City, OK, for plaintiffs-appellees.

Before BALDOCK, HOLLOWAY, and BRORBY, Circuit Judges.

BALDOCK, Circuit Judge.

The City of Oklahoma City ("the City") appeals the district court's denial of its motion for attorney fees, costs, and sanctions pursuant to Fed.R.Civ.P. 11, Okla.Stat.Ann. tit. 12, § 2011 (West 1993), and 28 U.S.C. § 1927. We have jurisdiction under 28 U.S.C. § 1291.

In 1991, Plaintiffs, employees and former employees of the Oklahoma City Jail, filed suit against the City in state court alleging negligent infliction of emotional distress, violations of the Emergency Planning and Community Right-to-Know Act, and violations of Occupational Safety and Health Act ("OSHA") regulations. Plaintiffs also asserted claims under the Oklahoma Governmental Tort Claims Act, and the First, Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[1] In their complaint, Plaintiffs claimed that Defendant knew and concealed from them that the insulation on water pipes in the jail contained asbestos fibers. According to Plaintiffs, because Defendant's actions were intentional, and because Plaintiffs were also exposed to asbestos while off duty, their action was outside the Oklahoma's Worker's Compensation

1. In their response to the City's motion for summary judgment, Plaintiffs failed to press any of their constitutional claims, except for those arising under the Due Process Clause. Plaintiffs also abandoned their action under the Oklahoma Governmental Tort Claims Act.

Act. Plaintiffs claimed that they experienced increased risk of cancer and other diseases, anxiety and mental anguish, injury to their immune systems and diseases in latency stages, and fear of cancer as a result of their alleged exposure to asbestos.

Based on the constitutional claims, the City removed the action to federal district court. The City then moved for summary judgment on all claims, and the district court granted the motion.[2] After judgment was entered dismissing Plaintiffs' action on the merits, the City filed a motion for attorney fees, costs, and sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, Okla.Stat.Ann. tit. 12, § 2011 (West 1993), and 28 U.S.C. § 1927.[3] The district court denied the City's motion, stating:

> Upon due consideration, the court, having intimate knowledge of the [case], concludes that Plaintiffs' counsel did not violate Okla. Stat. tit. 12, § 2011 in filing the Petition in this matter. In addition, the court concludes that Plaintiffs' counsel, in filing the other pleadings in this matter, did not violate Rule 11 of the Federal Rules of Civil Procedure and that his actions in this matter did not violate 28 U.S.C. § 1927. The court thus concludes that the imposition of sanctions is not appropriate.

The City appeals the district court's denial of its motion for attorney fees, costs, and sanctions, claiming (1) the court abused its discretion in concluding that Plaintiffs' counsel did not violate Fed.R.Civ.P. 11, and (2) the court abused its discretion in failing to find liability under 28 U.S.C. § 1927.

## I.

Three separate issues arise in the context of the City's Rule 11 argument. As a threshold matter, we must determine whether Plaintiffs or Plaintiffs' counsel can be subject to Rule 11 sanctions based on Plaintiffs' original complaint, which was filed in state court prior to removal to federal court. Second, we must determine whether the district court abused its discretion in failing to impose Rule 11 sanctions based on pleadings filed after removal. Finally, if Rule 11 sanctions are not appropriate based on Plaintiffs' original complaint, we must decide whether the district court has the authority to impose sanctions for the filing of the original complaint based on Okla.Stat.Ann. tit. 12, § 2011 (West 1993), and, if so, whether the court abused its discretion in denying sanctions pursuant to § 2011.

### A.

[1, 2] Federal Rule of Civil Procedure 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

Fed.R.Civ.P. 11. From this language, it is apparent that the act of *signing* the pleading, motion, or other paper provides the certification that the action is not frivolous. *See Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1199 (7th Cir.1990); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2nd Cir.1986) (en banc), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). Therefore, sanctions are only appropriate if a pleading, motion, or paper *is signed* in contravention of the Rule. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359 (1990). A pleading or paper is signed in violation of Rule 11 only if the signer is subject to the Federal Rules of Civil Procedure at the time of the signing. *Dahnke*, 906 F.2d at 1199.

[3] At the time a state court pleading is signed, the signer is not subject to the Federal Rules of Civil Procedure. *See* Fed. R.Civ.P. 1 (the rules "govern the procedure in the United States district courts"); *see also Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 257 (4th Cir.1987). Accordingly, a pleading signed in a state court proceeding cannot be signed in violation of Rule 11, and a federal court may not impose Rule 11 sanctions against a signer of a paper filed in state court based solely on that paper's frivolousness. *See Dahnke*, 906 F.2d at 1199; *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 130 (5th Cir.1988); *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808–09 (9th Cir. 1987); *Stiefvater Real Estate, Inc. v. Hinsdale*, 812 F.2d 805, 809 (2d Cir.1987); *Kirby*, 811 F.2d at 256–57; *see also Willy v. Coastal Corp.*, — U.S. —, —, 112 S.Ct. 1076, 1079, 117 L.Ed.2d 280 (1992) ("Rule 11 appl[ies] to all district court proceedings"); *Chambers v. Nasco, Inc.*, — U.S. —, —, 111 S.Ct. 2123, 2145, 115 L.Ed.2d 27 (1991) ("the rule does not apply to papers filed in fora other than district courts") (Kennedy, J., dissenting); *Cooter & Gell*, 496 U.S. at 406, 110 S.Ct. at 2461 ("[n]either the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings").

That the case is later removed to federal court does not change this result. A "violation of Rule 11 is complete when the paper is filed." *Cooter & Gell*, 496 U.S. at 395, 110 S.Ct. at 2455 (citation omitted). Although the Federal Rules of Civil Procedure "apply to civil actions removed to the United States district courts from the state courts," they only apply "*after removal.*" Fed.R.Civ.P. 81(c) (emphasis added). "By obvious implication, the rules, including Rule 11, do not apply to the filing of pleadings or motions prior to removal." *Kirby*, 811 F.2d at 257.

[4] Moreover, the removal of an action to federal court alone is capable of supporting the imposition of Rule 11 sanctions only if the Rule imposes a continuing obligation on the signer to update previously filed pleadings. Today we join those circuits that have concluded that Rule 11 does not impose such an obligation. *See Dahnke*, 906 F.2d 1192; *Corporation of the Presiding Bishop v. Associated Contractors, Inc.*, 877 F.2d 938, 941–42 (11th Cir.1989), *cert. denied*, 493 U.S. 1079, 110 S.Ct. 1133, 107 L.Ed.2d 1038 (1990); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir.1987); *Oliveri*, 803 F.2d at 1274–75; *see also Hilton Hotels Corp. v. Banor*, 899 F.2d 40, 44–45 (D.C.Cir.1990) (commenting that interpretation of Rule 11 such that no continuing obligation to update pleadings is imposed, is most consistent with attorneys' duties under ethical codes); *United Energy Owners Comm., Inc. v. United Energy Management Sys., Inc.*, 837 F.2d 356, 364–65 (9th Cir.1988) (holding that Rule 11 only applies to misconduct involving signing of papers). By its terms, Rule 11 only authorizes sanctions for the *signing* of a document in violation of the Rule. Fed.R.Civ.P. 11 ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction"). Rule 11's emphasis on the need for the signer to perform a reasonable inquiry before signing suggests that the Rule authorizes sanctions only for unreasonable filings, not failure to amend or withdraw a previously filed document. *Hilton Hotels Corp.*, 899 F.2d at 44; *see Gaiardo*, 835 F.2d at 484 ("Rule 11 sanctions are improper in situations which do not involve signing a paper"). Furthermore, the Advisory Committee Note to Rule 11 states that whether the signer's conduct amounts to a violation of Rule 11 is to be evaluated at the time a paper is signed. Fed.R.Civ.P. 11 advisory committee note; *see Oliveri*, 803 F.2d at 1274. As pointed out by the court in *Oliveri*, "[i]t is difficult to imagine why this comment would be made if the rule were meant to impose a continuing obligation on the attorney." 803 F.2d at 1274.

2. In a separate unpublished opinion, we affirmed the district court's grant of summary judgment in favor of the City. *See Griffen v. Oklahoma City*, No. 92-6198, slip op., 1993 WL 307998 (10th Cir. Aug. 10, 1993). In the opinion, we upheld the district court's determination that Plaintiffs failed to present any evidence of compensable injury. *Id.*

3. The City also requested sanctions pursuant to the district court's inherent authority to award attorney fees against a party who acts in bad faith. However, the district court did not address this issue in its denial of the City's motion, and should do so on remand.

[5, 6] Having determined that a federal court may not impose Rule 11 sanctions against a signer of a paper filed in state court, and having determined that signers have no obligation under Rule 11 to make continuous updates to previously filed pleadings, we hold that no sanctions can be imposed under Rule 11 in an action that is removed to federal court, unless a party files sanctionable papers in federal court. *Accord Dahnke*, 906 F.2d at 1199-1201; *Hurd*, 824 F.2d at 808-09; *Stiefvater Real Estate, Inc.*, 812 F.2d at 809; *Kirby*, 811 F.2d at 256-57; *see also Foval*, 841 F.2d at 130 (no Rule 11 sanction unless deficiency brought to signer's attention after removal and he or she refuses to correct it). *Contra Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335-36 (6th Cir. 1988) (holding that attorney has continuing obligation to review pleadings to conform to Rule 11). We therefore conclude that, in the instant case, the filing of Plaintiffs' complaint in state court cannot subject Plaintiffs or their attorneys to Rule 11 sanctions.

B.

[7] We now turn to the City's argument that the district court abused its discretion in failing to impose Rule 11 sanctions based on pleadings filed by Plaintiffs after the case was removed to federal court. In denying the City's motion for sanctions the court simply stated, "[u]pon due consideration, the court, having intimate knowledge of the [case], concludes that Plaintiffs' counsel, in filing the other pleadings in this matter, did not violate Rule 11 of the Federal Rules of Civil Procedure." We review all aspects of a district court's Rule 11 determination for an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405, 110 S.Ct. at 2460.

[8, 9] "A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand." *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir.1987) *cert. dismissed*, 485 U.S. 901, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988). Specific findings are not required when the reasons for denying a Rule 11 motion are apparent from the record, or when the justification for the district court's Rule 11 decision is readily discernible. *Id.*; *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir.1988) (en banc). When faced with a serious Rule 11 motion, however, a district court must make findings or give an explanation for its denial of the motion. *Szabo Food Serv., Inc.*, 823 F.2d at 1084; *Thomas*, 836 F.2d at 883. Such findings or explanations must be "detailed enough to assist in appellate review, help assure the litigants that the decision was the product of thoughtful deliberation, and enhance the deterrent effect of the ruling." *See White v. General Motors Corp., Inc.*, 908 F.2d 675, 681 (10th Cir.1990) (citation omitted), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991).

[10] In the instant case, the district court failed to make any findings and gave no explanations for its denial of the City's motion for Rule 11 sanctions. In our view, the City has made a colorable motion, and it is not obvious to us from the record why Rule 11 sanctions are not warranted. Because we cannot tell from the court's order why it refused to impose sanctions, we are left with no means by which to judge the exercise of the court's discretion. *See Doenié v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1171 (10th Cir.1991). Accordingly, we have no alternative but to remand for those findings. *See id.*; *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir.1986) (remand where record provides no basis for appellate court to review district court's exercise of discretion).[4]

C.

[11] The City argues that, even if Rule 11 does not apply to Plaintiffs' original complaint, the court abused its discretion in concluding that the complaint did not violate Okla.Stat.Ann. tit. 12, § 2011 (West 1993). The district court denied the City's motion for sanctions finding that "Plaintiffs' counsel did not violate [§ 2011] in filing the Petition in this matter."

Section 2011 is Oklahoma's counterpart to Rule 11.[5] The district court and both parties assume the federal district court has the authority to impose sanctions under § 2011, which governs the imposition of sanctions for misuse of Oklahoma state courts. Because we have found no authority to the contrary, and because we see no compelling reason why the district court lacks such authority, we agree.

Of the handful of courts that have addressed this issue, all have concluded that a federal court may apply a state-law counterpart to Rule 11 to a pleading filed in state court prior to removal. *See Harrison v. Luse*, 760 F.Supp. 1394, 1401 (D.Col.), *aff'd*, 951 F.2d 1259 (10th Cir.1991); *Schmitz v. Campbell-Mithun, Inc.*, 121 F.R.D. 189, 192 (N.D.Ill.1989); *Crowell v. Holy Order of Mans*, 39 Fed.R.Serv.2d 1223, 1224 (D.Mass. 1984); *In Re Wolf*, 118 B.R. 761, 768 (Bankr. C.D.Cal.1990); *see also Dahnke*, 906 F.2d at 1200 (in case removed to federal court, the court stated, "[s]ince [appellants] filed their action in a state administrative agency ... any sanctions imposed against the appellants for their conduct in that forum must be based upon the rules of that forum, not ours"); *Anthony v. Texaco, Inc.*, 803 F.2d 593, 595 n. 1 (10th Cir.1986) (cautioning attorneys in removal case against making facetious allegations due to constraints of Rule 11 *and* Okla.Stat.Ann. tit. 12, § 2011); *Columbus, Checo, Cabrini Medical Center v. Holiday Inn*, 111 F.R.D. 444, 446 (N.D.Ill.1986) (applying Illinois sanctions law to complaint filed prior to removal). The court in *Schmitz* observed that because no federal law applies to the filing of a complaint in state court, no conflict between state and federal law exists, and the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), is irrelevant to this issue. 124 F.R.D. at 192. The *Schmitz* court further concluded, and we agree, that "to hold that we cannot apply [the state counterpart to Rule 11] would mean that a plaintiff could file utterly baseless papers in state court and escape sanctions that otherwise would have been imposed on him by that court because of the happenstance ... that the defendant removed the case to Federal District Court." *Id.*

We also note that in other situations, federal courts have applied state rules of procedure to conduct occurring prior to removal. In *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1282 (9th Cir. 1980), the court held that since process was properly issued and timely served under state law prior to removal, such service remained sufficient after removal. The court also noted that although Fed.R.Civ.P. 41(b) applied to the removed action, whether the plaintiff failed to prosecute the case prior to removal was governed by state law. *Id.* at 1278 n. 5. *See also McKenna v. Heezy*, 130 F.R.D. 655, 656 (N.D.Ill.1989) (applying Illinois law governing failure to prosecute because conduct in question occurred prior to removal). Likewise, in *Winkels v. George A. Hormel & Co.*, 874 F.2d 567, 570 (8th Cir. 1989), the court held that the Minnesota procedural rule governing the commencement of actions applied to an action originated in state court and later removed to federal court. Finally, the Supreme Court in *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 439-40, 94 S.Ct. 1113, 1124, 39 L.Ed.2d 435 (1974), held that the removal of a case to federal court did not extend the duration of a temporary restraining order beyond its termination date under state law. We find these cases instructive, and we conclude that, in order to prevent a party from escaping sanctions for its improper conduct—as defined by state law—while in state court, upon removal of the case, a federal court may impose sanctions under the state-law counterpart to Rule 11 for such conduct.

4. The City argues that we need not remand because it is obvious from the record that Plaintiffs' counsel violated Rule 11. We disagree. In reviewing a district court's summary denial of a Rule 11 motion for abuse of discretion, we do not review for the "obviousness" of the Rule 11 violation; rather, we review for the "obviousness" of the district court's ruling. Here, the district court denied the City's motion and it is not obvious to us why the court so ruled. Remand is therefore appropriate. *See Cooter & Gell*, 496 U.S. at 402-03, 110 S.Ct. at 2459 (district court better suited than appellate court to determine whether litigant's position is factually well grounded and legally tenable).

5. Section § 2011 nearly tracks the language of Rule 11. The only substantive difference is that § 2011 includes language expressly abolishing the rule in equity requiring corroborating evidence to overcome an answer made under oath. *See* Okla.Stat.Ann. tit. 12, § 2011 (West 1993).

[12] Having determined that the district court had the authority to impose sanctions under § 2011, we remand for the court to make findings or explain its reasoning for denying the City's motion for sanctions. *See supra* part I.B (we cannot review Rule 11 determinations without adequate findings); *see also* Okla.Stat.Ann. tit. 12, §§ 2001–2127 (West 1993) introductory committee comment ("[a]pplication of the Oklahoma Pleading Code . . . will be facilitated by reference to the appellate decisions from federal and state courts construing the Federal Rules").

II.

[13] The City appeals the district court's denial of its motion for attorney fees, costs, and sanctions pursuant to 28 U.S.C. § 1927. The district court summarily denied the City's motion, stating that "[Plaintiffs' counsel's] actions in this matter did not violate 28 U.S.C. § 1927." We review for abuse of discretion. *See White v. American Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir.1990).

Section 1927 provides that any attorney who multiplies proceedings "unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Sanctions under § 1927 are appropriate "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc).

[14] Section 1927 is materially different from Rule 11. While Rule 11 *requires* the district court to impose sanctions if a document is signed in violation of the Rule, § 1927 merely *permits* the district court to impose sanctions against an attorney who multiplies a proceeding. *See* 28 U.S.C. § 1927. Nevertheless, both mandatory determinations under Rule 11 and discretionary determinations under § 1927 are subject to our review under the same abuse of discretion standard. Accordingly, we hold that the requirement that a district court make findings or give an explanation for its denial of a serious Rule 11 motion, applies with equal force to a court's denial of sanctions under § 1927. *Cf. Braley*, 832 F.2d at 1513 (citing Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 199 (1985)) (holding that when sanctions imposed under § 1927, district court must explain basis for sanction, in part, because "[f]indings and conclusions, even if only brief, . . . assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion.").

In the instant case, the district court gave no explanation for its denial of the City's nonfrivolous motion for sanctions under § 1927, and the reason for the court's denial is not apparent to us from the record. Accordingly, we remand for the district court to make findings in support of its denial of the City's motion, so that we may have a "means by which to judge the exercise of the court's discretion." *Daocne*, 934 F.2d at 1171.

REVERSED and REMANDED for further proceedings consistent with this opinion.


**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Matthew Wayne TOME, Defendant-Appellant.**

**No. 92-2104.**

United States Court of Appeals, Tenth Circuit.

Aug. 26, 1993.

Defendant was convicted in the United States District Court for the District of New Mexico, Santiago E. Campos, J., of aggravated sexual abuse, and he appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) testimony of six witnesses concerning child victim's out-of court statements to them about defendant's actions was not hearsay; (2) victim's prior consistent statements were not required to precede time that her alleged motive to lie arose for those statements to be admissible as nonhearsay; (3) admission of such testimony did not violate confrontation clause; and (4) permitting government to use leading questions during direct examination of victim was not abuse of discretion.

Affirmed.



**1. Criminal Law ⇐661**

Decision to admit evidence is within sound discretion of district court.

**2. Criminal Law ⇐1153(1)**

Court of Appeals accords heightened deference to trial court's hearsay rulings.

**3. Witnesses ⇐411(2)**

Testimony of six witnesses concerning child victim's out-of-court statements to them about defendant's actions was not hearsay in sexual abuse prosecution, where testimony was offered to rebut defense counsel's implication during cross-examination of victim that victim had fabricated allegations of abuse out of desire to live with her mother. Fed.Rules Evid.Rules 801, 801(d)(1)(B), 28 U.S.C.A.

**4. Witnesses ⇐411(2)**

Under rule defining what is not hearsay, evidence of witness' prior consistent statement is not hearsay if witness is subject to cross-examination concerning his or her prior statement and it is offered to rebut express or implied charge of recent fabrication or improper motive. Fed.Rules Evid.Rules 801, 801(d)(1)(B), 28 U.S.C.A.

**5. Witnesses ⇐411(2)**

Six and one-half-year-old victim was subject to cross examination in sexual abuse prosecution, as required for her prior consistent statements to be admissible under rule defining such statements as nonhearsay; although victim was reluctant to answer some questions and testified that she did not remember making certain statements, she ultimately answered most of defense counsel's question, and responded to simple and specific questions about specific persons. Fed. Rules Evid.Rules 801, 801(d)(1)(B), 28 U.S.C.A.

**6. Witnesses ⇐411(2)**

Trial court has discretion to determine whether prior consistent statement is offered to rebut charge of recent fabrication or improper motive, for purpose of rule making prior consistent statements nonhearsay. Fed.Rules Evid.Rules 801, 801(d)(1)(B), 28 U.S.C.A.

**7. Witnesses ⇐414(2)**

Child victim's prior consistent statements were not required to precede time that her alleged motive to lie arose for those statements to be admissible as nonhearsay in sexual abuse prosecution. Fed.Rules Evid. Rules 801, 801(d)(1)(B), 28 U.S.C.A.

**8. Witnesses ⇐411(2)**

Declarant's motive to lie is only one factor, although a crucial one, to be considered when evaluating relevancy of prior consistent statement; in doing so, trial judge must evaluate whether, in light of potentially powerful motive to fabricate, prior consistent statement has significant probative force bearing on credibility apart from mere repetition. Fed.Rules Evid.Rules 402, 403, 801, 801(d)(1)(B), 28 U.S.C.A.

**9. Witnesses ⇐411(2)**

Child victim's prior consistent statement concerning alleged acts of sexual abuse had probative force apart from mere repetition, as required for such statements to be relevant in sexual abuse prosecution; although defendant implied that victim fabricated allegations about defendant because she wanted to live with her mother, there was no evidence that victim possessed ability to conceive such a scheme. Fed.Rules Evid.Rules 402, 403, 801(d)(1)(B), 28 U.S.C.A.

**10. Criminal Law ⇐1139**

Court of Appeals reviews claims under the confrontation clause de novo. U.S.C.A. Const.Amend. 6

**11. Criminal Law ⇐662.9**

Admission of testimony concerning child victim's out-of court statements about alleged acts of sexual abuse did not violate confronta

ing as well as the effect to be accorded private agreements dealing with the proposed change. Nor does the reasonable bylaw at issue here conflict with the purposes of the Water Right Act or unduly interfere with the water court's exercise of its authority pursuant to that statute.

* * * * * *

Finally, should the directors disapprove the requested transfer we consider the question of the appropriateness of that disapproval to involve a "water matter" within the jurisdiction of the water court. Judicial economy would be promoted by permitting any challenge to director disapproval to be presented to the water court in the same proceeding as that in which a request for judicial approval of the director-disapproved change of water right is made.

*Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d at 506-07, 509 (citations omitted).

In light of the Secretary of the Interior's significant role in operating Green Mountain as trustee for Green Mountain's beneficiaries on the Western Slope, *United States v. Northern Colo. Water Conservancy Dist.*, 608 F.2d at 430, we cannot say that the consent provision is unreasonable. In addition, we agree with the Colorado Supreme Court's assessment that judicial economy is best served by treating the consent provision as a condition precedent to adjudication of the right under the Water Right Act. If, as Denver suggests, its proposed exchanges will not affect Green Mountain's function, and the Secretary nevertheless unreasonably withholds consent, Denver may challenge the Secretary's refusal in the same proceeding in which it files for adjudication of its exchange rights.[10]

We therefore reject Denver's contention that the district court improperly applied conditions to adjudication of its exchange rights under state law. The history and language of the prior agreements among the parties and the requirements of Colorado water law support the district court's dismissal of Denver's application as premature.

[8] Denver's final contention is that the dismissal of its application, although nominally without prejudice, deprived it of the priority dates for its claimed exchange rights. *See* the Water Right Act, Colo.Rev. Stat. § 37-92-305(1). We have already held that Denver's application was properly dismissed. The responsibility for any loss of priority lies squarely with Denver for failing to obtain the consent of the Secretary of the Interior before filing its ambitious application.

Accordingly, the ruling of the district court is AFFIRMED.

10. Denver would have a claim against the Secretary under paragraph 5 of the 1964 Stipulation, in which the Secretary apparently agreed not to unreasonably withhold consent as long as the enumerated conditions were satisfied.

**DODD INSURANCE SERVICES, INC. and Tom Dodd, Jr., Plaintiffs-Appellants,**

**v.**

**ROYAL INSURANCE COMPANY OF AMERICA, an Illinois corporation f/k/a Royal-Globe Insurance Companies, Defendant-Appellee.**

**No. 89-1368.**

United States Court of Appeals, Tenth Circuit.

June 11, 1991.

Insurance agency brought action against insurer after insurer attempted to terminate agency agreement. The United States District Court for the District of Colorado, Lewis T. Babcock, J., adopted the magistrate's summary judgment recommendation and imposed Rule 11 sanctions. Agency appealed. The Court of Appeals, Logan, Circuit Judge, held that: (1) the agency's defamation, breach of fiduciary duty, and negligence claims against the insurer were sufficiently meritless to be considered frivolous for purposes of Rule 11; (2) a complaint that contains both frivolous and nonfrivolous claims may violate Rule 11; and (3) remand was necessary for reconsideration of the amount of sanctions imposed.

Affirmed in part and vacated and remanded in part.



**1. Federal Courts ⇐668**

Premature notice of appeal from district court's approval of magistrate's recommendation that Rule 11 sanctions be imposed ripened when district court entered final judgment disposing of all issues in action. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**2. Federal Civil Procedure ⇐2769**

In deciding whether to impose Rule 11 sanctions, district court must apply objective standard; it must determine whether reasonable and competent attorney would believe in merit of argument. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**3. Federal Courts ⇐813**

In reviewing district court's decision to impose Rule 11 sanctions, Court of Appeals applies abuse of discretion standard to both district court's resolution of factual issues and its decision that pleading was not warranted by existing law or good faith argument for changing law. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

**4. Libel and Slander ⇐10(6)**

Letter written by insurer's branch manager to insurance agency expressing manager's opinions and expressing surprise that agency's employee was unaware of his obligation to discuss more than price with customer was not libel per se or libel per quod under Colorado law; letter was not deplorable, derogatory or disgraceful, nor did it impute incompetence, dishonesty, or misconduct.

**5. Insurance ⇐73**

Business relationship between insurer and independent insurance agency was strictly contractual and did not, under Colorado law, impose any fiduciary duty on insurer.

**6. Insurance ⇐73**
**Libel and Slander ⇐74**

Insurer owed no duty to insurance agency independent of parties' contract and, therefore, Colorado would not permit agency to maintain negligence claim in connection with drafting of rehabilitation agreement and writing and sending allegedly defamatory letter to agency.

**7. Federal Civil Procedure ⇐2771(2, 6, 7)**

District court did not abuse its discretion in determining that insurance agency's defamation, breach of fiduciary duty, and negligence actions against insurer were frivolous, warranting Rule 11 sanctions. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**8. Federal Civil Procedure ⇐2768**

Pleading that contains both frivolous and nonfrivolous claims may violate Rule 11, but presence of single frivolous or groundless claim does not always mandate Rule 11 sanctions. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**9. Federal Civil Procedure ⇐2771(7)**

District court did not abuse its discretion in imposing Rule 11 sanctions for insurance agency's filing ten-count complaint that included three frivolous claims against insurer; district court concluded that frivolous claims substantially burdened insurer and court. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**10. Federal Civil Procedure ⇐2814**

District court should not have used mathematical percentage approach to calculate amount of Rule 11 sanctions to be imposed for filing complaint that included three frivolous claims along with other nonfrivolous claims; mathematical percentage approach did not consider whether penalty imposed was least severe sanction adequate to deter future abuses. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**11. Federal Courts ⇐945**

Remand was necessary to permit district court to consider amount of Rule 11

sanctions that would adequately deter filing of complaint that included both frivolous and nonfrivolous claims; district court's mathematical percentage approach did not consider whether penalty imposed was least severe sanction that would be adequate. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**12. Federal Civil Procedure ⇐2817**

Although ability to pay Rule 11 sanctions must be considered by district court, inability to pay should be treated like affirmative defense, with burden placed on sanctioned parties to come forward with evidence of their financial status. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**13. Federal Civil Procedure ⇐2817**

Relative financial positions of insurance agency and insurer was wholly irrelevant in determining agency's ability to pay Rule 11 sanctions for filing complaint against insurer that included both frivolous and nonfrivolous claims. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

**14. Federal Courts ⇐945**

Remand was necessary to allow insurance agency to present evidence on its inability to pay Rule 11 sanctions; if agency was able to prove total inability to pay, district court could assess moderate sanction to deter future abusive litigation. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**15. Constitutional Law ⇐303**

**Federal Civil Procedure ⇐2828**

Insurance agency received adequate notice and opportunity to respond to insurer's motion for Rule 11 sanctions and, thus, agency was not denied due process, even though no hearing was conducted. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.; U.S. C.A. Const.Amends. 5, 14.

Bradley Pollock of Bell & Pollock, Littleton, Colo., for plaintiffs-appellants.

Alan Epstein (Bruce A. Menk with him, on the brief) of Hall & Evans, Denver, Colo., for defendant-appellee.

Before LOGAN, ALDISERT *, and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

The plaintiffs, Dodd Insurance Services, Inc. (Dodd Insurance) and its employee Tom Dodd, Jr., appeal a district court decision imposing Rule 11 sanctions against them. We affirm the court's decision to impose sanctions. We vacate and remand, however, for a recalculation of the amount of sanctions to be imposed.

[1] Dodd Insurance is an independent insurance agency. Under the terms of an "Agency-Company Agreement," it sold insurance policies for Royal Insurance Company of America (Royal). When Royal attempted to terminate the agreement, plaintiffs filed suit alleging ten causes of action. Royal moved for summary judgment on seven of plaintiffs' claims. A federal magistrate judge recommended summary judgment on eight of plaintiffs' claims, and, *sua sponte*, recommended that Rule 11 sanctions be imposed against plaintiffs. The district court adopted the magistrate's summary judgment recommendation on seven of plaintiffs' claims. The court also adopted the magistrate's recommendation to impose Rule 11 sanctions with respect to three of the causes of action alleged, noting that plaintiffs' defamation, breach of fiduciary duty, and negligence claims had "no basis in fact or law, and plaintiffs have not presented a good faith argument for extending, modifying or reversing the existing law...." II R. tab 31 at 7. Plaintiffs now appeal,[1] arguing that sanctions should not have been imposed because the claims were sufficient to withstand summary judgment, or, alternatively, because the claims complied with the requirements of Rule 11. They also challenge the district court's calculation of the amount of sanctions imposed and the procedures it employed in imposing sanctions. We additionally examine whether a pleading which contains several concededly nonfrivolous claims may violate Rule 11.

* The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

1. We have held that generally parties and attorneys sanctioned during litigation "must bear the burden of sanctions to the conclusion of the case and appeal on the merits of a fully adjudicated case." *D & H Marketers, Inc. v. Freedom Oil & Gas*, 744 F.2d 1443, 1446 (10th Cir.1984) (en banc). Nevertheless, we have jurisdiction of the appeal because the district court subsequently entered a final judgment disposing of all issues, which causes the prematurely filed notice of appeal to ripen and save the appeal. *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir.1988) (en banc). *See also Firstier Mortgage Co. v. Investors Mortgage Ins. Co.*, — U.S. —, 111 S.Ct. 648, 652, 112 L.Ed.2d 743 (1991) (premature notice of appeal ripens once final judgment is entered).



I

[2, 3] In deciding whether to impose Rule 11 sanctions, a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument. *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir.1990); *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir.1988). In reviewing a district court's decision to impose Rule 11 sanctions, we apply an abuse of discretion standard to both the court's resolution of factual issues and its decision that a pleading was not warranted by existing law or a good faith argument for changing the law. *Cooter & Gell v. Hartmarx Corp.*, — U.S. —, 110 S.Ct. 2447, 2457-61, 110 L.Ed.2d 359 (1990); *White*, 908 F.2d at 678. Although this standard of review does not preclude us from correcting a district court decision "based ... on an erroneous view of the law or on a clearly erroneous assessment of the evidence," *Cooter & Gell*, 110 S.Ct. at 2461, it requires that we give "[d]eference to the determination of courts on the front lines of litigation" because these courts are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted...." *Id.* at 2460. According to the United States Supreme Court, "[s]uch deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." *Id.* With these admonitions in mind we consider the district court's conclusions.

A

[4] Plaintiffs' defamation action arose after Roger Schade contacted Colorado's insurance commissioner to protest the cancellation and nonrenewal of an insurance policy issued by Royal and serviced by Dodd Insurance. Responding to Schade's protest, the Colorado Division of Insurance contacted Amye McClellan, a Royal branch manager, requesting that she provide the division and Schade with a justification for cancelling the policy. During correspondence regarding Schade's protest of cancellation, Tom Dodd, Jr. wrote McClellan a letter expressing his belief that Royal's underwriting guidelines were not part of the insurance policies sold by Dodd Insurance. In the letter, Dodd stated that "we [have never] been informed to advise the insureds of [the guidelines'] content...." I R. tab 4, ex. K. McClellan responded by sending the following allegedly defamatory letter to Tom Dodd, Jr.:

> "I'm quite surprised you are unaware of your obligation to discuss more than price with a customer. I would not think you would wait for your company's [sic] to advise you of this obligation. It would seem to me to be part of your role as an independent agent to compare and contrast company rates, rules, procedures, [sic] practices in the course of counseling your customers.
>
> Our guidelines are not a part of our policy. They are to guide you as an agent in the placing of new business, and for future reference on renewals. We do provide to you the Colorado Summary Disclosure forms which you should have from each of your companies, and which you should be giving to your customers. In the Summary Disclosure guides, we do discuss causes for nonrenewal. I'm sure you are aware of these disclosure

guide, [sic] and that you do distribute them for all your companies, as required by the State of Colorado."

*Id.*, ex D. McClellan sent copies of the letter to Schade, the Colorado Division of Insurance, and a Royal underwriter.

We agree with the district court's conclusion that, as a matter of law, the letter is not defamatory. As the magistrate pointed out, the letter is composed largely of McClellan's opinions. Such statements of opinion are not actionable under Colorado law. *See Simmons v. Prudential Ins. Co. of America*, 641 F.Supp. 675, 686 (D.Colo. 1986) (under Colorado law, statement of opinion must imply that it is based on undisclosed defamatory facts to be actionable). Nor can we construe McClellan's statement expressing surprise that Tom Dodd, Jr. was "unaware of [his] obligation to discuss more than price with a customer," to be libel per se or libel per quod. On its face, the statement is not "deplorable, derogatory, or disgraceful," *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 517 (10th Cir.1987) (citing *Bernstein v. Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780, 784 (1962)), or "unmistakably recognized as injurious," *McCammon & Assocs. v. McGraw-Hill Broadcasting Co.*, 716 P.2d 490, 492 (Colo.Ct.App. 1986). Nor does it impute incompetence, dishonesty, or misconduct incompatible with the conduct of plaintiffs' business. *See Bernstein*, 368 P.2d at 783-84 (statement that a certified public accountant failed to respond to a request to be interviewed after preparing and submitting unaudited financial statements not libelous per se as a matter of law). Even when interpreted with the aid of extrinsic evidence, the letter "simply informs Mr. Dodd that he has a duty to fully inform the customer about the coverage under the policy." II R. tab 29 at 6 (magistrate's opinion).[2]

B

[5] Plaintiffs' breach of fiduciary duty claim essentially alleges that over the course of their business relationship, plaintiffs came to repose trust and confidence in Royal.[3] After reviewing the record on appeal, we conclude that the district court properly granted summary judgment on this claim. Plaintiffs did not undertake to act for the benefit of Royal. *See Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). Nor did the business relationship between the parties cause plaintiffs " 'to relax the care and vigilance [they] would and *should* have ordinarily exercised in dealing with a stranger.' " *Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo.Ct.App.1981) (quoting *United Fire & Casualty Co. v. Nissan Motor Corp.*,

2. On appeal, plaintiffs point to allegedly untrue notices of nonrenewal and cancellation sent by Royal to Dodd Insurance clients, arguing that they provide further justification for the defamation cause of action. These allegations did not appear in plaintiffs' original complaint, and the magistrate recommended denial of plaintiffs' motion to amend to include these allegations. We read the district court's opinion to have adopted this recommendation. *See* II R. tab 31 at 2-4, 8. Because we cannot find the district court's decision to be an abuse of discretion, we do not consider these allegations in support of plaintiffs' appeal. *See Snider v. Circle K Corp.*, 923 F.2d 1404, 1409 (10th Cir.1991) (district court's decision to deny leave to amend complaint reviewed for abuse of discretion).

3. In support of their claim, plaintiffs point to the depositions of several "experts" stating that independent insurance agents like plaintiffs have a fiduciary relationship with their insurance companies. Plaintiffs concede, however, that "[t]he reports of these experts were not available to the Court at the time the Recommendation was made by the Magistrate nor at the time the original Order was entered nor at the time the Motion for Reconsideration was denied." Brief of Appellants at 14-15. In reviewing a district court's decision to grant summary judgment, we consider only those papers before the court at the time of its decision. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 650-51 (2d ed. 1983); *Guild Trust v. Union Pac. Land Resources Corp.*, 682 F.2d 208, 210 (10th Cir.1982). In reviewing an appeal of Rule 11 sanctions, we similarly will not consider an argument based on materials that were not properly presented to the district court. *See White*, 908 F.2d at 680 ("[I]t is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim."). Accordingly, we will not consider the depositions proffered by plaintiffs on appeal.



164 Colo. 42, 433 P.2d 769, 771 (1967)) (emphasis added). Nor were plaintiffs engaged in an employment relationship with Royal. *See Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 491-98 (Colo.1989) (en banc) (addressing duty of loyalty arising from employment relationship). Royal and the plaintiffs had a strictly contractual relationship. As the magistrate stated, *see* II R. tab 29 at 19, plaintiffs ran an independently owned insurance agency that made all of its own business decisions and sold insurance policies for companies other than Royal. *See* IV R. 30. Under Colorado law, such a relationship does not give rise to a fiduciary duty.

C

[6] Plaintiffs' negligence claim is based upon Royal allowing McClellan to draft a rehabilitation agreement that allegedly did not comport with Royal's own standards and to write and mail the allegedly defamatory letter. We agree with the district court's conclusion that plaintiffs' allegations do not state a negligence cause of action under Colorado law. "Colorado maintains a sharp distinction between tort and contract actions, defining tort as the breach of a legal duty arising by law, independent of contract." *Bloomfield Fin. Corp. v. National Home Life Assurance Co.*, 734 F.2d 1408, 1414 (10th Cir.1984). *See also Strey v. Hunt Int'l Resources Corp.*, 749 F.2d 1437, 1441 (10th Cir.1984) (Colorado does not recognize a tort action for breach of implied contractual duties), *cert. denied*, 479 U.S. 870, 107 S.Ct. 237, 93 L.Ed.2d 162 (1986).

*Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo.1983), and *Jet Courier Service*, upon which plaintiffs rely, do not blur this distinction. In both cases, the cause of action in tort was supported by a duty imposed by law, independent of the contract. *See Jet Courier Service*, 771 P.2d at 491-98 (analyzing duty of loyalty arising out of employment relationship); *Cosmopolitan Homes*, 663 P.2d at 1042 ("An obligation to act without negligence in the construction of a home is independent of contractual obligations such as an implied warranty of habitability."). Because no such duty exists in the instant case,[4] the district court appropriately granted summary judgment in Royal's favor.

D

[7] In imposing sanctions for plaintiffs' defamation, breach of fiduciary duty, and negligence actions, the district court adopted the magistrate judge's findings that McClellan's letter contained "nothing that even approache[d] defamatory language," that plaintiffs provided no case law or reasoning to support a finding that Royal owed a fiduciary duty to plaintiffs, and that there were "no facts to even suggest negligence and there is an abundance of case law prohibiting the assertion of tort claims for the breach of a contract." II R. tab 29 at 23-24. The district court was correct in finding these claims unmeritorious. Were the claims frivolous? The district court apparently believed that a reasonable and competent attorney would not believe in the merits of any of them. We cannot say that the court abused its discretion in reaching this conclusion.

II

Before we affirm the district court's decision to impose Rule 11 sanctions we must address an additional issue raised by this case: whether a complaint containing both frivolous and nonfrivolous claims can vio-

4. Plaintiffs had ample opportunity to identify the duty owed to them by Royal. As the magistrate judge noted:

> "at the hearing on this [summary judgment] motion, Mr. Bell, Plaintiffs' attorney, was asked seven times what the duty was that Royal owed to the Plaintiffs. Mr. Bell provided answers such as duty to treat the insurance agent fairly, duty to treat the agent not arbitrarily or capriciously, duty not to discriminate against the agents, duties with regard to the policies, underwriting and that sort of thing, duty to live up to the terms of the contract and duty not to lie or deceive the agents."

II R. tab 29 at 21. We agree with the magistrate judge that "[t]hese generalized standards of conduct labeled as duties are not legal duties applicable to this case capable of being breached." *Id.*

late Rule 11. In the instant case, the district court imposed sanctions on the basis of plaintiffs' complaint. The court found only three of the complaint's ten claims to be frivolous, however, and three claims survived summary judgment.

Under Rule 11, an attorney's signature on a "pleading, motion, or other paper" constitutes a certificate that "it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...." Fed.R.Civ.P. 11. Some courts have interpreted Rule 11 narrowly, suggesting that sanctions are inappropriate when a pleading contains both valid and frivolous claims. *See, e.g., FDIC v. Tekfen Constr. & Installation Co.*, 847 F.2d 440, 444 n. 6 (7th Cir.1988) ("[E]ven if this minor argument were off the mark, the fact that one argument in an otherwise valid paper is not meritorious" does not warrant Rule 11 sanctions.); *Burull v. First Nat'l Bank of Minneapolis*, 831 F.2d 788, 789 (8th Cir.1987) (lawsuit containing meritless and factually groundless claims did not mandate Rule 11 sanctions because complaint, "taken as a whole, was legally and factually substantial enough to reach a jury"), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir.1986) ("Rule [11] permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous."). Other courts interpret Rule 11 more broadly, finding that it may be violated by a pleading containing a single frivolous claim. *See, e.g., Cross & Cross Properties v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir.1989) ("[T]o adopt a standard that would deny sanctions for a significant and obviously meritless claim simply because the rest of the pleading was sound strikes us as contrary to this court's established reading of Rule 11."); *Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988) ("Rule 11 does not prevent the imposition of sanctions where it is shown that the Rule was violated as to a portion of a pleading, even though it was not violated as to other portions."); *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1067 (7th Cir.1987) ("Rule 11 applies to all statements in papers it covers. Each claim must have sufficient support; each must be investigated and researched before filing.").

[8] We hold that a pleading containing both frivolous and nonfrivolous claims may violate Rule 11. To conclude otherwise "would allow a party with one or more patently meritorious claims to pepper his complaint with one or more highly advantageous, yet wholly frivolous, claims, for that party would be assured that the weight of his meritorious claim(s) would shield him from sanctions." *Cross & Cross Properties*, 886 F.2d at 505. *Accord Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir.1990) (en banc). The presence of a single frivolous or groundless claim, however, may not always mandate Rule 11 sanctions. For example, a frivolous claim easily disposed of by the opposing party and the court might not warrant sanctions. *Compare Burull*, 831 F.2d at 790 (affirming district court determination that inclusion of meritless claims had no appreciable effect on litigation of otherwise nonfrivolous lawsuit), *and Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir.1986) (groundless boilerplate allegations did not warrant sanctions since it was "doubtful whether anyone gave the[ ] claims serious consideration or devoted any significant work toward disposing of them"), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987), *with Patterson*, 841 F.2d at 387 ("The district court was within its discretion in imposing Rule 11 sanctions as to a single count of a multiple count complaint, where the effect and cost of that count could be separated from that of the other counts.").

[9] The method of pleading plaintiffs employed in the case before us appears to be the type known colloquially as "throw - as - much - mud - against - the - wall - as - you - can - and - hope - some - of - it - sticks." As long tenured appellate judges we have seen hundreds of examples similar to the pleadings in the instant case.



This is the first case in which we have participated where sanctions were imposed when the complaint asserted a mix of frivolous and nonfrivolous claims. It may be that some judges would not have imposed sanctions in this case, perhaps because the inclusion of frivolous claims with some more meritorious is common practice. Nevertheless, we note that only three claims of ten survived summary judgment; we also note the extreme deference the Supreme Court has admonished us to apply to district courts' conclusions in this Rule 11 area. *See Cooter & Gell*, 110 S.Ct. at 2457-61. Rule 11 was strengthened in order to make parties and their lawyers consider the burden of defending frivolous claims. The magnitude of the sanctions imposed in the instant case indicates that the district court apparently concluded that plaintiffs' three frivolous claims substantially burdened Royal and the court. After reviewing the record, we cannot say that this conclusion amounts to an abuse of discretion. Accordingly, we must affirm the district court's decision to impose Rule 11 sanctions.

## III

[10] Plaintiffs argue that the district court erred in using a mathematical percentage approach to calculate the amount of Rule 11 sanctions to be imposed. The court found that three of ten claims in plaintiffs' complaint warranted sanctions. After some hesitation, the court imposed sanctions of $39,050.88—an amount equal to thirty percent of Royal's attorney's fees and costs.[5] We agree with plaintiffs that such an approach to the calculation of Rule 11 sanctions is inappropriate. In fairness to the district court, we note that it did not have the benefit of our *White* decision at the time it imposed the sanctions.

Although Rule 11 serves several functions, including "compensating victims of litigation abuse," *see White*, 908 F.2d at 683, "[d]eterrence is ... the primary goal of the sanctions." *Id.* Accordingly, "the amount of sanctions is appropriate only when it is the '*minimum* that will serve to *adequately* deter the undesirable behavior." *Id.* at 684-85 (quoting *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir.1988)) (emphasis in original). Although a mathematical percentage approach arguably serves the goal of compensation, such an approach fails even to consider whether the penalty imposed is the least severe sanction adequate to deter future abuses. Because the instant district court calculated sanctions without considering the minimum sanction necessary to deter future abuses, we vacate the award of sanctions and remand for further consideration in light of the factors delineated in *White*, 908 F.2d at 684-85.

[11] With respect to what attorney time was expended reasonably on each of the frivolous claims in the case, we recognize the difficulties the court had, based upon defense counsel's response to its order. Nevertheless, if defending against these three claims required the same proportionate amounts of attorneys' time as defending against the seven nonfrivolous claims,

5. The district court first ordered Royal to "file an affidavit for attorney fees and a bill of costs pertaining to the defense of these three claims for relief ..." II R. tab 31 at 7. Royal did so, seeking $39,050.88; thirty percent of the attorney's fees and costs incurred by Royal in defending the entire suit. The district court responded to Royal's request, noting that "the Supreme Court has expressly rejected the use of 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. *Hensley v. Eckerhart*, 461 U.S. 424, 435 n. 11, 103 S.Ct. 1933, 1940 n. 11, 76 L.Ed.2d 40 (1983)." II R. tab 39 at 1. Accordingly, the court ordered Royal to resubmit its time records, "detailing the actual hours which were reasonably expended on the defense of the three sanctioned claims..." *Id.* at 2. Royal responded that it could not segregate those attorney's fees and costs relating to the three sanctioned claims, but that to the best of its knowledge, thirty percent was a reasonable estimate. The court ultimately accepted Royal's estimate of attorney's fees and costs, deciding that since the bulk of attorney's fees and costs arose out of a common core of facts, it was unreasonable to expect Royal to segregate costs by cause of action. *See* II R. tab 42.

Thereafter, the court revised the Rule 11 sanctions, noting that Royal was entitled to only thirty percent of the previous amount—$11,715.26. Royal then moved to alter the court's award of costs to correct an apparent inadvertent error, noting that the $11,715.26 amount awarded represented thirty percent of thirty percent of Royal's litigation expenses. The court then amended its judgment and awarded $39,050.88. *See* II R. tab 47.

it is difficult to see how the three should be considered frivolous; by the same token, if $39,050.88 of attorney's fees were required to defend against these claims, arguably they ought not to be considered frivolous. On remand, the court should keep in mind that "the very frivolousness of the claim[s] is what justifies the sanctions." *White*, 908 F.2d at 684.

IV

[12, 13] Plaintiffs next argue that the district court erred by not considering their ability to pay the Rule 11 sanctions imposed. Although ability to pay must be considered by a district court, *see id.* at 685, inability to pay should be treated like an affirmative defense, "with the burden upon the parties being sanctioned to come forward with evidence of their financial status." *Id.* In their briefs in response to Royal's application for attorney's fees and costs and in their briefs on appeal, plaintiffs offer no evidence of an inability to pay. They simply point to the great disparity of wealth between Royal and plaintiffs, *see* Brief of Appellants at 43, and assert that "the Plaintiff is a small corporation which recognizes very little, if any, profit and faces financial ruin as the result of the actions taken in part by Royal Insurance Company." II R. tab 36 at 15. The relative financial position of plaintiffs and Royal is wholly irrelevant to plaintiffs' ability to pay Rule 11 sanctions.

[14] Moreover, a bald assertion that plaintiffs are on the verge of financial collapse is plainly insufficient to establish an inability to pay. *See White*, 908 F.2d at 685 (affidavit stating that party would be forced into bankruptcy by requested attorney's fees insufficient to establish inability to pay). Because we are remanding, however, we urge the district court to permit plaintiffs to supplement the record regarding their alleged inability to pay. *See id.* But even if plaintiffs prove a total inability to pay, the court may assess a moderate sanction to deter future abusive litigation. *Id.*

V

[15] Finally, plaintiffs argue that the district court violated their due process rights by assessing Rule 11 sanctions without a hearing. We disagree. Although a party must receive notice and an opportunity to respond before being sanctioned under Rule 11, *see id.* at 686, "[t]he opportunity to fully brief the issue is sufficient to satisfy due process requirements." *Id.* *See also Oliveri*, 803 F.2d at 1280 (though evidentiary hearing not required before imposition of Rule 11 sanctions, party must receive notice and opportunity to respond). Plaintiffs had ample opportunity to brief the Rule 11 issues raised in this case. Plaintiffs filed a lengthy brief objecting to the magistrate judge's recommendation to grant summary judgment and impose sanctions, *see* III R. (Objections to Recommendations by United States Magistrate and appendix thereto), and twice fully briefed their reasons for opposing the amount of attorney's fees and costs sought by Royal. *See* II R. tabs 36 and 41. Such an opportunity to respond satisfies all due process concerns.

The district court's decision to impose sanctions is affirmed. We vacate and remand, however, for a recalculation of sanctions consistent with this opinion.


**In re Andrew J. DURHAM and Cathryne Durham, Debtors.**

**Andrew J. DURHAM and Cathryne Durham, Plaintiffs–Appellees,**

**v.**

**MOUNTAIN AMERICA CREDIT UNION, a Utah corporation, Defendant–Appellant,**

**The Travelers Indemnity Company, a Connecticut corporation, Defendant.**

**No. 90–4011.**

United States Court of Appeals, Tenth Circuit.

June 13, 1991.

Borrowers that had filed for bankruptcy sought declaratory judgment that lender



was unsecured creditor and sought recovery as preferential transfers of payments received by lender during 90 days preceding bankruptcy filing. On cross motions for summary judgment, the United States District Court for the District of Utah, David Sam, J., held that lender held unsecured loan subject to discharge, and lender appealed. The Court of Appeals, Brorby, Circuit Judge, held that: (1) Utah's Uniform Commercial Code (U.C.C.) was applicable to successive loan transactions at issue, and (2) original loan debt secured by assignment of annuity payments and the accompanying assignment were extinguished by successive loan transactions in which additional amounts were borrowed and notes were provided for the total amount which had been borrowed, with lender drawing check to itself from loan proceeds of second note which completely paid off original note, under Utah law.

Affirmed.

**1. Secured Transactions ⇐3**

Utah's Uniform Commercial Code (U.C.C.) applied to loan transactions in which documents executed with respect to original loan clearly evidenced lender's intent to create security interest, although on their face none of the documents associated with three successive loans indicated creation of security interest in property except for showing pledge from borrowers' account with lender in amount of $50; U.C.C. specifically provides that its provisions apply to any transaction intended to create security interest regardless of its form. U.C.A.1953, 31A-22-412(1), 70A-9-102(1)(a).

**2. Secured Transactions ⇐201**

Original loan debt secured by assignment of annuity payments and the accompanying assignment were extinguished by successive loan transactions in which additional amounts were borrowed and notes were provided for the total amount which had been borrowed, with lender drawing check to itself from loan proceeds of second note which completely paid off original note, under Utah law.

**3. Federal Courts ⇐776**

In reviewing decision by district court granting summary judgment, Court of Appeals reviews de novo.

**4. Federal Courts ⇐802**

In reviewing decision by district court granting summary judgment, all facts and reasonable inferences derived therefrom must be construed in light most favorable to party opposing summary judgment.

**5. Assignments ⇐93**

Assignment was automatically extinguished under Utah law when underlying debt was extinguished.

**6. Estoppel ⇐52(8)**

Borrowers would not be equitably estopped from denying that assignment of annuity payments pursuant to original loan extended to subsequent notes which included original loan debt and additional borrowings, where proceeds from second loan had been used to pay off and extinguish first loan and thereby automatically extinguished its accompanying assignment, and no evidence of misconduct by borrowers appeared.

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Mona L. Lyman (Dale R. Kent and William T. Thurman with her on the briefs) of McKay, Burton & Thurman, Salt Lake City, Utah, for defendant-appellant.

Colin P. King of Wilcox, Dewsnup & King (Gerald H. Suniville of Van Cott, Bagley, Cornwall & McCarthy with him on the brief), Salt Lake City, Utah, for plaintiffs-appellees.

Before BALDOCK, McWILLIAMS, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

Mountain America Credit Union (Credit Union) appeals a determination that it is an unsecured creditor. We affirm.

The underlying facts of this case are undisputed. In 1986, Andrew and Cathryne Durham (Durhams) entered into a structured settlement agreement in compromise of a personal injury claim arising

and breach of contract are barred by the releases. Summary judgment on the claims of retaliatory discharge and breach of employment contract was properly granted.

III

[8] The district court's grant of summary judgment on plaintiff White's slander claim was also proper. In his pleadings and affidavit, White asserts that he applied for a job as a store manager trainee with Westlake Hardware. He discussed the job with several persons at Westlake, including Cynthia Mason. During one of his discussions with Mason, he stated that he had been forced out by GM, after eleven years of service. He [illegible]s that during this conversation, Mason mentioned a lawsuit against GM, then corrected herself, and made "some mention" of his being a "troublemaker." II R. tab 44, Ex. A-47. From this he concludes that Mason must have contacted GM and that someone at GM must have referred to him as a troublemaker.

GM has introduced the affidavit of Cynthia Mason, in which she stated that she has not discussed White with anyone at GM. *Id.* Ex. A-48. GM has also introduced the affidavits of GM personnel supervisors, who stated that neither they nor anyone known to them had accused White of being a troublemaker in response to a request for a reference.[4] Faced with these affidavits, White cannot rest on his contention that GM has introduced no affidavits swearing that *no one* at GM has said anything defamatory to anyone at Westlake. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). It is the plaintiff's burden to introduce specific evidence of what was said, by whom, and to whom. *Schulze v. Coykendall*, 218 Kan. 653, 545 P.2d 392, 396-97 (1976). White's affidavit, which fails to ascribe any defamatory statements to GM, is not sufficient to raise a material question of fact, and White's case must fail. *See Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. at 2552 ("[T]he plain language of [Fed.R. Civ.P.] 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). We therefore affirm the district court's grant of summary judgment on White's slander claim.

IV

[9] GM has requested an award of sanctions and attorney's fees against the plaintiffs because, it argues, this appeal is frivolous. Fed. R. App. P. 38; 28 U.S.C. § 1927; Tenth Cir. R. 46.5. We deal with sanctions levied by the district court upon plaintiffs and their attorney for the filing of this lawsuit and their actions in the *district* court in a companion appeal, *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir.1990) (*White II*), filed today. We there affirm in part and reverse in part, remanding for further proceedings in accordance with standards we set out in the opinion. Given the fact that we affirm the district court's dismissal of the lawsuit on its merits, and that we find plaintiffs' actions in the district court sanctionable, it might seem an easy determination to award sanctions against plaintiffs and/or their counsel for bringing this appeal. But that is not so.

Had plaintiffs forthrightly acknowledged their signing of a release at the time of their termination, and then attacked the releases on an economic coercion/unconscionability theory in an age discrimination action, that portion of their case certainly would not have been frivolous. In *Paolillo*, 821 F.2d 81, the Second Circuit overturned a grant of summary judgment in an analogous case in which the employee was given only six days to sign an early retirement agreement. In *Bodnar*, 843 F.2d 190, another similar case, the Fifth Circuit struggled a bit before finding that giving employees fifteen days to decide on an early retirement program was enough to deny an age discrimination claim. With the aid of these cases, we think plaintiffs could have formulated a whistleblowing claim also that could not have been considered frivolous.

[10] Thus, plaintiffs might have articulated nonfrivolous claims in district court, but did not do so. On appeal they did a somewhat better job, and the briefs and arguments on the duress and whistleblowing issues, though poorly done, cannot, considered by themselves, be deemed frivolous. We decline to hold that an appeal is frivolous per se if the presentation of the issues in district court was bad enough to be sanctionable. Such a draconian rule would make sanctions available in nearly every appeal of a case dismissed for failure to state a claim, unless the appellant is successful. This would constitute too great a chill of advocacy. Therefore, we hold that sanctions are not proper here for the appeal on the duress and whistleblowing issues.

On the other hand, plaintiffs' arguments that the releases were void due to fraud and ambiguity, and plaintiff White's appeal of his slander claim, are patently frivolous. Plaintiffs fail to cite any evidence of fraud perpetrated by GM and seem totally confused regarding exactly what can constitute fraud. On the issue of ambiguity, plaintiffs argue, even in the face of their own deposition testimony that they understood the documents they signed, that the releases were ambiguous. They were not. And plaintiff White's appeal of the court's summary judgment on his slander claim, despite his inability to produce any evidence of what was said, by whom and to whom, is also a clear and obvious loser. These arguments, however, constitute only a very small portion of plaintiffs' briefs on appeal.

Unfortunately, clearly losing and frivolous issues are raised often in otherwise legitimate appeals. A check of recent cases reveals at least thirty-one published opinions of the Tenth Circuit since January 1988 in which we regarded issues raised by the parties as too unworthy or frivolous to even discuss. Perhaps we ought to sanction lawyers, and if appropriate their clients, for pressing arguments on appeal that obviously have no merit. But for now we choose to pass our judgment on the appeal as a whole. Because arguments concerning whistleblowing and Kansas' recognition of economic duress as a basis for setting aside a release appear to form the principal basis of plaintiffs' briefs on appeal, we will overlook the fact that plaintiffs' lesser arguments regarding fraud, ambiguity, and the merits of the slander judgment are clear losers. *Cf. Granado v. Commissioner of Internal Revenue*, 792 F.2d 91, 94-95 (7th Cir.1986) (awarding Fed. R. App. P. 38 sanctions, despite appellant's one nonfrivolous argument, because twenty-two of twenty-four pages of appellant's brief concerned frivolous arguments), *cert. denied*, 480 U.S. 920, 107 S.Ct. 1378, 94 L.Ed.2d 692 (1988).

ACCORDINGLY, the district court's granting of summary judgment is AFFIRMED, and sanctions on appeal are DENIED.

4. These officials were identified by plaintiffs as being the ones to whom Mason spoke (or was likely to have spoken).



**Frederick Lawrence WHITE, Jr.; Benjamin L. Staponski, Jr., Plaintiffs–Appellants,**

**and**

**Gwen G. Caranchini, Appellant,**

**v.**

**GENERAL MOTORS CORPORATION, INC., Defendant–Appellee.**

**Nos. 89-3159, 89-3182.**

United States Court of Appeals, Tenth Circuit.

July 19, 1990.

Former employer moved for Rule 11 sanctions against former employees in ac-

tion for wrongful discharge and slander. The United States District Court for the District of Kansas, 126 F.R.D. 563, Dale E. Saffels, J., imposed sanctions on employees and their attorneys, and they appealed. The Court of Appeals, Logan, Circuit Judge, held that: (1) district court properly awarded sanctions; (2) district court failed to consider whether amount was least necessary to deter future misconduct; and (3) district court should have considered relative fault.

Affirmed in part, vacated in part, and remanded.

**1. Federal Civil Procedure ⇐2721**

Good faith belief in merit of argument is not sufficient to avoid Rule 11 sanctions; attorney's belief must be in accord with what a reasonable, competent attorney would believe under the circumstances. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**2. Attorney and Client ⇐24**

Attorney may not avoid Rule 11 sanctions by alleging the competent attorney could have made colorable claim based on facts and law at issue; attorney must actually present colorable claim. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**3. Federal Civil Procedure ⇐2721**

Plaintiffs may not shield their own incompetence and avoid liability for Rule 11 sanctions by arguing that, while they failed to make colorable argument, competent attorney would have done so. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

**4. Federal Civil Procedure ⇐2721**

Standard for deciding whether to impose Rule 11 sanctions is objective and requires reasonableness under the circumstances. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**5. Federal Civil Procedure ⇐2721**

District court did not abuse its discretion by failing to specify each pleading, motion, or paper for which it was imposing Rule 11 sanctions. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**6. Federal Civil Procedure ⇐2721**

Complaint alleging former employer's slander of former employee to prospective employer warranted Rule 11 sanctions; employee did not investigate whether prospective employer sought reference from former employer or whether any derogatory statements had been made about employee. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**7. Federal Civil Procedure ⇐2721**

Failure of former employees and their attorneys to act reasonably despite knowledge of release of claims against former employer warranted Rule 11 sanctions, even though reasonably competent attorney could have filed colorable age discrimination case against employer and nonfrivolous common-law whistleblowing claim; employees and attorneys raised specious arguments concerning duress in executing agreements; and although employees and attorneys claimed that releases were ambiguous, there was no substantial disagreement as to terms of releases. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**8. Federal Civil Procedure ⇐2721**

Part of reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar case. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**9. Attorney and Client ⇐24**

Attorney seeking to avoid Rule 11 sanctions need not forbear to file action if there is colorable argument that otherwise applicable affirmative defense is inapplicable in given situation; however, attorney runs risk of sanctions if only response to affirmative defense is unreasonable. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**10. Federal Civil Procedure ⇐2721**

Rule 11 should not be used to discourage advocacy, including that which challenges existing law. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**11. Federal Civil Procedure ⇐2721**

District court imposing Rule 11 sanctions could find improper purpose manifested by former employees' threats against former employer to utilize media, by unwarranted discovery requests, and by failure to make reasonable inquiry and to make claims cognizable under the law. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.



**12. Federal Civil Procedure ⇐2721**

Rule 11's mention of attorney fees does not create entitlement to full compensation every time frivolous paper is filed. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**13. Federal Civil Procedure ⇐2721**

Although monetary sanctions imposed would normally be limited to reasonable attorney fees and expenses incurred by opposing parties, court must also consider other factors in arriving at appropriate Rule 11 sanction. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**14. Federal Civil Procedure ⇐2721**

Appropriate sanction under Rule 11 should be the least severe sanction adequate to deter and punish. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

**15. Federal Civil Procedure ⇐2721**

The following circumstances must be expressly considered when determining Rule 11 sanctions: reasonableness (lodestar) calculation; minimum necessary to deter; ability to pay. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**16. Federal Civil Procedure ⇐2721**

Injured party has duty to mitigate costs recovered under Rule 11 by not overstaffing, overresearching or overdiscovering clearly meritless claims. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**17. Federal Civil Procedure ⇐2721**

Recoverable fees and costs under Rule 11 should be only those that reasonably relate to actions taken through court system. Fed Rules Civ.Proc.Rule 11, 28 U.S. C.A.

**18. Federal Civil Procedure ⇐2721**

It is inappropriate to use Rule 11 sanctions as means of driving certain attorneys out of practice. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**19. Federal Civil Procedure ⇐2721**

Amount of Rule 11 sanctions is appropriate only when it is minimum that will serve to adequately deter undesirable behavior. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**20. Federal Civil Procedure ⇐2721**

Parties claiming inability to pay Rule 11 sanctions have burden to come forward with evidence of financial status. Fed. Rules Civ.Proc Rule 11, 28 U.S.C.A.

**21. Federal Civil Procedure ⇐2721**

Even if plaintiffs prove that they are totally impecunious, court may impose modest Rule 11 sanctions to deter future baseless filings. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**22. Federal Civil Procedure ⇐2721**

Court deciding whether to impose Rule 11 sanctions may consider offending party's history, experience, and ability; severity of sanction; degree to which malice or bad faith contributed to violation; risk of chilling type of litigation involved; and other practices deemed appropriate in individual circumstances. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**23. Federal Civil Procedure ⇐2721**

Rule 11 sanctions must be appropriate in amount and levied upon person responsible for the violation. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

**24. Federal Civil Procedure ⇐2721**

Imposition of Rule 11 sanctions requires specific findings that party paying sanctions was aware of the wrongdoing. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**25. Federal Civil Procedure ⇐2721**

District court was required to consider relative fault of attorney and clients for Rule 11 violations and was required to make specific findings; competence of attorney was at issue since attorney could have made colorable age discrimination argument and avoided sanctions. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**26. Federal Civil Procedure ⇐2721**

Target of request for Rule 11 sanctions has due process right to notice that

sanctions are being considered by court, has right to subsequent opportunity to respond, and must be provided with enough detail concerning basis of fees to permit intelligent analysis; however, opportunity to fully brief the issue satisfies due process. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; U.S.C.A. Const.Amends. 5, 14.

**27. Federal Civil Procedure ⇐2721**

Former employer's affidavit for Rule 11 sanctions did not satisfy due process rights of former employees and their attorney to have enough detail to make intelligent analysis, even though affidavit broke down fees by total hours, rates per lawyer, and category; affidavit did not permit ascertainment of reasonableness of former employer's staffing positions. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; U.S.C.A. Const.Amends. 5, 14.

**28. Release ⇐56**

Testimony of former employer's attorney in another case that former employee was "very upset over being forced to take buy out" which contained release of all claims against employer would have been irrelevant in determining whether release was signed under duress under Kansas law; employer's attorney was not charged with responsibility of determining whether circumstances constituted duress.

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Gwen G. Caranchini, Kansas City, Mo. (Linda Scott Skinner, Overland Park, Kan., with her on the briefs), for plaintiffs-appellants.

Paul Scott Kelly, Jr. (R. Kent Sellers with him on the brief) of Gage & Tucker, Kansas City, Mo., for defendant-appellee.

Before LOGAN, McWILLIAMS, and BRORBY, Circuit Judges.

LOGAN, Circuit Judge.

In a related appeal, *White v. General Motors Corp.*, 908 F.2d 669 (10th Cir.1990) (*White I*), entered today we have affirmed the district court's grant of summary judgment in favor of General Motors Corporation (GM) on the merits of claims filed against it by former employees Frederick Lawrence White, Jr. and Benjamin L. Staponski, Jr. In the instant appeal White, Staponski and their attorneys [1] (hereinafter collectively "plaintiffs") challenge the district court's award of Fed.R.Civ.P. 11 sanctions against them, jointly and severally, in the amount of $172,382.19. *See White v. General Motors Corp.*, 126 F.R.D. 563 (D.Kan.1989).

Plaintiffs make essentially five arguments on appeal: (1) the district court erred in imposing sanctions because plaintiffs' conduct satisfied Rule 11 and their arguments were meritorious; (2) the district court's order imposing sanctions was insufficiently specific to allow meaningful appellate review; (3) the amount of sanctions imposed was excessive; (4) the district court erroneously denied plaintiffs a hearing on sanctions; and (5) the district court erred in refusing to grant plaintiffs' Fed.R.Civ.P. 60(b) motion to reconsider its summary judgment order in favor of GM.

All of the issues raised are subject to review under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, — U.S. —, 110 S.Ct. 2447, 2460–61, 110 L.Ed.2d 359 (1990) (across the board abuse of discretion standard in Rule 11 cases); *Valmont Indus. Inc. v. Enresco, Inc.*, 446 F.2d 1193, 1195 (10th Cir.1971), *cert. denied*, 405 U.S. 922, 92 S.Ct. 960, 30 L.Ed.2d 793 (1972) (Rule 60(b) motion subject to abuse of discretion review standard).

I

The facts are more fully set out in *White I*, and we only briefly summarize here. White and Staponski were long-time GM employees terminated under GM's Special Incentive Separation Program (SISP). They each received approximately $60,000 cash and other benefits under the separation program. They were in the age group protected by the Age Discrimination in Employment Act (ADEA). At the time of their termination, however, they each signed a release discharging GM from all claims "known or unknown" based upon their cessation of employment, including ADEA, the Civil Rights Act of 1964, and "any other federal, state, or local law, order, or regulation, or the common law relating to employment and any claims for breach of employment contract, either express or implied." I R. tab 10, exs. 2-A, 2-B. Allegedly White and Staponski thought they were among the GM employees singled out to be terminated because they had previously complained to management about defective brake work being done in their plant. White also thought that when he gave GM as an employment reference to Westlake Hardware, to which he was submitting a job application, GM reported that he was a "troublemaker." White and Staponski consulted lawyer Gwen G. Caranchini, and she filed suit on their behalf against GM.

An attorney's signature on the complaint or other pleading in a suit in federal court constitutes a certificate

> "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Fed.R.Civ.P. 11. If there is a violation the court can sanction the lawyer, the client, or both. *Id.* These sanctions may include payment of the other party's "reasonable expenses incurred because of the filing ... including a reasonable attorney's fee." *Id.*

The portions of Rule 11 relevant to determining whether sanctions are justified in the instant case are its requirements of "reasonable inquiry" and "good faith argument" based on at least an extension of existing law, and its requirement that the filing was "not interposed for any improper purpose." *Id.*

The lawsuit plaintiffs filed made no ADEA claim. It was filed as a diversity case for wrongful discharge, breach of implied contract of employment, and slander under Kansas law. The original complaint made no mention of signed releases.

The district court found, as one basis for its award of sanctions, that although GM's lawyers advised attorney Caranchini of the releases, she never obtained copies before filing the complaint. 126 F.R.D. at 565. To Caranchini's allegation that she and her clients were unable to locate copies of the releases, the district court responded that a reasonable attorney would have waited to acquire them before filing suit, because there were no statute of limitations problems. *Id.*

On the slander count, the complaint did not name the GM employee who allegedly committed the slander, nor the Westlake employee who allegedly asked for the reference. GM attorneys acquired the Westlake employee's name, obtained the employee's affidavit that she did not call GM for a reference on White, and then asked Caranchini to dismiss the claim. This the attorney refused to do despite having no other evidence to contradict the Westlake employee's affidavit. This led the district court to conclude that plaintiffs conducted no investigation of the slander claim, thereby violating the "reasonable inquiry" requirement of Rule 11. *Id.* at 566.

The court also found that plaintiffs violated the Rule 11 requirement that claims advanced must be warranted at least by a "good faith argument for the extension, modification, or reversal of existing law," because plaintiffs' attorney insisted that "the court's application of the black letter law set out in Hastain[2] was in error," and "that whether a certain set of facts consti-

1. The complaint and many other filings were cosigned by Linda Scott Skinner, who apparently served as local counsel in Kansas. The district court's order on sanctions directs they be paid by "plaintiffs and their attorneys." *White v. General Motors Corp.*, 126 F.R.D. 563, 567 (D.Kan.1989). The briefs on appeal, however, appear to treat Gwen G. Caranchini as the sole attorney subject to sanctions. Whether Skinner was intended to be held liable for sanctions is a matter to be clarified by the district court on remand.

2. The reference here is to *Hastain v. Greenbaum*, 205 Kan. 475, 482, 470 P.2d 741, 746 (1970), in which the court held that whether facts as alleged by a party are sufficient to constitute duress is a question of law.

tutes duress is a question of fact for the jury." *Id.* The court also found plaintiffs' argument that the releases were ambiguous to be "specious." *Id.* The fraud and unconscionability claims were found to be without merit but were not used as a basis for Rule 11 sanctions. *Id.*

The court also found violation of Rule 11 because the action was advanced for an improper purpose and because plaintiffs needlessly increased the costs of litigation. Plaintiffs had made prefiling threats to contact the media and government agencies about the allegedly defective brake work being done at the plant if settlement demands were not met. As to this, the court stated the following:

> "In light of the fact that this court has found plaintiffs failed to make a reasonable inquiry into the facts in this case, and that plaintiffs pursued claims which were not warranted by existing law, the court finds that plaintiffs' threats to publicize those baseless claims and their subsequent filing of the lawsuit were improper and in violation of Rule 11."

*Id.* at 567. Additionally, the court found a Rule 11 violation in that "voluminous discovery requests" plaintiffs filed were unwarranted "since plaintiffs' claims were not well-founded in fact or in law." *Id.*

The court ordered "plaintiffs and their attorneys" to pay GM's costs and attorney's fees in defending the entire case, as well as in its pursuit of sanctions. *Id.* After GM filed an affidavit and exhibits detailing its expenses and attorney's fees incurred, the court rejected plaintiffs' motions to strike, for discovery, and for a hearing. It rejected plaintiffs' affidavits claiming that they were unable to pay any amount of sanctions, finding that they consisted of "bald assertions" that did not show what assets or income plaintiffs and their counsel had. III R. tab 145, at 2-3. It found the affidavit of GM's principal lawyer, which sought attorney's fees at an average hourly rate of $115.00, to be reasonable, and awarded all fees and expenses claimed, a total amount of $172,382.19. *Id.* at 3.

## II

### A. *Objective Standard*

[1-3] As a preliminary matter, plaintiffs challenge the district court's imposition of sanctions on the ground that the court applied a subjective rather than objective standard in evaluating plaintiffs' conduct. This circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions. *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir.1988). A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. *Id.* In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. *See Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir.1988) (focus on whether an objectively reasonable basis for claim "was demonstrated"), *rev'd in part on other grounds*, — U.S. —, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Thus, plaintiffs may not shield their own incompetence by arguing that, while they failed to make a colorable argument, a competent attorney would have done so. *See Garardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir.1987) (Rule 11 intended to prevent abuses arising from bad faith, negligence, and to some extent, professional incompetence).

[1] The district court recited the correct standard in its review of plaintiffs' conduct. It stated that "the court should evaluate the parties' actions under an objective standard. The standard, then, is one of reasonableness under the circumstances." 126 F.R.D. at 565. We conclude that the district court applied the proper standard and that its conclusion that plaintiffs' actions in this case fell below that standard was not erroneous.

### B. *Specificity*

[5] In its opinion, the district court failed to specify each of the "pleadings, motions or other papers" for which it was imposing sanctions. *See* Fed.R.Civ.P. 11. Plaintiffs object to the lack of specificity. As noted, the court held plaintiffs responsible for all of GM's expenses and attorney's fees through its grant of summary judgment, thus apparently concluding that all of plaintiffs' actions were tainted by their failure to make reasonable inquiry or to make nonfrivolous arguments on the law, and by improper purpose. While the court's method of imposing sanctions was not optimal, neither was it an abuse of discretion. *See Lupo v. R Rowland & Co.*, 857 F.2d 482, 485-86 (8th Cir.1988) (affirming district court award of sanctions based on "bulk of filings" and "conduct of litigation"), *cert. denied*, — U.S. —, 109 S.Ct. 2101, 104 L.Ed.2d 662 (1989). The court's findings and conclusions, which we have extensively quoted, were detailed enough to "assist in appellate review . . .[,] help assure the litigants . . . that the decision was the product of thoughtful deliberation, and . . . enhance[ ] the deterrent effect of the ruling." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir.1988) (en banc) (quoting Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 199 (1985)).

## III

We now turn to a review of the district court's particular findings.



### A. *Slander Claim*

[6] The district court properly granted summary judgment against plaintiff White on his claim that he was slandered by GM personnel when he gave GM as a prior work reference in a job interview at Westlake Hardware. Plaintiffs refused to dismiss this cause of action when confronted with an affidavit of the Westlake employee that she made no inquiry of GM, and plaintiffs had no evidence to contradict her affidavit. The court concluded that it was "inescapable" that plaintiffs' attorney "in fact conducted no investigation into whether anyone at Westlake Hardware had sought a reference from GM or whether any derogatory statements had been made concerning White." *Id.* at 566.

Under Kansas law a slander claim must set out in detail "the alleged words spoken or published, the names of those persons to whom they were spoken or published and the time and place of their publication." *Schulze v. Coykendall*, 218 Kan. 653, 545 P.2d 392, 397 (1976). Plaintiffs, when they filed their complaint, evidenced neither general knowledge of the elements of slander, nor knowledge of the specifics of the alleged slander in this case.[3] Failing to investigate the facts of a claim before filing a complaint is sanctionable and the district court did not abuse its discretion in so holding.[4] *Hilton Hotels Corp. v. Banor*, 899 F.2d 40, 41-44 (D.C.Cir.1990).

3. The affidavit of plaintiff White, filed in response to GM's motion for summary judgment, is informative on this issue. White's affidavit only states that he believed "some mention" in his conversation with Westlake Hardware personnel was made about him being a "troublemaker." II R. tab 44, Ex. A-47.

4. This is not, of course, a claim the details of which were uniquely and exclusively in the control of the defendant. Were that the case, we would not find plaintiffs' conduct sanctionable. *See Donik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C.Cir.1989), *aff'd in part, rev'd in part* sub nom. *Cooter & Gell v. Hartmarx Corp.*, — U.S. —, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In the instant case plaintiffs had access to Westlake Hardware personnel. Plaintiffs therefore should have ascertained the details of the allegedly slanderous communication before filing suit. In their reply brief plaintiffs assert Westlake employees would not talk to White or White's counsel before or after the suit was filed. Reply Brief of Appellants at 3-4. Plaintiffs assert that Westlake's counsel denied a request to speak to Westlake personnel unless through a deposition, but they do not indicate whether this request was before or after litigation commenced. *Id.* at 4. Before the district court, however, they only stated that White "would obviously be assisted in helping defeat the [GM] motion for summary judgment if he could take the depositions of the various Westlake personnel referred to in his affidavit. Westlake will not agree to informal statements of its personnel, therefore depositions are necessary." I R. tab 34, at 18-19. In any event plaintiffs are not excused from meeting the pleading requirements of Kansas law.

B. *Claims of Wrongful Discharge and Breach of Contract*

[7] The district court held that plaintiffs' claims for wrongful discharge and breach of contract were sanctionable because plaintiffs had executed valid releases at the time of their termination. The court found that plaintiffs failed to reasonably inquire into the existence of the releases before filing suit in this case, that a reasonable inquiry would have revealed their existence, and that a reasonable attorney knowing of their existence would not have filed suit.

At least one circuit has held that failing to mention the existence of a release that could bar a claim is sanctionable under Rule 11. *See Blackwell v. Department of Offender Rehabilitation*, 807 F.2d 914 (11th Cir.1987). We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

[8, 9] Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. Schwarzer, *Rule 11 Revisited*, 101 Harv.L.Rev. 1013, 1023-24 (1988). An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable. *See id.* (if failure to make prefiling investigation is sanctionable so too is failure to disclose adverse results of investigation).

The court rejected plaintiffs' arguments that they had executed the releases under duress and found their arguments regarding Kansas law on duress so poorly framed and so negligently made as to be sanctionable. We agree. Among the arguments made to the district court was that the Kansas Supreme Court case of *Hastain v. Greenbaum*, 205 Kan. 475, 470 P.2d 741 (1970), which is binding on this court, was distinguishable because the West Publishing Company classified it as a "Bills and Notes" case in formulating its Headnotes. III R. tab 125, at 17. The arguments that plaintiffs presented to the district court were specious.[5]

The district court also sanctioned plaintiffs for alleging that the releases were void due to ambiguity. Plaintiffs point out that the exact duties of GM are not set out in the releases. But the releases clearly state that all present and future claims, known and unknown, were released by White and Staponski. Further, plaintiffs failed to allege any real confusion caused by any ambiguities in the releases. There is no substantial disagreement between the parties on the terms of the contract.

[10] As we have discussed in *White I*, there were arguments to set aside the releases that could have been made that would not have warranted sanctions. A reasonably competent attorney could have filed a colorable, nonfrivolous ADEA case against GM. Although it would be more difficult, a nonfrivolous common law whistleblowing claim also might have been brought. Thus, we have the tragedy of inept lawyers who failed to investigate their claims, and who compounded the court's and the defendant's problems in

5. Furthermore, plaintiffs argued, in opposition to GM's motion for summary judgment, that the question of duress could not be decided as a matter of law in this case, while arguing in their own motion for partial summary judgment that the facts were sufficiently settled to entitle them to a judgment as a matter of law.



dealing with the case by adopting an extremely aggressive approach. Rule 11 should not be used to discourage advocacy, including that which challenges existing law. Nevertheless, the court is entitled to expect a reasonable level of competence and care on the part of the attorneys who appear before it, and to expect that claims submitted for adjudication by those attorneys will have a rational basis. We cannot find the district court's decision to award sanctions an abuse of discretion.[6]

C. *Improper Purpose*

[11] The district court justified its decision to sanction the plaintiffs in part because of evidence of improper purpose, manifested by their threats against GM to utilize the media to create adverse publicity for GM and in their unwarranted discovery requests. In making this fact determination and in evaluating the improper purpose prohibition of Rule 11, it relied in part upon plaintiffs' failure to make reasonable inquiry and failure to make claims cognizable under the law. We cannot find the court's fact findings clearly erroneous or its decision to sanction an abuse of discretion.

## IV

Plaintiffs argue that the amount of sanctions chosen by the trial court was excessive because it exceeded the amount necessary to accomplish deterrence and because plaintiffs are absolutely incapable of paying such an amount. They urge that we vacate the sanction award and remand with directions. Although we express no view on the proper amount of sanctions, we agree that the award should be vacated and remanded for reconsideration in the light of the purposes and standards we set forth herein. In addition, we believe the trial court erred in not making specific findings on the degree of fault among the sanctioned plaintiffs to permit us to determine whether joint and several liability is justified.

A. *Amount of Sanctions*

Rule 11 sanctions are meant to serve several purposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management. *See* American Bar Association, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* (1988), *reprinted in*, 5 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 212, 235–36 (Supp. 1989) (hereinafter *ABA Standards*). Deterrence is, however, the primary goal of the sanctions. *Cooter & Gell v. Hartmarx Corp.*, — U.S. —, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359 (1990) ("It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, . . . streamline the administration and procedure of the federal courts."); *see also* Advisory Committee Note to Rule 11, 97 F.R.D. 198 (1983) (justifying amendments due to ineffectiveness of prior Rule 11 in "deterring abuses" and citing need to "discourage dilatory or abusive tactics"); *Gaiardo*, 835 F.2d at 483; *Thomas*, 836 F.2d at 881; *Eastway Constr. Corp. v. City of New York*, 637 F.Supp. 558, 564 (E.D.N.Y.1986) (citing cases), *modified*, 821 F.2d 121, (2d Cir.), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

[12–14] Although the rule specifically allows the award of attorney's fees to the opposing party as an appropriate sanction, the award of fees "is but one of several methods of achieving the various goals of Rule 11." *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir.1988). The rule's mention of attorney's fees does not create an entitlement to full compensation on the part of the opposing party every time a frivolous paper is filed. *See, e.g., Thomas*, 836 F.2d at 879 (noting that reasonable attorney's fees

6. Arguments presented by plaintiffs on appeal were clearer and more specific on the issue of economic duress. *See White I.* When we considered the appeal, we determined that while not ultimately persuasive, the arguments on appeal did not merit sanctions. The record reflects that practice improved plaintiffs' ability to make the argument.

"does not necessarily mean actual expenses"); *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080, 1091 (3d Cir.1988) (same). Thus, although the monetary sanction imposed would normally be limited to the reasonable attorney's fees and expenses the opposing parties incur, the court must also consider other factors in arriving at "an appropriate sanction." Fed.R.Civ.P. 11. The appropriate sanction should be the least severe sanction adequate to deter and punish the plaintiff. *Doering*, 857 F.2d at 195–96; *Cabell v. Petty*, 810 F.2d 463, 466–67 (4th Cir.1987).

[15] We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:

[16] 1. *Reasonableness (lodestar) calculation.* Because the sanction is generally to pay the opposing party's "reasonable expenses ... including a reasonable attorney's fee," Fed.R.Civ.P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. *Doering*, 857 F.2d at 195. The injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims. *E.g., Napier*, 855 F.2d at 1092–94; *Thomas*, 836 F.2d at 878–81. In evaluating the reasonableness of the fee request, the district court should consider that the very frivolousness of the claim is what justifies the sanctions. Indeed, it is difficult to imagine how GM could have reasonably incurred $172,382.19 attorney's fees and expenses in ridding itself of this frivolous suit on summary judgment. We recognize that plaintiffs' attorneys followed "scorched earth tactics," and launched the kind of paper blizzard that we have condemned elsewhere, *see Glass v. Pfeffer*, 849 F.2d 1261, 1266 (10th Cir.1988). But the expenditure of 1263.88 attorneys' and 96.44 legal assistants' hours to defend this suit through summary judgment seems incredible. *See* III R. tab 135 ex. A.[7]

[17] We note that 17.06 hours of attorney time is explicitly attributed to "Publicity/Media," which GM's principal lawyer declared "includes time spent responding to adverse publicity generated by plaintiffs," including client consultations and responding to media inquiries. *Id.* tab 135, Affid. of P.S. Kelly, Jr., at 10 & ex. A. Because Rule 11 limits sanctions to those arising out of an improperly filed "pleading, motion or other paper," the attorney's fees and costs should be only those that reasonably relate to actions taken through the court system. *See Cooter & Gell*, 110 S.Ct. at 2461 (limiting scope of Rule 11 sanctions to filings in district court); *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986); *Gaiardo*, 835 F.2d at 484 (Rule 11 sanctions only apply in situations involving attorney's signing paper). On remand we direct the district court to reexamine GM's fee request using standards similar to those we set out in *Ramos v. Lamm*, 713 F.2d 546, 553–55 (10th Cir.1983). However, we do not intend the examination of "reasonableness" to place any significant additional time burden upon the court or to require additional evidentiary hearings. *See infra* Part V.

[18, 19] 2. *Minimum to deter.* As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. *Doering*, 857 F.2d at 196 & n. 4. We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "*minimum* that will serve to *adequately* deter the undesirable behavior." *Id.* at 194 (quoting *Eastway*, 637 F.Supp. at 565) (emphasis in Circuit opinion); *see also* Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901, 912–14 (1988) (stressing importance of optimal rather than maximum deterrence in the imposition of Rule 11 sanctions). Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer. *E.g., Doering*, 857 F.2d at 195–96.

[20] 3. *Ability to pay.* The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. *Thomas*, 836 F.2d at 881; *Doering*, 857 F.2d at 196. Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages. Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 35 A.L.R. 4th 441, 459–61 (1985) (citing cases); *cf. Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir.1986) (considering financial status of offender in evaluating effect of fine imposed under Rule 11). Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

[21] The district court attempted to consider the financial conditions of plaintiffs in making the award; plaintiffs submitted affidavits, however, stating that each would be forced into bankruptcy if the court imposed GM's requested attorney's fees "in whole or in part." We sympathize with the district court's frustration on receiving such a general and unhelpful statement of plaintiffs' ability to pay sanctions. Nevertheless, because we remand anyway, we urge the district court to allow plaintiffs to supplement the record in this regard on remand. *See Calloway*, 854 F.2d at 1478. We hold, however, that if the plaintiffs remain uncooperative on remand the court may ignore ability to pay in levying sanctions. We also hold that even if plaintiffs prove that they are totally impecunious the court may impose modest sanctions to deter future baseless filings.

[22] 4. *Other factors.* In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. *See ABA Standards* at 236–37.

Because the trial court did not consider the issue of what amount was the least necessary to deter future misconduct, we vacate the award of sanctions and remand for further consideration.

### B. *Joint and Several Liability*

There is an obvious conflict of interest between White and Staponski, on the one hand, and their counsel, on the other, on the issue of who should be liable for the sanctions imposed by the district court. The matter was not raised in plaintiffs' briefs; this may have resulted, however, from the very conflict to which we refer. An attorney in the circumstances before us who argues that her clients were ignorant of any wrongdoing in the filing of the papers leading to sanctions essentially argues that she should bear sole liability for those sanctions. We therefore raise this joint and several liability issue sua sponte. *See Calloway*, 854 F.2d at 1473–76.

[23–25] Sanctions must be appropriate in amount and levied upon the person responsible for the violation. *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985). We agree with those circuits that have expressed the view that the sanctioning of a party requires specific findings that the party was aware of the wrongdoing. *Calloway*, 854 F.2d at 1474–75; *Donaldson v. Clark*, 819 F.2d 1551,

7. GM's brief itself notes that "the dispositive legal issues of release, duress, and slander are neither novel nor unsettled, and plaintiffs' claims ran afoul of hornbook law." Brief of Appellee at 23.

1560 (11th Cir.1987) (en banc). In the instant case, the trial court appears to have assessed joint and several liability without considering relative fault. This concerns us particularly because this case is one in which at least a colorable ADEA argument could have been made to advance White and Staponski's position; however, no colorable argument was made in fact. The competence of counsel is, therefore, at issue. Excessive discovery requests, which were complained of in this case, also seem peculiarly the province of lawyers. Moreover, we cannot determine whether the court intended to impose liability upon both of plaintiffs' attorneys, or only upon Caranchini. *See supra* note 1. Therefore, on remand the court should make more specific findings regarding who bears the fault for the various actions warranting sanctions.

V

Plaintiffs challenge the court's refusal to allow them a separate hearing on the issue of the amount of attorney's fees claimed by GM. The plaintiffs' motion was not a request for a hearing on the imposition of sanctions *vel non*, rather it was for a hearing on the *reasonableness* of the attorneys' fees requested by GM. III R. tab 141 at 5.

[26] A party that is the target of a sanctions request has a due process right to "notice that such sanctions are being considered by the court and a subsequent opportunity to respond," before final judgment. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir.1987) (en banc) (motion for sanctions for frivolous appeal). However, *Braley* clearly held that an opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to fully brief the issue is sufficient to satisfy due process requirements. *Id.* at 1515. This rule has been adopted in most other circuits and comports with the cautions of the Advisory Committee Notes against generating satellite litigation on the issue of sanctions. Advisory Committee Note, 97 F.R.D. at 201. *See Donaldson*, 819 F.2d at 1560 n. 12 (citing cases permitting sanction decision without oral hearing).

[27] We believe, however, that an adequate opportunity to respond to an attorney's fee request requires that the persons to be sanctioned be provided enough detail concerning the basis of the requested fees to permit an intelligent analysis. The affidavit upon which the court relied in this case was insufficient because, although it broke down the fees by total hours and rates per lawyer and by category, it did not permit plaintiffs to ascertain the reasonableness of GM's staffing decisions. III R. tab 135. For instance, we note that as many as three attorneys or others represented GM at particular depositions. This information may seem burdensome to provide, but absent a hearing in which cross-examination is possible, we do not see how plaintiffs could challenge the request except in general terms on the basis of the attorney fee information provided in the instant case. We hold, therefore, that a separate hearing is not necessary to accord plaintiffs due process, but on remand the court should insure that plaintiffs receive enough detail to respond intelligently in writing to the reasonableness of the requested fees.

VI

[28] Plaintiffs allege that the trial court erred in denying their motion "for remand" pursuant to Fed.R.Civ.P. 60(b). Despite plaintiffs' inaccurate labeling, their motion was clearly one to set aside the summary judgment because of new evidence. The court rejected plaintiffs' proffer of new evidence and denied their motion. We find no error in the court's decision.

The evidence presented by plaintiffs which they contend justifies vacating the summary judgment is a snippet of testimony by one of GM's attorneys, given in another case, in which the attorney characterized plaintiff White as "very upset over being forced to take the buy out." III R. tab 136, at 3. We agree with the district court that even if the given testimony reflects the attorney's view that plaintiff White acted under duress in accepting the buyout, it is irrelevant because the attorney is not charged with the responsibility of determining whether the circumstances constituted duress. That is an issue of law, which the court resolved correctly in accordance with Kansas law. Thus, the new evidence does not merit modification of the summary judgment.

We AFFIRM the district court's denial of plaintiffs' Rule 60(b) motion and its determination that sanctions are proper in the instant case. We VACATE the particular award which the district court made and REMAND for further proceedings consistent with this opinion.



**David TORREZ, Plaintiff–Appellant,**

**v.**

**PUBLIC SERVICE COMPANY OF NEW MEXICO, INC., Defendant–Appellee.**

**No. 89–2103.**

United States Court of Appeals, Tenth Circuit.

July 20, 1990.

Following separation from employment, employee commenced racial/national origin employment discrimination law suit. The United States District Court for the District of New Mexico, Santiago E. Campos, J., granted summary judgment for employer, and employee appealed. The Court of Appeals held that: (1) in deciding whether employee's signing of release at time of his employment termination constituted knowing and voluntary waiver of his right to bring employment discrimination action, totality of circumstances and conditions under which release was signed should be considered, and not just language of release, and (2) under totality of circumstances, there was fact question as to whether employee knowingly and voluntarily signed release.

Vacated and remanded.

**1. Release ⇐2**

Both Title VII and § 1981 employment discrimination claims may be waived by agreement, but waiver of such claims must be knowing and voluntary. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

**2. Release ⇐15**

In deciding whether employee's signing of release at time of his employment termination constituted knowing and voluntary waiver of his right to bring employment discrimination action, totality of circumstances and conditions under which release was signed should be considered, and not just language of release. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**3. Federal Civil Procedure ⇐2497**

In racial/national origin employment discrimination suit, totality of circumstances raised fact question as to whether employee knowingly and voluntarily signed release, precluding summary judgment on ground of waiver. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 406, 42 U.S.C.A. § 2000e-5.

Earl Mettler of Mettler & LeCuyer, P.C., Albuquerque, N.M., for plaintiff-appellant.

Robert C. Conklin and Margaret E. Davidson of Keleher & McLeod, P.A., Albuquerque, N.M., for defendant-appellee.

Before LOGAN, JONES,* and SEYMOUR, Circuit Judges.

* Honorable Nathaniel R. Jones, Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

10

Recent Changes to Federal Appellate Rules

by Bobbee J. Musgrave
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## I. AMENDMENTS TO APPELLATE RULE 3(c): CONTENT OF NOTICE OF APPEAL

A. The "old" Appellate Rule 3(c):

> "A notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

B. The amended Appellate Rule 3(c):

> "A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."

C. The amended rule in essence overrules the decision by the United States Supreme Court in Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). In Torres the

Supreme Court held that the language of Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a **jurisdictional** requirement and that naming the first party and adding "et al.," without any further specificity was insufficient to identify the appellants. The Supreme Court held that the specificity requirement of Rule 3(c) was met only by some designation that gives fair notice of the specific individual or entity seeking to appeal. Failure to name a party in the notice constituted a failure of that party to timely file a notice of appeal, which then deprived the court of jurisdiction. Accordingly, an appeal was not perfected where a party: (1) was never named or otherwise designated on the notice of appeal; (2) did not file the "functional equivalent" of the notice of appeal; and (3) did not seek leave to amend the notice of appeal within the time prescribed by Rule 4.

D. Despite the warnings set forth in Torres and its progeny, there has been a great deal of litigation regarding whether a notice of appeal that contained some indication of the appellants' identities but did not name the appellants was sufficiently specific. As a result, unnamed parties suffered the harsh consequences of dismissal for failure to comply with Rule 3(c).

E. In the Tenth Circuit alone there were over 15 cases in two years that addressed the Torres problem.

F. The Tenth Circuit has followed the tenets of Torres. For example, in Storage Technology Corp. v. United States District Court, 934 F.2d 244 (10th Cir. 1991) the Tenth Circuit held that each appealing party must be specifically named in the notice of appeal or in a functionally equivalent document that is filed within the time period required for a notice of appeal. Because only one appellant was identified in the notice, the Tenth Circuit dismissed the remaining 68 appellants who were not named in the notice of appeal.

G. The amendment states a general rule that specifying the parties should be done by naming

them. Naming an appellant in an otherwise timely and proper notice ensures that the appellant has perfected the appeal.

H. However, under amended Appellate Rule 3(c), the appellant can fulfill the specificity requirement by identifying "all plaintiffs" or "all defendants." Rule 3(c) now allows an "et al." designation, and only requires that the representative class member be designated even if the class is not certified.

I. The test established by the amended rule for determining whether such designations are sufficient is whether it is objectively clear that the party intended to appeal.

J. The amended rule makes clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If the court determines it is objectively clear that the party intended to appeal, there are neither administrative nor fairness concerns that should prevent the appeal from going forward.

K. **EXCEPTION:** Appellate Rules 15(a) and 25 -- Appeal of Administrative Orders -- still require the specificity set out in Torres. Therefore, terms such as "et al.," "petitioners" or "respondents" are not effective to identify the parties. The explanation for the distinction between the requirements of Rule 3(c) and Rules 15(a) and 25 is that a petition for review of an agency decision is the first filing in court and, therefore, is analogous to a complaint in which all parties must be named.

## II. AMENDMENTS TO APPELLATE RULE 4(a)(4): IMPACT OF POST-TRIAL MOTIONS ON AN APPEAL IN A CIVIL CASE

A. The "old" Appellate Rule 4(a)(4):

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is

granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. . . ."

B. The amended Appellate Rule 4(a)(4):

"If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an

order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. . . ."

C. The 1979 amendment to this paragraph created a trap for the unsuspecting litigant who filed a notice of appeal before a post-trial motion or while a post-trial motion was pending.

D. The result of the old rule was that if the notice of appeal was filed before or while post-trial motions were pending, the notice of appeal had no effect and was treated as a nullity. The appellant had to file a new notice within time allowed following entry of order disposing of post-trial motions.

E. The amended rule eliminates trap for a litigant who filed a notice of appeal before the filing of a post- trial motion or while a post-trial motion is pending.

F. The amendment provides that a notice of appeal filed before the disposition of a specified post-trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon the previously filed notice effectively places jurisdiction in the court of appeals.

G. The amendment provides that a notice of appeal filed before the disposition of a post-trial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a post-trial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a

party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

H. Appellate Rule 4(a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post-trial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986).

I. To conform to a Supreme Court decision -- Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988) -- the amendment excludes motions for attorney fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment must be read in conjunction with the amendment of Fed.R.Civ.P. 58.

## III. AMENDMENTS TO APPELLATE RULE 4(b): APPEAL IN A CRIMINAL CASE

A. The "old" Appellate Rule 4(b):

"In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the

ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

B. The amended Appellate Rule 4(b):

"In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order -- but before entry of the judgment or order -- is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;
(2) for arrest of judgment;
(3) for a new trial on any ground other than newly discovered evidence; or
(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant. . . ."

C. The amended Appellate Rule 4(b) eliminates an ambiguity from the third sentence of old Rule 4(b). Before this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Appellate Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post-trial motions was timely filed.

D. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post-trial motion may be disposed of more than 10 days before sentence is imposed, i.e., before the entry of judgment.

E. To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later.

F. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order <u>denying</u> the motion; the amendment says instead that an appeal may be taken within 10 days after

the entry of an order disposing of the last such motion outstanding. The change recognizes that there may be multiple post-trial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

IV. **AMENDMENTS TO APPELLATE Rule 4(c): APPEAL BY INMATE CONFINED IN AN INSTITUTION**

A. The amended Appellate Rule 4(c):

"If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. . . ."

B. In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

C. Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross- appeals. In a civil case, the time for filing a cross- appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired.

D. To avoid that problem, the Rules Committee added Appellate Rule 4(c). Rule 4(c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the

institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

V. **AMENDMENT TO APPELLATE RULE 6: APPEAL IN A BANKRUPTCY CASE FROM A FINAL JUDGMENT, ORDER OR DECREE OF A DISTRICT COURT OR OF A BANKRUPTCY APPELLATE PANEL**

A. The "old" Appellate Rule 6(b)(2)(i):

"If a timely motion for rehearing under Bankruptcy Rule 8015 is filed in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying the rehearing or the entry of the subsequent judgment."

B. The amended Appellate Rule 6(b)(2)(i):

"If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice."

C. There are concurrent changes to Appellate Rule 4(a)(4). Although Appellate Rule 6 never included language such as that being changed in Appellate Rule 4(a)(4), i.e., language that made a notice of

appeal void if it was filed before, or during the pendency of, certain post-trial motions, courts have found that a notice of appeal is premature if it is filed before the court disposes of a motion for rehearing. See e.g., In re Shah, 859 F.2d 1463 (10th Cir. 1988).

D. The Rules Committee wanted to achieve the same result here as in Appellate Rule 4 -- the elimination of a procedural trap.

## VI. AMENDMENT TO APPELLATE RULE 12(b): FILING A REPRESENTATION STATEMENT

A. The "old" Appellate Rule 12(b):

"Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed."

B. The amended Appellate Rule 12(b):

"Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney."

C. This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually.

D. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney.

E. Although the notice of appeal is the jurisdictional document and it must clearly

indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

F. The rule allows a court of appeals to require filing the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

## VII. AMENDMENTS TO APPELLATE RULE 28(a)(5): BRIEFS MUST INCLUDE STANDARD FOR REVIEW FOR EACH ISSUE

A. The "old" Appellate Rule 28(a)(5):

"The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."

B. The amended Appellate Rule 28(a)(5):

"The argument may be preceded by a summary. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues."

C. The amended rule requires a discussion of the standard of review for each issue to be included in the appellant's brief. This is already required by the Tenth Circuit local rules.

D. The reason for requiring a statement of the standard of review is that it generally results in arguments that are properly shaped in light of the standard.

## VIII. AMENDMENTS TO APPELLATE RULE 34(c): STATEMENT OF THE CASE IN ORAL ARGUMENT

A. The "old" Appellate Rule 34(c):

> "The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities."

B. The amended Appellate Rule 34(c):

> "The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities."

C. The amendment deletes the requirement of a statement of the case in oral argument.

D. Circuits may require statement of the case pursuant to local rule, but the Tenth Circuit does not require statement of the case in oral arguments.

**APPENDIX A**

## Time Table for Appeals Under the Federal Rules

Bobbee J. Musgrave
Musgrave & Theis, P.C.

**TIMETABLE OF AN APPEAL**

| SUBJECT | AMENDED FEDERAL RULES OF APPELLATE PROCEDURE |
|---|---|
| Commencement of appeal as of right | A. 30 days from entry of judgment or order. App.R.4(a)(1)<br><br>B. If U.S. or an officer or agency thereof is a party, notice of appeal may be filed by any party within 60 days after entry of judgment or order App.R.4(a)(i).<br><br>C. By other parties, within 14 days of filing the first notice of appeal or within the time otherwise prescribed by App.R.4(a), whichever last expires. App.R.4(a)(3) |
| Impact of post-trial motions on time for filing appeal | If party files post-trial motions under Civ.R. 50(b) (motion for judgment); Civ.R. 52(b) (to amend or make additional findings of fact); Civ. R. 59 (to alter or amend judgment); Civ.R. 54 (for attorney's fees under Rule 54 if district court under Rule 58 extends the time for appeal); Civ.R. 59 (for new trial); Civ.R. 60 (relief from judgment or order due to mistake, inadvertence, excusable neglect, newly discovered evidence if motion is served within 10 days after entry of judgment), time for appeal runs from entry of order disposing of last motion outstanding. App.R. 4(a)(4). |
| Appeals by permission under 28 U.S.C. § 1292(1) (interlocutory orders) | Ten days after entry of order including statement that controlling question of law is involved and appealable under 28 U.S.C. § 1292(b). App. R. 5(a). |
| Bankruptcy | If a motion for rehearing under Bankruptcy Rule 8015 is filed in a district court or in a bankruptcy appellate panel, time for appeal to court of appeals runs from entry of order disposing of motion. App.R. 6(b)(2)(i). |
| Inmates | A notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing. App.R. 4(c), 25(a). |

| SUBJECT | AMENDED FEDERAL RULES OF APPELLATE PROCEDURE |
|---|---|
| Commencement of appeal as of right | A. 30 days from entry of judgment or order. App.R.4(a)(1)<br><br>B. If U.S. or an officer or agency thereof is a party, notice of appeal may be filed by <u>any</u> party within 60 days after entry of judgment or order App.R.4(a)(i).<br><br>C. By other parties, within 14 days of filing the first notice of appeal or within the time otherwise prescribed by App.R.4(a), whichever last expires. App.R.4(a)(3) |
| Representation statement | Within 10 days after filing notice of appeal, unless court of appeals designates another time, attorney who filed notice shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. App.R. 12(b). |
| Entry of judgment or order, notice of | Lack of such notice by clerk does not affect time to appeal or relieve or authorize court to relieve party for failure to appeal within time allowed, except as permitted in App.R. 4(a). Civ. R. 77(d). |
| Record (Appellant) | Within 10 days after filing notice of appeal: Appellant must place written order for transcript and file copy of order with the clerk; if no transcript is ordered, file a certificate to that effect; unless entire transcript is included, file a statement of issues and serve appellee a copy of order or certificate and of statement. App.R. 10(b). |
| Record (Appellee) | Within 10 days after service of appellant's order or certificate and statement, appellee to file and serve on appellant a designation of additional parts of transcript to be included. Unless within 10 days after designation appellant has ordered such parts and so notified appellee, appellee may within the following 10 days either order the parts or move in district court for order requiring appellant to do so. App.R. 10(b). |
| Stay of proceeding to enforce judgment | Effective when supersedeas bond is approved by court. Civ.R. 62(d). |
| Briefs | Appellant must file a brief within 40 days after record is filed. Appellee must file a brief within 30 days after service of appellant's brief. A reply brief must be filed with 14 days after service of appellee's brief. App.R. 31(a). |

**IMPACT OF DECEMBER 1, 1993 AMENDMENTS ON BANKRUPTCY COURT RULES AND PRACTICE**

By: Thomas C. Seawell

General Procedural Order Number 1994-2, entered February 28, 1994, generally bifurcates the impact of the December 1, 1993 Amendments to the Federal Rules of Civil Procedure ("1993 Amendments"): in adversary proceedings, all 1993 Amendments apply (but the timing will probably be altered in most cases); in contested matters, all 1993 Amendments apply EXCEPT the amendments to Rule 26 (discovery). A copy of this order is attached.

I. Adversary Proceedings.

Although all of the 1993 Amendments apply in adversary proceedings, the timing of most items will be controlled by a scheduling order issued pursuant to Rule 16 (made applicable by Bankruptcy Rule 7016). Note that "district judge" in Rule 16 must be read to refer to "bankruptcy judge" under Bankruptcy Rule 7016.

A. Where No Scheduling Conference is Set.

In less complex adversary proceedings, where no scheduling conference with be set, the Court will issue a standardized "Notice of Hearing and Order Pursuant to

Fed.R.B.P. 7016." (The form prepared by Chief Judge Matheson, which is expected to be used by all the judges, is attached.) This order should be issued within 12 days after the Answer is filed and accomplishes the following:

> (1) Sets the deadline for the Rule 26(f) meeting among counsel (20 days from date of order) [Note that the date of this meeting triggers the time for Rule 26(a)(1) disclosures];
>
> (2) Requires counsel's Rule 26(f) report to be filed within 10 days after the meeting;
>
> (3) Requires Rule 26(a)(3) and (a)(4) disclosures (trial witnesses and exhibits) to be made 15 days before trial;
>
> (4) Sets the deadline for Rule 26(a)(2) disclosures (expert data);
>
> (5) Sets the deadline for COMPLETION of all discovery; and
>
> (6) Sets the trial date (normally on a trailing calendar).

B. Where Scheduling Conference is Set.

In more complex adversary proceedings, the Court will issue an order setting a scheduling conference which, in turn, triggers the Rule 26(f) meeting and report and the Rule 26(a)(1) disclosures. A scheduling order tailored to the needs of the particular case with respect to the Rule 26(a)(2), (a)(3) and (a)(4) disclosures presumably will result from the scheduling conference.

II. Contested Matters.

General Procedural Order Number 1994-2 provides that "the amendments to Rule 26 of the Federal Rules of Civil Procedure which became effective December 1, 1993, shall not be applicable to any contested matters, as defined by Rule 9014 of the Federal Rules of Bankruptcy Procedure, except as may be otherwise ordered by any judge. . . ." Therefore, while working to learn the December 1, 1993 specific changes to Rule 26, one will also need to remember to forget those amendments when working on a contested matter! This simply means that the version of Rule 26 in effect prior to December 1, 1993 will govern discovery in contested matters.

It should be noted that Bankruptcy Rule 9014 does not make Rule 16 applicable to contested matters, so the other major part of the 1993 Amendments does not apply in contested matters.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF COLORADO



IN THE MATTER OF
THE IMPLEMENTATION OF AMENDMENTS TO
THE FEDERAL RULES OF CIVIL PROCEDURE

---

GENERAL PROCEDURAL ORDER NUMBER 1994-2

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In order to provide for the orderly implementation of certain amendments made to the Federal Rules of Civil Procedure, it is hereby

ORDERED, that the amendments to Rule 26 of the Federal Rules of Civil Procedure which became effective December 1, 1993, shall not be applicable to any contested matters, as defined by Rule 9014 of the Federal Rules of Bankruptcy Procedure, except as may be otherwise ordered by any judge; and it is

FURTHER ORDERED, that disclosures made pursuant to Fed.R.Civ.P. 26(a)(1), (a)(2), and (a)(3), as amended effective December 1, 1993, shall not be filed with the Court except

(1) when directed by a judge;
(2) when and to the extent needed by any party
    (a) in connection with any motion or response thereto, or
    (b) for use at trial.

Entered by the Court this 28 day of February, 1994.

BY THE COURT:

Charles E. Matheson, Chief Judge

Patricia Ann Clark, Judge

Roland J. Brumbaugh, Judge

BY THE COURT:

Sidney B. Brooks, Judge

Donald E. Cordova, Judge

Marcia S. Krieger, Judge

caption

NOTICE OF HEARING AND
ORDER PURSUANT TO Fed.R.B.P. 7016
(Fed.R.Civ.P. 16(b))

IT IS HEREBY ORDERED that the provisions of Fed.R.Civ.P. 26, as amended effective December 1, 1993, shall apply to this proceeding, subject to the provisions of this order concerning timing.

In order to expeditiously prepare this matter for trial, the parties shall complete the following activities by the designated dates:

1. File Amended Pleadings and/or seek the joinder of additional parties on or before **30 days** from the date of this order.

2. File dispositive motions, if any, on or before **60 days** before trial.

3. Conduct the meeting required by Fed.R.Civ.P. 26(f), within **20 days** from the date of this order, and file with the Court the report required by that Rule within **10 days** thereafter.

4. Disclosures made by the parties pursuant to Fed.R.Civ.P. 26(a)(1) and (a)(2) SHALL NOT be filed with the Court.

5. The disclosures and filings required by Fed.R.Civ.P. 26(a)(3) and (a)(4) will be made at least **15 days** before trial. Within **7 days** thereafter a party may, pursuant to Fed.R.Civ.P. 26(a)(3), file and serve objections to evidentiary designations made by another party. All exhibits will be pre-marked (Plaintiff shall use numbers and Defendant shall use letters) for identification before appearing for trial, and counsel shall exchange marked exhibits at the time the Fed.R.Civ.P. 26(a)(3) disclosures are made.

6. Disclosures concerning experts required by Fed.R.Civ.P. 26(a)(2) shall be made at lease __**(1)**__ days before trial or, if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within __**(2)**__ days after the disclosure by the other party.

7. All discovery shall be COMPLETED on or before __**(3)**__ days before trial, except depositions of experts may be taken as late as __**(4)**__ days before trial. (Delete the exception for expert discovery if the trial date is more than 120 days from the date the answer is filed.) "Completed" means that all depositions are concluded and that responses to written discovery are due on or before the discovery completion date. Responses to written

discovery shall be due no later than **20 days** after service of the discovery request. (Delete this sentence if the trial date is more than 120 days from the date the answer was filed.)

IT IS FURTHER ORDERED, that the special provisions regarding limited and simplified discovery as specified in L.B.R. 726.1 shall apply; and

IT IS FURTHER ORDERED that this matter is set for trial on the Court's trailing trial docket which commences on __, in Courtroom C, U.S. Bankruptcy Court, U.S. Custom House, 721 19th Street, Denver, Colorado, 80202-2508; and

IT IS FURTHER ORDERED that the Court's Procedural Order on the trailing docket, a copy of which is submitted herewith, will apply to the trial of this matter; and

IT IS FURTHER ORDERED that unless the parties, pursuant to the report to be filed after their Rule 26(f) meeting, request amendments to this Order, no modifications will be entertained by the Court.

DATED:

BY THE COURT:

Charles E. Matheson, Chief Judge

(1) Insert "45" if trial is set 145 days or less from the date the answer is filed. (Trial will ordinarily not be set significantly earlier than this.) Insert "60" if trial is set between 145 and 180 days from the answer. Beyond that, the provisions of Rule 26(a)(2) govern.

(2) The response should be filed in 15 days unless the trial setting is more than 180 days from the answer, in which event the Rule itself provides for 30 days.

(3) and (4). Discovery shall be completed 30 days before trial, but depositions for experts could be taken up to 15 days before trial when the trial is set with 120 days of the filing of the answer.

THIS NOTICE SHOULD ISSUE NO LATER THAN 12 DAYS AFTER THE ANSWER IS FILED. THIS NOTICE IS FOR USE ONLY IN THOSE ADVERSARY PROCEEDINGS WHERE A SEPARATE SCHEDULING CONFERENCE IS NOT SET.

(Revised 2/23/94---CEM)

# UNITED STATES DISTRICT COURT

# DISTRICT OF COLORADO

# CIVIL JUSTICE REFORM ACT

# ADVISORY GROUP REPORT

APRIL 1993

## TABLE OF CONTENTS

## INTRODUCTION

### The Statutory Scheme

The Judicial Improvements Act of 1990, Public Law 101-650, also known as the Biden Bill, became effective December 1, 1990. Title I of the statute consists of the "Civil Justice Reform Act of 1990" (the "Act"), requiring all United States District Courts to develop and implement a civil justice expense and delay reduction plan by December 1, 1993.

The stated purpose of the legislation is to ensure just, speedy, and inexpensive resolution of civil disputes in federal courts. By improving the quality of the process of civil litigation, the legislation will contribute to the improvement of the quality of justice delivered by the civil justice system.

The chief judge of each district court is required to appoint an advisory group of attorneys and other participants in the civil litigation process to serve for terms no longer than four years, with the exception of one permanent member, the United States Attorney for the district.

The advisory group must issue a report to the court that includes assessing the state of the court's civil and criminal docket, determining the condition of the docket, identifying trends in case filings and demands on the court's resources, identifying the principal causes of cost and delay in civil litigation, and determining to what extent cost and delays could be reduced by better assessment of the impact of new legislation on the courts. In the report's recommendations, the advisory group must include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay.

Chief Judge Sherman G. Finesilver appointed the District of Colorado's fifteen member

Civil Justice Reform Act Advisory Group, representing the major categories of litigants, in February 1991. The Advisory Group was chaired by Chief Judge Finesilver from its inception until the group's work began to focus on specific recommendations. Chief Judge Finesilver then appointed Thomas C. Seawell, Esq. as co-chair and Mr. Seawell chaired the Advisory Group for the development of the recommendations and drafting of the report.

Meeting frequently and participating in three subgroups devoted to the topics of Business of the Court, Local Rules and Alternative Dispute Resolution, the Advisory Group has gathered, analyzed, and evaluated information. The Advisory Group has examined the demands of various kinds of litigation, the common causes of cost and delay in litigation and dispute resolution including methods other than by trial.

After receiving the report, the Court will create, in consultation with the Advisory Group, its own plan for expense and delay reduction, including an implementation schedule. Consideration must be given, by the Advisory Group and the Court, to specific litigation management principles and to cost and delay reduction techniques set forth in the Act. The plan must be implemented by December 1, 1993.

At least two levels of review of the district court's report and plan will be conducted. First, a committee composed of the chief judges of each district court in the circuit, or another judge designated by the chief judge, and the chief judge of the court of appeals for the circuit, will review each report and plan and make suggestions for additional actions or modifications as the committee considers appropriate.

Following the circuit committee's examination, the Judicial Conference of the United States will review each report and plan submitted by the district courts. The Judicial

Conference may request a district court to take additional action if it determines the district court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the Advisory Group.

The CJRA process does not end with the Court developing and implementing its plan. Annually, each district court, in consultation with its advisory group, must evaluate the condition of its civil and criminal dockets to determine appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management techniques of the court. The requirements of the Act regarding the report, plan, advisory group, and review process continue until December 1, 1997.

## Organization of the Report

The introduction to the report provides the legislative background and the task presented to the Advisory Group followed by the summary of the report. The recommendations are grouped together as a convenience to the reader. The numbering of the recommendations is in the sequence in which they appear in the text of the report and should not be construed as representing any ranking or order of priority. The section of the report describing internal and external factors contributing to delay is also accompanied by the recommendations.

## SUMMARY OF THE REPORT

The Advisory Group's primary conclusion is that the overall condition of the civil docket in the District of Colorado is good. The Advisory Group further believes that the presently discernable trends, most notably the dramatic increase in the burden of criminal cases, will place extraordinary demands on the Court's resources in the very near future. For the most part, controlling these trends is beyond the Court's control but strategies must be developed to respond in the most effective manner.

The Advisory Group believes that there are significant areas in which the Court can effect cost-saving and time-reduction techniques. These steps can be grouped in three main categories:

- improved case management by the Court;
- enhancement of awareness and utilization of alternative dispute resolution methods;
- better litigation practices of attorneys and litigants.

The areas of case management which can be improved by the Court include more extensive utilization of magistrate judges and more rapid disposition of motions.

The Court and the attorneys are called by several forces to bring recognized alternative dispute resolution techniques into the litigation arena. ADR must not be offered as a substitute for the traditional judicial process, but as a supplement. The Court's role should consist of recognition and support of ADR techniques and leadership in the education of the legal community.

The Advisory Group believes that the Court can continue to improve the practices of

attorneys and litigants to reduce the extent and cost of discovery and to reduce substantially unnecessary motion practice. The mechanics of dealing with cases moving from the bankruptcy court to the district court can be streamlined and better defined, with a concomitant reduction in cost and delay.

The Advisory Group recommends to the Court the establishment of a federal practice group of lawyers who are interested in practicing before the Court. This group could provide the framework for sharpening of federal practice skills and the inspiration of enhanced levels of professionalism.

Lastly, the Advisory Group recommends seeking additional judgeships to alleviate the impact of the sharp increase in the general criminal workload as well as the increase in complex civil cases which the Court is experiencing.

## CJRA ADVISORY GROUP RECOMMENDATIONS

RECOMMENDATION NUMBER 1

**The Court should broaden the scope of matters referred to a magistrate judge to include the trial of cases with consent of the parties and reference of dispositive motions for recommended findings and ruling in selected cases.**

RECOMMENDATION NUMBER 2

**The Court's district judges should each review their administrative procedures for disposition of pending motions to determine whether speedier rulings can be attained. The resources available in the Clerk's office should be used in developing and implementing any review process or implementing changes in administrative procedures.**

RECOMMENDATION NUMBER 3

**The Local Rules of the District of Colorado should be modified to provide that a final pretrial conference be held not more than 60 days and not less than 30 days prior to trial. All motions, except evidentiary motions in limine, must be filed at least thirty (30) days before the date of the final pretrial conference and must be ruled on before or at the final pretrial conference.**

RECOMMENDATION NUMBER 4

**The Local Rules of the District of Colorado should be modified to provide that the Court rule on all non-dispositive motions within 60 days after they are at issue. All dispositive motions should be ruled upon no later than 90 days after they are at issue.**

RECOMMENDATION NUMBER 5

**The Court should expand its public access to information to include the Public Access to Court Electronic Records (PACER) system.**

RECOMMENDATION NUMBER 6

**The Court should adopt a policy statement expressing the Court's support for litigants seeking ways to resolve their disputes outside the judicial system, but reinforcing the public's confidence that the Court is accessible and available for all who properly choose to use its resources.**

RECOMMENDATION NUMBER 7

The Local Rules of the District of Colorado should be modified to require that the parties file, no later than the first Rule 16 conference, stipulations or individual written statements as to their plan for use of alternative dispute resolution (ADR) techniques or the reasons why they believe such techniques are inappropriate in their case.

RECOMMENDATION NUMBER 8

The Court should use a Differentiated Case Manager from within existing staff to develop and implement a pilot program with one or more judges and magistrate judges to recommend to the judges methods by which cases might be focused or streamlined and whether a case is suitable for disposition through ADR techniques. The pilot program should include procedures to measure its effectiveness and a sunset provision.

RECOMMENDATION NUMBER 9

The Court should include the subject of alternative dispute resolution (ADR) in seminars and other educational programs presented for the attorneys practicing before the Court.

RECOMMENDATION NUMBER 10

The Court should provide opportunities for the judges and magistrate judges to learn more about available alternative dispute resolution (ADR) processes.

RECOMMENDATION NUMBER 11

The Court should establish a systematic procedure for monitoring the effectiveness of new local rules created to curb discovery abuse.

RECOMMENDATION NUMBER 12

The Court should assume the leadership role in establishing a practice resource group with the goal of providing attorneys additional training, mentoring, and practice in developing the skills, competence, and professionalism necessary to practice in the Court.

RECOMMENDATION NUMBER 13

The Court should continue to assume early and ongoing control of the pretrial process through the involvement of a judicial officer in setting deadlines for filing motions, at the earliest practicable time.

RECOMMENDATION NUMBER 14

The Local Rules of the District of Colorado (D.C.COLO LR 29.1) should be modified to provide that each party, including state and federal governmental agencies, must be represented by a person with the authority to bind such party as to all issues previously identified for discussion at each hearing or conference.

RECOMMENDATION NUMBER 15

The Local Rules of the District of Colorado (D.C.COLO. LR 53.2) should be modified to provide that (additions in capital letters), "At any stage of the proceedings, on a district judge's motion or pursuant to motion or stipulation of counsel, a district judge may direct the parties to a suit to engage in an EARLY NEUTRAL EVALUATION, AN early settlement conference or other alternative dispute resolution proceeding. To facilitate settlement or resolution of the suit, the judge may stay the action in whole or in part during a time certain or until further order. Relief from an order under this section may be had upon motion showing good cause."

RECOMMENDATION NUMBER 16

The Local Rules of the District of Colorado should be modified to provide that the Court shall require the presence of the parties at any settlement conference conducted under the auspices of the Court. The only exception to this requirement shall permit parties who reside outside the District of Colorado to participate in the settlement conference by telephone if, at least ten days prior to such conference, such party has made a showing that presence at the conference would create an undue financial hardship for such party. If the party is a corporation, governmental agency, association or other entity, such party shall be represented at the settlement conference by a person with the authority to bind such party to a settlement agreement.

RECOMMENDATION NUMBER 17

The Court should adopt and place rules pertaining to bankruptcy matters in a separate Article or Appendix of the Local Rules. At a minimum, these rules should address withdrawal of reference, findings of fact and conclusions of law in non-core proceedings, bankruptcy appeals, and general administrative procedures. The Local Rules should reflect a systematic method of handling matters between the District Court and Bankruptcy Court.

RECOMMENDATION NUMBER 18

The Local Rules of the District of Colorado should be modified to provide that the Court hold a status conference, if requested by one or more parties, for any bankruptcy matter brought to the District Court from the Bankruptcy Court (whether on appeal or otherwise) within fifteen days of receipt of the Bankruptcy Court file, to determine the nature of the matter and its potential impact on the underlying case or other proceedings still before the Bankruptcy Court.

RECOMMENDATION NUMBER 19

Congress should draft legislation with more precision to avoid litigation-causing errors or omissions. Statutory ambiguity, and failure to address threshold issues such as retroactivity, statutes of limitations, or jurisdictional limits, spawn unnecessary litigation.

RECOMMENDATION NUMBER 20

Congress should expand resources available to the judiciary when creating additional areas of federal jurisdiction that will increase the workload of the federal courts.

RECOMMENDATION NUMBER 21

The executive branch should evaluate the effectiveness of and work towards further implementation of the executive order encouraging use of expeditious dispute resolution methods in cases involving the United States.

RECOMMENDATION NUMBER 22

The executive branch should nominate candidates for judicial vacancies in a timely manner and the Senate should act promptly on such nominations.

RECOMMENDATION NUMBER 23

The Court should request additional judgeships to meet the demands created by the sharp increase of complex civil and criminal cases.

## SECTION 1. DESCRIPTION OF THE COURT

### A. GEOGRAPHIC AND DEMOGRAPHIC OVERVIEW

The District of Colorado is the entire state of Colorado, consisting of 104,247 square miles, divided into sixty-three counties. The "seat" of the United States District Court for the District of Colorado ("the Court") is located in the state's capitol, Denver.

As the third fastest growing state in the nation, Colorado is experiencing a higher than anticipated population growth, representing the state's highest growth in a decade (1983-1992).[1] Population figures for 1992 are estimated at 3,470,216.

The diversity of the state is reflected in the population growth of the racial and ethnic minorities, exceeding the rate of increase for the population as a whole. Over the past ten years, the state's black population has increased 30.9% to become 4% of the state's residents. The percentage of Hispanic residents grew by 24.9% to reach 12.9% of the state population. Nationally, the black population grew at a rate of 13.2% to become 12.1% of the nation's residents and the Hispanic community increased by 53% to become 9.1% of the population.

Colorado is a regional center for the federal government, including the Department of Justice. A Drug Task Force, a Financial Institutions Task Force, and a special White Collar Crime Unit are located in the District. Florence, Colorado is the site of a new federal correctional center presently under construction that will have all levels of security. Upon completion in 1994, the facility will include a section with security tighter than the maximum security facility at Marion, Illinois. Although the new facility has not been completed, the

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[1]Reynolds, R. (1992, December) New State Population Estimate. Denver, CO: State Demographer, State of Colorado.

first pro se prisoner filing has already been received by the Court.

Several military installations are located in Colorado. The apparent trend toward a reduction in military expenditures may create dramatic changes in the uses of defense facilities and personnel in Colorado.

## B. PLACES OF DOING BUSINESS

The eight district judges,[2] three magistrate judges, the Clerk's Office, and Pretrial Services are located in the United States Courthouse, 1929 Stout Street, Denver, Colorado. The Bankruptcy Court is housed directly across Stout Street in the United States Custom House. The Probation department is located seven blocks from the courthouse in leased space at 475 - 17th Street, Denver.

The Court's fourth full-time magistrate judge is assigned to Colorado Springs. Chambers, courtroom, and support staff is provided in leased space at 212 N. Wahsatch Avenue, #101. The Court maintains a courtroom and chambers at 5th and Main Streets in Pueblo. The facility is used by the magistrate judge from Colorado Springs, the district judges, and the Bankruptcy Court. Coordination of its use is maintained by the Clerk's Office.

A full-service facility is located in Grand Junction, Colorado. A courtroom with a twelve-person jury box, district judge and magistrate judge chambers, a mini law library, and district support staff is provided. A part-time magistrate judge, a satellite office of the Probation department, and a full-time Deputy Marshal are housed in the complex. The

[2]Eight district judges includes one senior judge.

clerical staff of the Probation Department have been authorized to act as deputy clerks of the Court for the limited purpose of accepting filings. The Grand Junction facility is located in the Wayne Aspinall Federal Building at 4th and Rood Avenue.

A mini-courtroom and chambers are located in Durango at the Federal Building, 701 Camino Del Rio. The space is assigned to the part-time magistrate judge and is used by the district judges for hearings and trials to the Court. When jury trials are held in Durango, state court facilities are used.

## C. OVERVIEW OF COURT RESOURCES

### 1. JUDICIAL RESOURCES

#### a. ARTICLE III JUDGESHIPS

The Court has seven authorized district judgeships. The number has remained unchanged since 1985.[3] A discussion of the number of judgeships in the District of Colorado must also include the number of vacant judgeship months experienced by the Court.[4] The Court has not had a full bench in six of the past ten years because of vacancies. Currently, the District of Colorado has one senior and seven active district court judges. The Court recently lost the valued service of senior judge Alfred A. Arraj, who remained very active until shortly before his death late in 1992.

The number of Article III judges authorized for each court is dependent on several

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[3]Statistical year, July 1 to June 30.

[4]Vacant judgeship months occur when a district judge has been authorized for the district court, but the vacancy has not been filled, either because the President has not designated a candidate or Congress has not acted on the nomination.

factors. One of the key criteria on which a request for additional judgeships is evaluated is the number of weighted filings per judgeship. "Weighted filings per judgeship" incorporates not only the number of cases assigned to each judge, but also the complexity of the different types of cases. Some types of cases consistently demand more work of the judiciary than others. The theory is that the "average" is worth one case, so every case is worth more than, equal to or less than the number depending on the amount of judicial time needed.[5]

### b. MAGISTRATE JUDGESHIPS

The District of Colorado has four full-time magistrate judges and two part-time magistrate judges. Of the full time magistrate judges, three sit in Denver and one newly created full-time position primarily serves in Colorado Springs, Pueblo and southern Colorado. Part-time magistrate judges sit in Durango and Grand Junction.

## 2. HISTORY OF JUDICIAL VACANCIES

Prior to statistical year 1991,[6] the District of Colorado experienced vacant judgeship months[7] every year for six years. During the years 1985 through 1990 there were 131.6 vacant judgeship months. Table 1 illustrates the history of judicial vacancies experienced by the District of Colorado over a ten year period.

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[5]Administrative Office of the United States Courts. (1980). Annual Report of the Director (629-752/6004. page 104). Washington, DC: U.S. Government Printing Office.

[6]The "statistical year" for 1991 was July 1, 1990 to June 30, 1991. Federal Court Management Statistics, published annually by the Administrative Office of the United States Courts, is the main source of judicial workload statistics used in this report.

[7]Vacant judgeship months are used to describe the situation in which an additional judge (or judges) has been authorized by Congress, or in which a death or resignation has occurred but the vacancy not yet filled. Perhaps, the judge has not been nominated by the President or if nominated, the nomination not acted on by the Senate.

Table 1

## HISTORY OF JUDICIAL VACANCIES
## U.S. DISTRICT COURT
## DISTRICT OF COLORADO
## 1983 - 1992

| Year[a] | Authorized Number of Judgeships | Vacant Judgeship Months | Actual Number of Judges |
|---|---|---|---|
| 1992 | 7 | 0 | 7 |
| 1991 | 7 | 0 | 7 |
| 1990 | 7 | 15.1 | 5.7 |
| 1989 | 7 | 28.7 | 4.6 |
| 1988 | 7 | 26.7 | 4.8 |
| 1987 | 7 | 24.0 | 5 |
| 1986 | 7 | 24.0 | 5 |
| 1985 | 7 | 13.1 | 5.9 |
| 1984 | 6 | 0 | 6 |
| 1983 | 6 | 0 | 6 |

[a]Year refers to statistical year, July 1 to June 30.

## D. DATA GATHERING METHODOLOGY

The Advisory Group used several sources and techniques to gather information used in this report. Statistics, questionnaires, interviews, public testimony, miscellaneous written statements, and the experience and expertise of the members of the Advisory Group are the main sources of the information used in the report. A public hearing was held by the Court[9] before the new local rules were adopted in June 1992[10] and written statements accepted from the legal community regarding modifications of the local rules. The Advisory Group was very active in the process used to develop the new local rules. In addition to conducting a thorough review and analysis of the Court's proposed rules when they were first announced, the Advisory Group's Local Rules Sub-group submitted extensive comments and recommendations relative to the proposals. Many of the recommendations were adopted. Additionally, the Local Rules Sub-group provided to the Court an ongoing source of opinion and comment on the impact of changes under consideration and adopted. Attorneys with a wide variety of federal litigation experience reviewed all proposed changes for purposes of providing suggestions and comments on proposed local rules.

Questionnaires from the Advisory Group were distributed to district court judges, magistrate judges, the staff of the Clerk's office, attorneys, and litigants. Members of the legal community were invited to participate in sub-group meetings.

The experience and expertise of the Advisory Group itself were drawn on through extensive meetings. Statistics, professional articles, and other CJRA reports and plans were

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[9]August 22, 1991, 2:00 p.m., Courtroom C-201, United States Courthouse, Denver, Colorado.

[10]Effective June 1, 1992.

reviewed. Other district courts were contacted for additional information about their special programs or methods for reducing cost and delay. Information was collected from resource people in Colorado and around the country for additional detail regarding their publications or perspective. Requests for additional information were, without exception, met with responses that were helpful, generous in time, and beneficial to the Advisory Group.

## SECTION II. ASSESSMENT OF THE DOCKET

### A. ASSESSMENTS OF THE CONDITION OF THE CIVIL AND CRIMINAL DOCKETS

#### 1. NARRATIVE AND ANALYSIS

The condition of the civil and criminal dockets in the District of Colorado is good. Civil cases take about eight months from filing to disposition; the Court is ranked 15th out of all 94 districts in this category. The number and percentage of civil cases over three years old continued to decline to a low of 107 cases (4.9%) of the civil docket. Disposition of the older cases keeps the filing to disposition time higher because the older cases are included in the median times reported for filing to disposition of cases. The Court's percentage of civil cases over three years old (4.9%) is much lower than the percentage of civil cases over three years old for all district courts (8.7%).

Criminal felony cases take a median time of 4.2 months from filing to disposition compared to a median time 5.9 months for all 94 districts, a ranking of tenth when compared to all district courts.

The Court has a heavy concentration of complex civil and criminal cases. The types of complex civil cases include non-prisoner civil rights, contract actions (other than student

loan, veterans' benefits), and torts.[11] The types of complex criminal cases include drug-related cases, many with multiple defendants and multiple counts, and a high number of banking-related and stock fraud cases.[12] The number of complex cases (civil and criminal) filed in the District of Colorado has increased 28.3% in 1992[13] over the previous year, placing the Court ninth in the nation per judgeship when compared to all 94 district courts.

As the number of complex cases per judgeship increases, the number of pending cases may also rise unless the Court takes unusual measures to compensate for the escalating cases. In the past when the number of cases per judge has risen dramatically and there were vacancies on the bench, the Court has requested through the state and local bar associations that cases be directed to the state courts, if possible, in an effort to alleviate the situation.

Despite the Advisory Group's generally positive impression of the Court's docket, there is some deterioration in the areas of the number of cases terminated and the number of pending cases compared to previous years. In statistical year 1992[14] the number of pending cases increased 21% over the previous year, from 2,030 to 2,461. During the same time period, the number of terminations decreased by eight percent, from 2,670 to 2,450.

Table 2[15] illustrates the number of cases terminated in 1992 in the District of Colorado compared to other district courts. The Court ranked 69th out of 94 courts for the number

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[11]Appendix B-2, Civil Filings by Nature of Suit.

[12]Appendix B-3, Criminal Felony Filings by Nature of Offense.

[13]Administrative Office of the United States Courts, Judicial Workload Profile for the U.S. District Court, District of Colorado. See Appendix B-1 for "U.S. District Court--Judicial Workload Profile."

[14]July 1, 1991 to June 30, 1992 is statistical year '92.

[15]Table 2 is developed from Appendix B-1, U.S. District Court--Judicial Workload Profile, published by the Administrative Office of the United States Courts.

of cases terminated; the Court ranked sixth out of eight district courts within the Tenth Circuit.

Table 2 also compares the Court's number of pending cases per judgeship to a national ranking of the 94 district courts and a ranking within the eight district courts of the Tenth Circuit, 59th and fourth, respectively.

The Court compares favorably and above average to other district courts when examining most aspects of the civil and criminal docket. The Court is better than the norm of the 94 district courts in all areas examined except two: the time for civil cases to go from issue to trial, and the number of terminations for the time period July 1, 1991 to June 30, 1992. A civil case from issue to trial required fifteen months[16] in the District of Colorado, while the average of all district courts was fourteen months. The number of terminations per judgeship for the Court was 350 compared to an average of 416 for other district courts. Further assessment of Table 2 indicates that even though there was a 28% increase in weighted filings and a 21% increase in overall filings, the Court continued to lower its percentage of cases over three years old.

[16]Less than five percent of the civil cases go to trial.

Table 2

## DISTRICT OF COLORADO COMPARED TO OTHER U.S. DISTRICT COURTS
### July 1, 1991 to June 30, 1992

| | U.S. District Court District of Colorado | All District Courts | Ranking U.S. | Ranking Tenth Circuit |
|---|---|---|---|---|
| Time From Filing to Disposition:[17] | | | | |
| Civil | 8 Months | 9 Months | 15th[18] | 3rd |
| Criminal Felony | 4.2 Months | 5.9 Months | 10th | 3rd |
| Issue to Trial (Civil) (Median Times) | 15 Months | 14 Months | 40th | 6th |
| Total Filings Per Judgeship | 414 Cases | 403 Cases | 35th | 3rd |
| Terminations Per Judgeship | 350 Cases | 416 Cases | 69th | 6th |
| Pending Cases Per Judgeship | 352 Cases | 402 Cases | 59th | 4th |
| Weighted Filings Per Judgeship | 476 Cases | 405 Cases | 9th | 1st |
| Civil Cases Over 3 Years Old (Number/Percent) | 107 Cases 4.9% | 19,423 Cases 8.7% | 35th | 6th |

[17]Time for Filing to Disposition and Issue to Trial are given in median times.

[18]Ranking is used to compare the Court to other district courts. For example, in the civil case category, Time from Filing to Disposition, the Court ranks 15th when included with all district courts and 3rd within the Tenth Circuit. In other words, fourteen of the 93 district courts take less time than the District of Colorado. Within the eight district courts of the Tenth Circuit, two courts take less time from filing to disposition than the District of Colorado.

## B. TRENDS IN FILINGS AND DEMANDS ON RESOURCES

### 1. NARRATIVE AND ANALYSIS

The District of Colorado faces the following trends which will significantly impact the Court's civil docket:

- a rapidly escalating amount of time consumed in dealing with criminal matters;
- a growing number of civil case filings, with an associated increase in complex civil cases;
- a rising number of pro se litigants, both prisoner and non-prisoner;
- an increasing number of requests for information and services from within the judicial branch and outside the court system.

The demand on the Court's resources generated by criminal matters is, in the view of the Advisory Group, the single most significant factor which will impact civil litigation into the foreseeable future. The component parts include at least the apparently insatiable Congressional appetite for federalization of traditional state law crimes; the imposition of sentencing guidelines and the attendant increase in time required for sentencing and the right to appeal criminal sentences; and the increasing number and complexity of felony filings. Table 3 illustrates the increase for the past ten years on the number of felony filings per judgeship as well as the percentage increase the criminal cases are becoming of all cases filed. Since 1983, narcotic-related criminal filings have increased by 660% and criminal fraud cases have increased by 315% compared to a 32% increase in felony filings generally. Increasing the numbers of investigators and prosecutors to wage the war on crime must be met with at least commensurate increases in the judicial resources.

Some judges of the Court estimate that the amount of time spent on criminal cases has increased from ten to fifty percent over the last two or three years. The Advisory Group is confident that by the time the Court adopts its Plan, there will be more federal crimes than when this Report is being written. While commentary on the policy decisions behind these trends is beyond the scope of this Report, the impact of these trends on the civil docket cannot be understated.

Civil case filings continued an upward trend in 1992 by jumping 21.8%.[19] Table 4 illustrates the docket trends over the past ten years. Weighted filings (complex civil and criminal cases) increased 28.3%. The number of pro se litigants now represents 27% of the civil docket. Of the 688 pro se litigants in calendar year 1992, 254 were filings by non-prisoner litigants. Overall, the civil pro se (prisoner and non-prisoner) filings increased almost four percent over calendar year 1991 (662).[20] The number of prisoner cases, most of which will be pro se, is expected to rise significantly with the housing of inmates in the three new prisons under construction, including two state prisons and the new federal facility at Florence.

Currently, the Court has a systematic, well defined method of handling the pro se filings. With a new ruling handed down from the Tenth Circuit Court of Appeals, the Court may be required to appoint more attorneys for pro se litigants in non-prisoner cases.

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[19]Appendix B-1, U.S. District Court--Judicial Workload Profile for the District of Colorado.

[20]Statistics collected by the District of Colorado.

Table 3

## CRIMINAL FELONY DOCKET TRENDS
## PER JUDGESHIP • PERCENT OF TOTAL FILINGS
## DISTRICT OF COLORADO
## 1983 - 1992

| Year | Total Case Filings | Number of Felony Filings Per Judgeship | Felony Filings As Percent of Total Filings (Civil and Criminal)[21] | Time From Filing to Disposition (Criminal Felony)[22] |
|---|---|---|---|---|
| 1992 | 2900 | 51 | 12.3% | 4.2 Months |
| 1991 | 2397 | 44 | 12.8% | 4.2 Months |
| 1990 | 2667 | 45 | 11.8% | 3.8 Months |
| 1989 | 2630 | 44 | 11.7% | 3.7 Months |
| 1988 | 2471 | 41 | 11.6% | 3.7 Months |
| 1987 | 2517 | 39 | 10.8% | 3.5 Months |
| 1986 | 2844 | 33 | 8.12% | 3.3 Months |
| 1985 | 3066 | 36 | 8.2% | 3.3 Months |
| 1984 | 2959 | 38 | 7.7% | 3.6 Months |
| 1983 | 2653 | 46 | 10.4% | 3.1 Months |

During the past five years the number of felony filings per judgeship has increased over 24%.

[21]Calculated using the number of criminal felony filings per judge, multiplied by the number of authorized judgeships, and divided by the total number of filings (civil and criminal) for the statistical year.

[22]Median times.

Table 4

## CIVIL DOCKET TRENDS
## U.S. DISTRICT COURT
## DISTRICT OF COLORADO
## 1983 - 1992

| Year | Civil Filings | Percentage of Total Filings | Actual Number of Judges | Number of Civil Filings Per Judgeship | Time From Civil Filing to Disposition | Time From Issue to Trial (Civil Only) | Number and Percent of Civil Cases Over 3 Years |
|---|---|---|---|---|---|---|---|
| 1992 | 2538 | 88% | 7 | 363 | 8 Months | 15 Months | 107<br>4.9% |
| 1991 | 2083 | 87% | 7 | 298 | 8 Months | 18 Months | 108<br>6% |
| 1990 | 2355 | 88% | 5.7 | 336 | 9 Months | 17 Months | 138<br>6.5% |
| 1989 | 2322 | 88% | 4.6 | 332 | 8 Months | 20 Months | 152<br>7.2% |
| 1988 | 2181 | 88% | 4.8 | 312 | 8 Months | 16 Months | 141<br>7.1% |
| 1987 | 2249 | 89% | 5 | 321 | 9 Months | 16 Months | 117<br>5.9% |
| 1986 | 2610 | 92% | 5 | 373 | 8 Months | 16 Months. | 117<br>5.1% |
| 1985 | 2812 | 92% | 5.9 | 402 | 8 Months | 13 Months | 133<br>5.8% |
| 1984 | 2732 | 92% | 6 | 455 | 7 Months | 15 Months | 121<br>5.3% |
| 1983 | 2372 | 89% | 6 | 396 | 8 Months | 13 Months | 80<br>3.5% |

Supporting district court personnel are asked to provide more services internally though the Administrative Office of the United States Courts and externally from the public as well as other branches of government. The Administrative Office of the United States Courts requests additional surveys, participation on work and policy committees, and changes in methods of service delivery, often involving additional training, time and frequently delay of existing service methods. Automation, financial and other technical support systems are under going a great deal of change, requiring an immense amount of staff time and support. Such a commitment of time, without additional supporting personnel, distracts from the delivery of basic case management services to the Court.

Outside the court system, requests for court-based information are mushrooming. The Civil Justice Reform Act itself requires a significant amount of supporting personnel time from the Clerk's office. The cooperative attitude of the Clerk's staff, which is essential for the Advisory Group's ability to perform its statutory duties, draws time from its official duties. The Act itself requires district courts to have additional case management statistical reports available to the public. Each district court is also required to perform annual assessments of the docket to determine additional appropriate actions that may be taken by the Court to reduce cost and delay in civil litigation.

## SECTION III. COST AND DELAY

### A. INTERNAL FACTORS CONTRIBUTING TO COST AND DELAY

The Advisory Group has determined that the District of Colorado is doing well in most areas of court-wide procedures that impact cost and delay.

The Advisory Group, however, is mindful of the Court's opportunity to improve in some areas and believes that the pace of litigation and access to the Court could be improved by changes in the following areas:

- expanding the systematic method of screening cases;
- broadening the scope of matters referred to magistrate judges;
- motion practice by attorneys and handling of motions by judicial officers;
- electronic public access to court information;
- the use of alternative dispute resolution techniques;
- use of discovery;
- lawyer competence and professionalism;
- clarification of procedures governing cases from bankruptcy court to district court.

#### 1. CASE MANAGEMENT

##### a. ORGANIZATION

The Court uses a decentralized docket: once cases are assigned, each judge has sole responsibility for managing his or her cases. The administration of each case within the judge's chambers, including the setting of hearing and trial dates, the utilization of magistrate

judges, and even the minutiae of courtroom protocols are determined by each district judge. The only significant practice which is uniformly employed is a standard form of pretrial order, mandated by local rule. Most, but not all, of the district judges conduct a final pretrial conference 30-45 days before trial.

Pro se cases are the only cases systematically screened in the Clerk's office before the file is delivered to the district judge or magistrate judge. The Court has developed, with the pro se staff attorney, a method of prioritizing the pro se cases to maximize the use of judicial time and resources. The Advisory Group believes the methods used could be adapted to other types of cases for screening to recommend to the assigned judicial officer what may be the most effective treatment of the particular case.

Whatever systems for initial screening and subsequent monitoring are employed when a case reaches the judge's chambers are designed and maintained solely by each judge. While the details of this process, such as the roles played by law clerks and other support staff, are not fully known to the Advisory Group, it is clear that these practices vary widely and have differing levels of efficiency and success. The administration/handling of the paper flow is a critical task which will become increasingly more burdensome.

### b. MAGISTRATE JUDGES

The three full-time magistrate judges sitting in Denver and the one in Colorado Springs/Pueblo are paired with district judges. Each district judge refers all of his or her referred matters to only one magistrate judge. There is no formal procedure in place for the selection of the pairs or the duration of the pairing assignments.

The district judges use the services of the magistrate judges in differing ways and to differing degrees. Most district judges prefer to conduct their own Rule 16 conferences and most refer almost all of their cases to a magistrate judge for monitoring the discovery process and resolution of discovery disputes. About half the district judges refer all non-dispositive motions to a magistrate judge, but only a few dispositive motions are referred. About half of the district judges delegate the responsibility for developing a pretrial order to a magistrate judge. Most district judges refer most cases to a magistrate judge for the purpose of conducting a settlement conference or conferences.

The Advisory Group believes that the Court should broaden the scope of matters referred to magistrate judges to include the trial of cases with consent of the parties and reference of dispositive motions for recommended findings and ruling in selected cases. The District of Colorado is presently the only district in the country which does not allow magistrate judges to conduct civil trials with the consent of the parties. The Advisory Group believes that it is time to expand the responsibilities of the magistrate judges but any changes should be made in conjunction with a review of the magistrate judge's overall role in the judicial process. It appears to the Advisory Group that the Court does not have a clear focus on the role(s) of the magistrate judges nor on the skills or experience necessary or useful to the magistrate judges. The ability to conduct settlement conferences is quite different from the ability to manage discovery programs, handle pro se prisoner matters or deal with various criminal docket responsibilities. The selection of magistrate judges does not appear to reflect a conscious selection of particular skills or experience.

With the broadening of the workload of magistrate judges recommended herein, the

practice of paring each district judge with one magistrate judge may need to be modified. For example, if a case is referred to a magistrate judge for a settlement conference, that same magistrate judge cannot rule on a dispositive motion or preside at a trial in that same case. The Court should consider organizing the reference of particular matters to a particular magistrate judge rather than an entire case to one magistrate judge.

### c. DISPOSITION OF MOTIONS

In their responses to the questionnaire, the lawyers identified the failure of the district judges to rule promptly on motions as the most significant cause of delay. There is little doubt that slow rulings on motions contribute to unnecessary cost and delay, but it is difficult to assess the extent of the problem. Available statistics are not sufficiently precise for this purpose but they do indicate that the problem is much greater with some judges than with others.[23] Indeed, in some courtrooms the problem does not exist at all. This fact suggests that the delay, where it exists, is probably due to administrative difficulties rather than workload.

To some extent, the question of prompt rulings on motions is intertwined with the utilization of magistrate judges as a method of dealing with increasing demands on the time of the district judges. The great majority of pending motions are probably not dispositive motions and, if referred to a magistrate judge, could be dealt with more rapidly. The Advisory Group also believes that the reference of dispositive motions to magistrate judges for recommended findings and ruling would, in many cases, reduce cost and delay.

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[23] "Civil Justice Reform Act of 1990, Report of Motions Pending Over Six Months, Bench Trials Submitted Over Six Months, Cases Pending over Three Years on March 31, 1992," prepared by the Administrative Office of the U.S. Courts.

### d. TRIAL DATES

The Act (§ 473(a)(2)(3)) requires the consideration of "setting early, firm trial dates." Of course, early trial dates are always desirable, but they represent the result of effective docket management rather than a means to achieve it. Firm trial dates are extremely important tools to minimize the cost of litigation. Trailing calendars which do not permit advance planning of time and reduced travel expense by lawyers, litigants, and witnesses add significantly to the cost of trial. To the extent one interprets the statutory language to mean the early setting of trial dates (whether firm or not) the Advisory Group believes this point is not as important as the firmness of the date.

### e. ELECTRONIC PUBLIC ACCESS TO INFORMATION

The ability to provide people outside the court easier and better access to court information should be a goal of the Court. The time of lawyers and litigants could be saved if the Court implemented the electronic public access system called PACER (Public Access to Court Electronic Records). PACER is the system designed by the federal judiciary to allow a law firm or an individual with a personal computer or word processor with a modem, to dial into the court, using standard telephone lines, to obtain court data from a special public information computer, and request information about a case. The PACER system, currently used in some district courts, can provide a full listing of all parties and participants (including judge and magistrate judge assignments), a full listing of all participating attorneys, including firm's address, telephone numbers, and attorney designations (such as lead attorney, recipient of noticing), and an extensive compilation of case-related and

demographic information (such as cause of action, nature of suit, dollar demand, filing and termination dates, and jury demand). In addition, the Court should work toward the goal of having the entire docket sheets for a case available online. A similar system, already available in the Bankruptcy Court, is considerable help to lawyers and litigants.

RECOMMENDATION NUMBER 1

**The Court should broaden the scope of matters referred to a magistrate judge to include the trial of cases with consent of the parties and reference of dispositive motions for recommended findings and ruling in selected cases.**

RECOMMENDATION NUMBER 2

**The Court's district judges should each review their administrative procedures for disposition of pending motions to determine whether speedier rulings can be attained. The resources available in the Clerk's office should be used in developing and implementing any review process or implementing changes in administrative procedures.**

RECOMMENDATION NUMBER 3

**The Local Rules of the District of Colorado should be modified to provide that a final pretrial conference be held not more than 60 days and not less than 30 days prior to trial. All motions, except evidentiary motions in limine, must be filed at least thirty (30) days before the date of the final pretrial conference and must be ruled on before or at the final pretrial conference.**

RECOMMENDATION NUMBER 4

**The Local Rules for the District of Colorado should be modified to provide that the Court rule on all non-dispositive motions within 60 days after they are at issue. All dispositive motions must be ruled upon no later than 90 days after they are at issue.**

RECOMMENDATION NUMBER 5

**The Court should expand its public access to information to include the Public Access to Court Electronic Records (PACER) system.**

## 2. ALTERNATIVE DISPUTE RESOLUTION

Our judicial system has developed over hundreds of years for the purpose of resolving disputes by a deliberative process culminating in a trial. In the main, it performs this function remarkably well.

An equally ancient tradition has been the voluntary resolution of disputes by agreement. Sometimes the views of third persons have been sought, either formally or informally. In certain industries, the desire for rapid resolution by neutral but substantively knowledgeable people has led to arbitration's becoming the norm. As society evolves the forms of non-traditional dispute resolution will undoubtedly multiply and change.

Americans are generally demanding alternatives to the traditional judicial resolution of disputes. "Alternative dispute resolution" ("ADR") techniques are riding a popular wave of great strength. The Colorado Supreme Court has recently adopted the following provision

in its Rules of Professional Conduct: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought" Rule 2.1 This provision, of course, is adopted as part of this Court's standards of professional responsibility under D.C.COLO.L.R. 83.6. Thus the profession's obligation to learn about and advise clients concerning these techniques is clear.

The question raised by the Act and a great deal of current thinking is to what extent and in what ways the judicial system should be involved in non-traditional ADR techniques. The roots of many organizations, representing the commercial offering of dispute-resolving services, are already firmly embedded in the soil of Colorado and the nation. Apart from the traditional judicial rule that "settlements" are to be fostered by recognition and enforcement by the courts, the relationship between the judicial system and this ever-growing and largely unsupervised industry needs to be explored.

There are now several different, fairly well defined techniques which are generally recognized as alternative dispute resolution techniques: early neutral evaluation; mediation; settlement conference; mini-trial; summary jury trial; and arbitration. A recently completed study by the Colorado Bar Association defines these techniques and the Advisory Group adopts these definitions which are contained in Appendix C.

Except for settlement conferences, the relationship between the judiciary and ADR in the District of Colorado has been largely one of arms-length separation. Processes similar to recognized ADR techniques, such as the appointment of special settlement masters, are occasionally utilized by a judge in a specific case, but strictly on an ad hoc basis and not

according to any rule or other structured methodology.

Most (but not all) judges in this district routinely refer all cases to a magistrate judge for a settlement conference(s). There are, however, no rules governing such references or the process to be employed by the magistrate judge. In practice, the parties are typically required to furnish a confidential statement of their settlement position to the magistrate judge who then conducts separate or joint conferences in an effort to obtain a settlement agreement. The magistrate judge has a great deal of discretion in choosing the particular techniques that are employed and in deciding whether multiple conferences should be held. If the representatives of the parties at the conferences do not have authority to commit to settlement agreements, the chances for success of the process are substantially diminished.

Although there is a divergence of views among the judges as to the precise relationship between the court and ADR, none of the judges is opposed to at least suggesting that the parties utilize some ADR technique. Most lawyers, responding to the requests of clients and their new ethical mandate, support the use of these techniques as alternatives to the full litigation process. All agree that successful utilization of most ADR techniques is speedier and less costly than formal litigation.

It must be recognized that the reference of a case to a magistrate judge for the purpose of holding a settlement conference is, conceptually, simply requiring the parties to engage in mediation. Utilizing the magistrate judges has one significant benefit over utilizing private mediators: there is no charge to the litigants for the mediator's services. There are, however, several other factors which can be beneficial or detrimental in any given case: the "authority" of the magistrate judges, as perceived by litigants, increases the intimidation

factor; the availability and scheduling problems of the magistrate judges render them much less accessible; their skills as mediators are largely unknown before their selection as a magistrate judge; they are often perceived as being pressured by the district judge to achieve some kind of settlement and that pressure is sometimes felt by the parties. The essence of mediation is not intimidation but finding common ground for agreement, and district judges and magistrate judges need to be sensitive to this fact. Indeed, unsuccessful attempts at settlement, whether by means of conferences with a magistrate judge or some other ADR technique, almost always add to the cost of litigation.

Without a formal, systematized plan for the recognition and possible invocation of ADR techniques, a plan that is uniform in its design and application and based on published rules, the possibilities for employing speedy, less costly dispute resolution are not maximized and cloaked in suspicion and myth. While involvement of judges on an ad hoc basis in urging settlement or requiring settlement conferences as trial approaches can sometimes be helpful, it can also be regarded by litigants as distasteful and inappropriate pressure.

The Advisory Group believes that the court should require the parties to present a definite plan for settlement efforts, or demonstrate to the court why such efforts are not acceptable, but leave the choice and the timing of the settlement technique to the litigants and attorneys. It is assumed that most litigants will continue to prefer magistrate settlement conferences, but that should be their decision and not the court's.

The Advisory Group's recommends that the Court use the system created for handling pro se cases as a model to develop and implement a Differentiated Case Management (DCM) pilot program. The purpose of the DCM program would be to provide front-end

screening by a member of the Clerk's office and furnishing recommendations to the judge with respect to possible suggestions for ADR or adoption of different discovery and motion tracks. The Advisory Group is not in complete agreement over the concept. Some members believe it represents an opportunity to have a screening function performed by a person whose skills and experience could be devoted primarily to this one task, rather than by law clerks or other in-chambers personnel who may be less specialized. Most members have concerns over the addition of what could become another layer of bureaucracy. The consensus solution was to experiment with a pilot program which might be employed by a few district judges. The Advisory Group considers the use of a DCM pilot project, using existing staff for a specific period of time, with evaluation methods included in the program, a valuable way to determine if such a technique reduces delay in the Court.

RECOMMENDATION NUMBER 6

**The Court should adopt a policy statement expressing the Court's support for litigants seeking ways to resolve their disputes outside the judicial system, but reinforcing the public's confidence that the Court is accessible and available for all who choose to utilize its resources.**

RECOMMENDATION NUMBER 7

**The Local Rules of the District of Colorado should be modified to require that the parties file, no later than the first Rule 16 conference, stipulations or individual written statements as to their plan for use of ADR techniques or the reasons why they believe such techniques are inappropriate in their case.**

RECOMMENDATION NUMBER 8

**The Court should use a Differentiated Case Manager from within existing staff to develop and implement a pilot program with one or more judges and magistrate judges to recommend to the judges methods by which cases might be focused or streamlined and whether a case is suitable for disposition through ADR techniques. The pilot program should include procedures to measure its effectiveness and a sunset provision.**

RECOMMENDATION NUMBER 9

**The Court should include the subject of alternative dispute resolution (ADR) in seminars and other educational programs presented for the attorneys practicing before the Court.**

RECOMMENDATION NUMBER 10

**The Court should provide opportunities for the judges and magistrate judges to learn more about available alternative dispute resolution (ADR) processes.**

## 3. PRACTICES OF ATTORNEYS AND LITIGANTS

### a. DISCOVERY

All district judges, all magistrate judges, and most lawyers agree that discovery is a major cause of excess cost and delay. Excessive numbers of depositions, excessive length of depositions, excessively broad document requests and excessively broad interrogatories are

all identified as significant problems. Many judges and lawyers see excessive discovery as abuse, pointing to the use of discovery devices primarily as weapons employed as part of a "battle plan" approach to litigation; some attribute the excessive use to self-protection efforts designed by attorneys to avoid malpractice claims by clients and others identify lawyer incompetence as the reason behind the abuse. When comparing written discovery to depositions, only a few judges and lawyers see written discovery as reducing delay; about half view written discovery as cost-reducing.

The Advisory Group firmly believes that excessive discovery is one of the most significant causes of cost and delay. The Advisory Group recommended changes in the Court's local rules, many of which were promptly adopted. Under the new local rules, the judge has the discretion to limit the number of depositions, interrogatories, requests for admissions, and requests for production. The new local rules referring to the control of discovery, including provisions for strong sanctions for abuse of depositions during discovery, are as follows:

| | |
|---|---|
| D.C.COLO.LR 16.1 | D.C.COLO.LR 30.1B |
| D.C.COLO.LR 16.2A | D.C.COLO.LR 30.1C |
| D.C.COLO.LR 29.1 | D.C.COLO.LR 37.2 |
| D.C.COLO.LR 30.1A | |

The Advisory Group believes close scrutiny should be given to the effect of these local rule changes over the coming months.

**RECOMMENDATION NUMBER 11**

**The Court should establish a systematic procedure for monitoring the effectiveness of new local rules created to curb discovery abuse.**

## b. MOTION PRACTICE

The district judges and magistrate judges are divided on the question of whether motions for summary judgment add to or reduce the cost and time involved in civil cases. Some judges believe that too many of these motions are filed and that most consume lawyer and court time without aiding case resolution. Others argue that these motions sometimes help litigants to avoid trials altogether, and, even when not broadly successful, can be used as a vehicle to narrow issues. This latter group also believes that these motions often force lawyers to evaluate their evidence and legal authorities early in the process.

Most judges and lawyers agree that apart from summary judgment motions, too many motions, in general, are filed. Most of these motions involve discovery disputes, but a material portion appear to consist of motions in limine. Many attorneys believe that delay in ruling on motions inevitably generates the filing of more motions. A frequently cited cliche is "motions breed motions."

The filing of inappropriate or unnecessary motions clearly reflects a lack of professionalism on the part of the attorney and the failure to rule promptly on all motions often makes the Court an unwitting participant in delaying and cost-increasing tactics.

### c. LAWYER COMPETENCE AND PROFESSIONALISM

Some judges identify lawyer incompetence as a major cause of excess cost and delay. They see this incompetence as resulting in inappropriate or unnecessary motions being filed (with the incompetence causing either the filing or opposing of the motions); too much time being taken in writing briefs that are of little or no assistance to the Court; too much time being taken during hearings or trials; too much time being spent in researching fundamental questions of law or trial practice; inability to evaluate a case for settlement purposes; and inability to negotiate settlement agreements. Causes of the perceived incompetence include deficiencies in law school curricula, lack of mentoring/training in the early years of practice and the result of an extraordinary number of lawyers competing for clients' business.

Most judges agree that professionalism among lawyers has declined steadily over the last many years. Some attribute that decline to the increase in the number of lawyers and the resulting competition among lawyers. Almost all of the judges report that they sometimes must introduce adversaries to each other because the attorneys have not done so themselves. The failure of lawyers to confer among themselves to try to resolve some problem in the case, rather than filing a motion, is cited as a cause of excess cost and delay by about half the judges.

The use of client resources to overwhelm a less affluent adversary is cited by some judges as a lack of professionalism which directly affects the cost and delay of a case. At least one judge points out that the present system generally rewards such strategies with success.

Some judges point to lawyers' billing practices as inconsistent with high standards of professionalism; they describe lawyers as greedy and overcompensated with respect to society in general. Almost all judges are sure that there is "churning" by some lawyers in billing clients; some believe that the economic pressures inherent in large firm practices result in padding of time. One judge faults the practice of billing almost exclusively on the basis of hourly rates, preferring instead to see more emphasis on the nature of and amount involved in the case, the client's ability to pay and the results achieved.

The litigant survey conducted by the Advisory Group included questions regarding fee arrangements between the litigant and the attorney. "Lawyer fees were unreasonable" was the fourth most frequent reason given for the important causes of unreasonable costs.

The Advisory Group believes that attorneys need additional training, mentoring, and practice in developing the skill, competence, and professionalism necessary to practice in the Court. The extent of the deficiency is impossible to measure in any given lawyer or in any set of lawyers as a group. No matter how great or small the deficiency may be, however, all sensible efforts must be made to reduce or eliminate it. Clearly, these efforts must primarily be the responsibility of the law schools and professional organizations, but, to some extent, the courts can and should assist in this effort.

The Advisory Group believes that the Court should establish a framework for attorneys interested in practicing before the Court, helping the attorneys to obtain ongoing education in the topics uniquely involved in federal practice. The Court should consider using the Advisory Group, the current committee on professional conduct and the Criminal Justice Act Committee for assistance in implementing such a federal practice resource group.

The seminar held in 1992 by the Court and the Advisory Group met a growing need for information and guidance from the district court. Many of the attorneys (28%) attending the seminar were in practice five years or less. Not only had they been in practice for a relatively short period of time, but most of the attorneys attending were from small firms, with 40% from firms of five members or less. Strong interest for establishing a federal practice group was expressed on the written evaluations from the conference. Additional seminars were requested by 73% of the participants, with the most frequent topic suggested for future seminars, "practical litigation techniques."

Many Advisory Group members have expressed a willingness to help the Court establish a federal practice group, citing the need to help with the mentoring process by working with less experienced attorneys to improve their federal practice skills.

RECOMMENDATION NUMBER 12

**The Court should assume the leadership role in establishing a practice resource group with the goal of providing attorneys additional training, mentoring, and practice in developing the skills, competence, and professionalism necessary to practice in the Court.**

## 4. MODIFICATIONS TO THE LOCAL RULES TO ENHANCE CASE MANAGEMENT

In an effort to further enhance the opportunity for improving access to the judicial system and reducing cost and delay in the litigation process, the Advisory Group reviewed

the Court's Local Rules of Practice (D.C.COLO.LR)[24] using the principles and guidelines of litigation management and cost and delay reduction techniques outlined in the Act.

The Court's Local Rules of Practice include many of the principles and techniques recommended in the Act. The rules were designed to strengthen the case management responsibility of the district judge, mandate greater cooperation among attorneys in pretrial fact finding and motions, and create a positive settlement atmosphere early in the litigation, and permit the judge to facilitate settlement discussions by calling a "time-out period" that is dedicated exclusively to exploring settlement options. The rules also provide strong sanctions for abuse of the deposition process.

The objectives of the Court in developing the new local rules were to reduce the costs of litigation, bring cases to trial sooner, and provide an earlier opportunity to explore settlement options. The Advisory Group believes the new local rules are an important step toward realizing the goals of the Act.

Comparing the local rules to the principles and guidelines of litigation management stated in the Act also produced recommendations from the Advisory Group to the Court, for areas in which the particular needs of the District of Colorado could be better met. Following each principle and guideline are specific references to the local rules that support the concept from the Act or the recommendation made by the Advisory Group if additional changes are needed.

[24]Effective June 1, 1992.

## a. PRINCIPLES AND GUIDELINES OF LITIGATION MANAGEMENT[25]

1. Systematic and differential treatment of cases tailored to case complexity and judicial resources available (473(a)(1)).

| | |
|---|---|
| D.C.COLO.LR 16.1 | D.C.COLO.LR 40.3 |
| D.C.COLO.LR 16.2 | D.C.COLO.LR 72.1 |
| D.C.COLO.LR 29.1 | D.C.COLO.LR 72.4 |
| D.C.COLO.LR 40.1 | |

RECOMMENDATION NUMBER 8

**The Court should use a Differentiated Case Manager from within existing staff to develop and implement a pilot program with one or more judges and magistrate judges to recommend to the judges methods by which cases might be focused or streamlined and whether a case is suitable for disposition through ADR techniques. The pilot program should include measures by which to determine its effectiveness and a sunset provision.**

2. Early and ongoing judicial intervention (473(a)(2)(A)).

| | |
|---|---|
| D.C.COLO.LR 7.1A | D.C.COLO.LR 30.1C |
| D.C.COLO.LR 7.1M | D.C.COLO.LR 40.3 |
| D.C.COLO.LR 16.1 | D.C.COLO.LR 72.1 |
| D.C.COLO.LR 16.2A | |

RECOMMENDATION NUMBER 3

**The Local Rules of the District of Colorado should be modified to provide that a final pretrial conference be held not more than 60 days and not less than 30 days prior to trial. All motions, except evidentiary motions in limine, must be filed at least thirty (30) days before the date of the final pretrial conference and must be ruled on before or at the final pretrial conference.**

[25]Recommendations listed out of numerical sequence have appeared earlier in the report.

**RECOMMENDATION NUMBER 13**

**The Court should continue to assume early and ongoing control of the pretrial process through the involvement of a judicial officer in setting deadlines for filing motions, at the earliest practicable time.**

3. Setting early and firm trial dates. Careful case management by a judicial officer, including preparation of a discovery schedule and exploration of bifurcation of issues of discovery (473(a)(2)(B)).

| | |
|---|---|
| D.C.COLO.LR 16.1 | D.C.COLO.LR 29.1 |
| D.C.COLO.LR 16.2A | D.C.COLO.LR 40.3 |

4. Control of discovery (473(a)(2)(C)).

| | |
|---|---|
| D.C.COLO.LR 16.1 | D.C.COLO.LR 30.1B |
| D.C.COLO.LR 16.2A | D.C.COLO.LR 30.1C |
| D.C.COLO.LR 29.1 | D.C.COLO.LR 37.2 |
| D.C.COLO.LR 30.1A | |

5. Controlling motion practice. Motions should be filed only after counsel have certified a good faith effort to resolve the issue (473(a)(2)(D),(3)(D)).

| | |
|---|---|
| D.C.COLO.LR 7.1 [ALL] | D.C.COLO.LR 7.1A [SPECIFICALLY] |

6. Alternative means of dispute resolution, including settlement (473(a)(3)(A)), (473(a)(6)), (473(b)(4)).

| | |
|---|---|
| D.C.COLO.LR 16.1 | D.C.COLO.LR 53.2 |

**RECOMMENDATION NUMBER 7**

**The Local Rules of the District of Colorado should be modified to require that the parties file, no later than the first Rule 16 conference, stipulations or individual written statements as to their plan for use of alternative dispute resolution (ADR) techniques or the reasons why they believe such techniques are inappropriate in their case.**

**RECOMMENDATION NUMBER 14**

**The Local Rules of the District of Colorado (D.C.COLO LR 29.1) should be modified to provide that each party, including state and federal governmental agencies, must be represented by a person with the authority to bind such party as to all issues previously identified for discussion at each hearing or conference.**

7. Final pretrial conferences.
   D.C.COLO.LR 16.1 D.C.COLO.LR 16.2

**RECOMMENDATION NUMBER 3**

**The Local Rules of the District of Colorado should be modified to provide that a final pretrial conference be held not more than 60 days and not less than 30 days prior to trial. All motions, except evidentiary motions in limine, must be filed at least thirty (30) days before the date of the final pretrial conference and must be ruled on before or at the final pretrial conference.**

## b. LITIGATION MANAGEMENT TECHNIQUES AND COST AND DELAY REDUCTION TECHNIQUES

**(§ 473(b))**

1. Joint discovery plans presented at the initial pretrial conference.
   D.C.COLO.LR 16.1 D.C.COLO.LR 29.1
   D.C.COLO.LR 16.2A D.C.COLO.LR Appendix A

2. Each party must be represented by an attorney who has the authority to bind them as to all issues previously identified for discussion at each conference.

RECOMMENDATION NUMBER 14

**The Local Rules of the District of Colorado (D.C.COLO LR 29.1) should be modified to provide that each party, including state and federal governmental agencies, must be represented by a person with the authority to bind such party as to all issues previously identified for discussion at each hearing or conference.**

3. All requests for extensions of time must by signed by the party and his or her attorney.

   The Advisory Group believes the goal of client involvement in the request for an extension of time has been met by D.C.COLO.LR 7.1C, "...proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all pro se litigants".

4. A neutral evaluation program at a nonbinding conference conducted early in the litigation.

RECOMMENDATION NUMBER 15

**The Local Rules of the District of Colorado (D.C.COLO. LR 53.2) should be modified to provide that (additions in capital letters), "At any stage of the proceedings, on a district judge's motion or pursuant to motion or stipulation of counsel, a district judge may direct the parties to a suit to engage in an EARLY NEUTRAL EVALUATION, AN early settlement conference or other alternative dispute resolution proceeding. To facilitate settlement or resolution of the suit, the judge may stay the action in whole or in part during a time certain or until further order. Relief from an order under this section may be had upon motion showing good cause."**

5. Presence of decision makers at settlement conference.

**RECOMMENDATION NUMBER 16[26]**

**The Local Rules of the District of Colorado should be modified to provide that the Court shall require the presence of the parties at any settlement conference conducted under the auspices of the Court. The only exception to this requirement shall permit parties who reside outside the District of Colorado to participate in the settlement conference by telephone if, at least ten days prior to such conference, such party has made a showing that presence at the conference would create an undue financial hardship for such party. If the party is a corporation, governmental agency, association or other entity, such party shall be represented at the settlement conference by a person with the authority to bind such party to a settlement agreement.**

## 5. CLARIFICATION OF PROCEDURES GOVERNING CASES FROM BANKRUPTCY COURT TO DISTRICT COURT

The complex relationship between the bankruptcy courts and the district courts, coupled with the dramatic increase in bankruptcy case filings and proceedings in recent years, creates the need for clearly articulated procedures governing the submission of bankruptcy matters to the district judges.

All but the most experienced bankruptcy practitioners are confused by the lack of procedural guidelines for submitting motions for withdrawal of reference, requests for review

[26]The United States Attorney has asked that his strong objection to making this rule applicable to the United States be recorded.

of findings of facts and conclusions of law in non-core matters, review of contempt orders, and other matters which draw the district court into the bankruptcy process.

At the present time, the minimal guidance which does exist is scattered among several procedural orders of the Court, is difficult to find, and is incomplete. Consultations by Advisory Group members with the bankruptcy judges, the Clerk of the Bankruptcy Court, and members of the bankruptcy subcommittee of the Colorado Bar Association, all indicate strong support for additional local rules of the Court which could serve as a "road map" to practitioners. Such additional rules could help assure that bankruptcy litigants seeking to exercise their rights before the district court are not subject to undue delay or unnecessary cost due to procedural uncertainties. Included as Appendix D to this report are proposed local rules recommended for adoption by the Court.

Bankruptcy cases frequently involve and include numerous administrative and adversary proceedings on different issues. Appeals of such proceedings, as well as motions to withdraw reference, to review certain types of orders and other matters, often are brought before the district court while the underlying cases and other proceedings continue before the bankruptcy court.

Especially in business reorganization cases, a matter which is pending before the district court may have a significant influence on the direction or outcome of the underlying case or other proceedings still before the bankruptcy court. Even "timely" treatment of such a matter before the district court, as measured by ordinary standards, could cause delays in the underlying case which have a profoundly negative impact on the entire bankruptcy estate. An early status conference would enable the district court to be promptly apprised

of the nature of the matter before it and its potential impact on the underlying case. With this information, the district court could better assess the relative urgency of the requested review and to schedule accordingly.

RECOMMENDATION NUMBER 17

**The Court should adopt and place rules pertaining to bankruptcy matters in a separate Article or Appendix of the Local Rules. At a minimum, these rules should address withdrawal of reference, findings of fact and conclusions of law in non-core proceedings, bankruptcy appeals, and general administrative procedures. The Local Rules should reflect a systematic method of handling matters between the District Court and Bankruptcy Court.**

RECOMMENDATION NUMBER 18

**The Local Rules of the District of Colorado should be modified to provide that the Court hold a status conference, if requested by one or more parties, for any bankruptcy matters brought to the District Court from the Bankruptcy Court (whether on appeal or otherwise), within fifteen days of receipt of the Bankruptcy Court file, to determine the nature of the matter and its potential impact on the underlying case or other proceedings still before the Bankruptcy Court.**

## D. EXTERNAL CAUSES OF EXCESSIVE COST AND DELAY IMPACTING THE DISTRICT OF COLORADO

### 1. EXAMINING THE IMPACT OF LEGISLATION ON COST AND DELAY

The Act instructs each Advisory Group to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." [Sec. 472 (c)(1)(D)]. It is obvious, of course, that the relationship between legislative actions and judicial burdens is direct and intense. If, for example, the Congress were to abolish diversity of citizenship jurisdiction or to enact any of the numerous proposals to restrict habeas corpus jurisdiction, the caseload in this district would be significantly reduced. If, on the other hand, anything like the recently considered (and rejected) Violent Crime Control Act -- which would have massively increased the federal criminal jurisdiction -- were to become law, the docket of this district would likely become completely unmanageable. It is also true that ambiguity, sometimes even studied ambiguity, has always marked the legislative process. Charles Sumner characterized the fourteenth amendment itself as like a "sign on a highway with different inscriptions on each side, so that those approaching ... from different directions necessarily read it differently." These sorts of continuing interplays between legislative and judicial authority will, no doubt, always be with us. Still, several particular pressures presented by legislative enactments should be highlighted.

First, it is likely that Congress has too infrequently realized the impact that new statutory regimes will visit upon the federal judiciary. On the civil side, relatively recent enactments like the Civil Rights Restoration Act, the Americans with Disabilities Act, the Fair Debt Collection Practices Act, the Immigration Reform and Control Act, are presumably

producing intended substantive consequences, but they will also significantly increase the workload of the federal courts. The practice of criminal law in the federal courts, on the other hand, has been affected in a substantial way by the Sentencing Reform Act of 1984. The implementation of federal sentencing guidelines has required a far more detailed and formalized sentencing determination in criminal cases -- even after the filing of a guilty plea. Under the statute's strictures, criminal defendants have also apparently become less inclined to plea bargain. The judicial time, effort, and energy required to deal with the already substantial criminal docket will, as a result, be augmented. It is not clear that Congress realized the effect that these sorts of policy choices will have on the ability of federal courts to manage their civil caseloads. The information provided by a "better assessment of the impact of new legislation on the courts" will be essential to the proper and efficient functioning of the federal judiciary.

Second, the frequent absence of precision in the drafting of new statutory provisions, statutes of limitation, and limits on jurisdiction works to spawn unnecessary litigation. The courts, for example, have been repeatedly required to determine whether new federal statutory regimes create independent causes of action. Karahalios v. National Federation of Federal Employees, 489 U.S. 527 (1989) and Franklin v. Gwinnett County Public Schools, 60 L.Wk. 4167 (1992) are recent examples of Supreme Court determinations. The appropriate limitations period to be applied in sec. 10(b)(5) securities actions was litigated in the federal courts for years before the question was finally resolved by the Supreme Court in Lampf v. Gilbertson, 115 S.Ct. 321 (1991). And, most pointedly, the Civil Rights Restoration Act of 1990 left intentionally unresolved the important question of retroactive

application. Federal courts have since struggled with the ambiguity, and reached conflicting results. In all these instances, the costs and delay inherent in litigating these issues through the district court and the court of appeals, before resolution by the Supreme Court, are or will be formidable. More straightforward legislative determinations in such instances would obviously ease the burdens placed on the federal courts.

RECOMMENDATION NUMBER 19

**Congress should draft legislation with more precision to avoid litigation-causing errors or omissions. Statutory ambiguity, and failure to address threshold issues such as retroactivity, statutes of limitations, or jurisdictional limits, spawn unnecessary litigation.**

RECOMMENDATION NUMBER 20

**Congress should expand resources available to the judiciary when creating additional areas of federal jurisdiction that will increase the workload of the federal courts.**

## 2. IMPACT OF EXECUTIVE BRANCH ACTION ON EXCESSIVE COST AND DELAY

Focus of the impact of the executive branch is limited to two areas in this report. Factors contributing to cost and delay were judicial vacancies and the ability of executive branch's attorney to make decisions at various stages of litigation.

In 1992, the President issued an executive order[27] implementing "Civil Justice Reform" plan designed to achieve swifter justice and reducing the costs of litigation. A major component of the plan is dispute resolution. Litigation counsel are directed to make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial. Other aspects of the executive order include discovery reform and notice of complaint. Under notice of complaint, the parties would be notified, where appropriate, whom the United States intends to sue, informing them of the nature of the dispute, before filing suit.

A recurring problem stated by attorneys and litigants is the lack of authority of the counsel representing the United States government during pre-trial events, such as settlement conferences.

The second area of executive branch involvement is the filling of judicial vacancies. The Advisory Group believes that additional judges are necessary for the District of Colorado to respond adequately to the increasing civil and criminal caseload. The Court's past experience with judicial vacancies (Table 1, page 16) is a pattern that creates concern. For four years, there were two vacancies; one judgeship remained vacant for two additional years. Such a shortage takes a toll on the judges serving on the bench. It is a disadvantage that can be remedied by executive branch action. According to the American Bar Association's ABA Journal, the number of days from vacancy to nomination has averaged more than 300 during the last three years and the average number of days from nomination to confirmation has risen from 30 and 40 in the early 1980s to a high of 139.[28]

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[27]Executive Order No. 12778, 56 Fed. Reg. 55,195 (October 23, 1991).

[28]Reske, H.J. (1993, January). Molding the courts. ABA Journal, p. 20.

RECOMMENDATION NUMBER 21

**The executive branch should evaluate the effectiveness of and work towards further implementation of the executive order encouraging use of expeditious dispute resolution methods in cases involving the United States.**

RECOMMENDATION NUMBER 22

**The executive branch should nominate candidates for judicial vacancies in a timely manner and the Senate should act promptly on such nominations.**

After reviewing the increasing number of civil and criminal filings, considering the complexity of the types of cases filed, and understanding the implication of the loss of a senior judge to the management of the case load allocated to the judges of the District of Colorado, the Advisory Group makes the following recommendation to the Court:

RECOMMENDATION NUMBER 23

**The Court should request additional judgeships to meet the demands created by the sharp increase of complex civil and criminal cases.**

## APPENDIX A MEMBERSHIP OF THE ADVISORY GROUP

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# APPENDIX B-1

## 1992 FEDERAL COURT MANAGEMENT STATISTICS PROFILE
## U.S. District Court-- Judicial Workload Profile
## District of Colorado

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

| | COLORADO | | TWELVE MONTH PERIOD ENDED JUNE 30 | | | | | | NUMERICAL STANDING WITHIN U.S. CIRCUIT | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | 1992 | 1991 | 1990 | 1989 | 1988 | 1987 | | |
| OVERALL WORKLOAD STATISTICS | Filings* | | 2,900 | 2,397 | 2,667 | 2,630 | 2,471 | 2,517 | | |
| | Terminations | | 2,450 | 2,670 | 2,643 | 2,493 | 2,434 | 2,837 | | |
| | Pending | | 2,461 | 2,030 | 2,318 | 2,292 | 2,156 | 2,119 | | |
| | Percent Change In Total Filings Current Year | Over Last Year... | | 21.0 | | | | | 11 | 1 |
| | | Over Earlier Years... | | | 8.7 | 10.3 | 17.4 | 15.2 | 15 | 1 |
| | Number of Judgeships | | 7 | 7 | 7 | 7 | 7 | 7 | | |
| | Vacant Judgeship Months | | .0 | .0 | 15.1 | 28.7 | 26.7 | 24.0 | | |
| ACTIONS PER JUDGESHIP | FILINGS | Total | 414 | 342 | 381 | 376 | 353 | 360 | 35 | 2 |
| | | Civil | 363 | 298 | 336 | 332 | 312 | 321 | 34 | 3 |
| | | Criminal Felony | 51 | 44 | 45 | 44 | 41 | 39 | 45 | 3 |
| | Pending Cases | | 352 | 290 | 331 | 327 | 308 | 303 | 59 | 4 |
| | Weighted Filings** | | 476 | 371 | 423 | 433 | 433 | 405 | 9 | 1 |
| | Terminations | | 350 | 381 | 378 | 356 | 348 | 405 | 69 | 6 |
| | Trials Completed | | 38 | 38 | 31 | 38 | 33 | 42 | 25 | 2 |
| MEDIAN TIMES (MONTHS) | From Filing to Disposition | Criminal Felony | 4.2 | 4.2 | 3.8 | 3.7 | 3.7 | 3.5 | 10 | 3 |
| | | Civil** | 8 | 8 | 9 | 8 | 8 | 9 | 15 | 3 |
| | From Issue to Trial (Civil Only) | | 15 | 18 | 17 | 20 | 16 | 16 | 40 | 6 |
| OTHER | Number and % of Civil Cases Over 3 Years Old | | 107<br>4.9 | 108<br>6.0 | 138<br>6.5 | 152<br>7.2 | 141<br>7.1 | 117<br>5.9 | 35 | 6 |
| | Average Number of Felony Defendants Filed per Case | | 1.5 | 1.7 | 1.4 | 1.3 | 1.4 | 1.4 | | |
| | Jurors | Avg Present for Jury Selection | 33.49 | 30.06 | 26.46 | 23.82 | 31.17 | 23.64 | 40 | 5 |
| | | Percent Not Selected or Challenged | 47.1 | 39.7 | 29.4 | 21.9 | 35.7 | 25.9 | 91 | 8 |

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

| 1992 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Type of | TOTAL | A | B | C | D | E | F | G | H | I | J | K | L |
| Civil | 2538 | 34 | 131 | 477 | 98 | 53 | 166 | 359 | 333 | 67 | 411 | 9 | 400 |
| Criminal* | 343 | 19 | 15 | 27 | 9 | 19 | 31 | 76 | 9 | 83 | 5 | 28 | 22 |

* Filings in the Overall Workload Statistics section include criminal transfers, while filings by nature of offense do not.
**See Page 167

**APPENDIX B-2**

## CIVIL FILINGS BY NATURE OF SUITS
## U.S. DISTRICT COURT
## DISTRICT OF COLORADO
## 1983 - 1992

| Statistical Year | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 |
|---|---|---|---|---|---|---|---|---|---|---|
| Nature of Suit | | | | | | | | | | |
| Social Security | 69 | 82 | 53 | 33 | 25 | 45 | 34 | 26 | 35 | 34 |
| Recovery of Overpayments/Enforcement of Judgments | 94 | 351 | 547 | 262 | 173 | 56 | 139 | 115 | 89 | 131 |
| Prisoner Petitions | 250 | 251 | 215 | 244 | 278 | 265 | 299 | 404 | 431 | 477 |
| Forfeitures/Penalties/ Tax Suits | 97 | 114 | 102 | 70 | 71 | 74 | 77 | 74 | 114 | 98 |
| Real Property | 82 | 49 | 55 | 63 | 64 | 47 | 47 | 51 | 25 | 53 |
| Labor Suits | 199 | 174 | 119 | 179 | 149 | 175 | 131 | 162 | 114 | 166 |
| Contracts | 568 | 682 | 648 | 518 | 548 | 466 | 512 | 455 | 291 | 359 |
| Torts | 355 | 377 | 349 | 444 | 246 | 320 | 316 | 271 | 256 | 333 |
| Copyright/Patent/ Trademark | 81 | 80 | 69 | 85 | 58 | 89 | 56 | 106 | 61 | 67 |
| Civil Rights | 274 | 293 | 292 | 392 | 299 | 304 | 321 | 290 | 295 | 411 |
| Antitrust | 21 | 27 | 22 | 12 | 10 | 7 | 10 | 13 | 10 | 9 |
| All Other Civil | 282 | 252 | 341 | 308 | 328 | 333 | 380 | 388 | 362 | 400 |
| **Total Civil Filings** | **2372** | **2732** | **2818** | **2610** | **2249** | **2181** | **2322** | **2355** | **2083** | **2538** |
| Total of All Filings | 2653 | 2959 | 3066 | 2844 | 2517 | 2471 | 2630 | 2667 | 2397 | 2900 |

**APPENDIX B-3**

## CRIMINAL FELONY FILINGS BY NATURE OF OFFENSE
## U.S. DISTRICT COURT
## DISTRICT OF COLORADO
## 1983 - 1992

| Statistical Year | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 |
|---|---|---|---|---|---|---|---|---|---|---|
| Nature of Offense | | | | | | | | | | |
| Immigration | 17 | 12 | 8 | 11 | 7 | 2 | 10 | 10 | 11 | 19 |
| Embezzlement | 35 | 12 | 14 | 21 | 25 | 13 | 11 | 17 | 14 | 15 |
| Auto Theft | 3 | 2 | 2 | 1 | 1 | 1 | 2 | 55 | 39 | 27 |
| Weapons/ Firearms | 14 | 18 | 23 | 20 | 33 | 26 | 32 | 7 | 0 | 9 |
| Escape | 5 | 8 | 7 | 2 | 8 | 8 | 8 | 13 | 15 | 19 |
| Burglary/ Larceny | 34 | 22 | 18 | 24 | 14 | 27 | 14 | 21 | 37 | 31 |
| Marihuana/ Controlled Substances | 10 | 17 | 17 | 12 | 5 | 15 | 21 | 47 | 50 | 76 |
| Narcotics | 17 | 17 | 28 | 34 | 36 | 53 | 68 | 1 | 6 | 9 |
| Forgery/ Counterfeiting | 20 | 16 | 12 | 10 | 16 | 11 | 10 | 84 | 80 | 83 |
| Fraud | 60 | 42 | 61 | 47 | 62 | 64 | 69 | 1 | 7 | 5 |
| Homicide/ Robbery/ Assault | 23 | 18 | 18 | 13 | 25 | 28 | 21 | 16 | 14 | 28 |
| All Other Criminal Felony | 22 | 31 | 34 | 22 | 17 | 30 | 29 | 29 | 26 | 22 |
| **Total Criminal Felony Filings*** | **260** | **215** | **242** | **217** | **249** | **278** | **295** | **301** | **299** | **343** |
| Total of All Filings | 2653 | 2959 | 3066 | 2844 | 2517 | 2471 | 2630 | 2667 | 2397 | 2900 |

*Felony filings do not include criminal felony transfers.

**APPENDIX C**

## ALTERNATIVE DISPUTE RESOLUTION
## DESCRIPTION OF TECHNIQUES

NEGOTIATION:

Parties, directly or indirectly, attempt to reach joint settlement.

MEDIATION:

Mediator(s) assist parties in negotiations and facilitate settlement.

SETTLEMENT CONFERENCE:

Neutral(s) perform case evaluation and advise as to probable result; assist in negotiations.

EARLY NEUTRAL EVALUATION:

Evaluator narrows case issues, assists with discovery plan, case management and settlement.

MINI-TRIAL:

Panel hears summary case presentation; neutral panel member may assist parties with settlement negotiations.

SUMMARY JURY TRIAL:

Voluntary or paid jury hears summary case presentations and issues non-binding decision.

ARBITRATION:

Arbitrator(s) with subject matter expertise preside over case presentation and issue a non-binding or binding opinion subject to limited right of court review.

Source: Manual on Alternative Dispute Resolution published by the Alternative Dispute Resolution Committee of the Colorado Bar Association, 1992.

APPENDIX D

**PROPOSED LOCAL RULES**

**OF THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLORADO**

**PERTAINING TO BANKRUPTCY MATTERS**

Rule _____ Reference

A. Pursuant to 28 U.S.C. § 157(a), all cases under title 11 United States Code, and all proceedings arising under title 11 or arising in or related to a case under title 11, shall be referred automatically to the bankruptcy judges for this district without further order, and the bankruptcy judges for this district shall exercise jurisdiction in all bankruptcy matters as provided in 28 U.S.C. § 157(b)-(c).

B. The bankruptcy judges of this district are authorized to make and amend rules of practice and procedure in all cases and proceedings before the bankruptcy court, subject to review and approval by this court.

C. All papers in cases and proceedings referred to the bankruptcy judges shall be filed in the bankruptcy court. Any such papers filed in this court shall be transmitted to the bankruptcy court.

Rule _____ Withdrawal of Reference

A. A motion to withdraw the reference of a bankruptcy case or proceeding pursuant to 28 U.S.C. § 157(d) shall use the caption of the bankruptcy court and shall be filed with the clerk of the bankruptcy court. The clerk of the bankruptcy court shall transmit the motion, together with such copies of the record and transcript as the bankruptcy court may order to this court for determination.

B. A motion to withdraw the reference of a bankruptcy proceeding shall contain a statement as to whether the bankruptcy court has made a determination of the core or non-core nature of the proceeding. If the bankruptcy court has made such a determination, the motion to withdraw the reference shall include a copy of the bankruptcy court's order pursuant to 28 U.S.C. § 157(b)(3) as an exhibit. If the bankruptcy court has not made such a determination, the motion to withdraw the reference shall state whether, to the movant's best knowledge and belief, there is any dispute among the parties as to the core or non-core nature of the proceeding.

C. A complaint setting forth a personal injury tort or wrongful death claim arising in or related to a title 11 case filed in this district shall use the bankruptcy court caption and shall be filed with the clerk of the bankruptcy court, but the jurisdictional allegations of such complaint shall include a clear statement that the claim is based on 28 U.S.C. § 157(b)(5). Upon review of the complaint, if the bankruptcy judge believes the claim to be based on 28 U.S.C. § 157(b)(5), the bankruptcy judge shall enter a recommendation for an order that the matter be tried in this court, and the clerk of the bankruptcy court shall transmit such recommendation to this court and mail copies to all parties to the proceeding. If this court approves the bankruptcy court's recommendation, its order shall indicate whether the proceeding is to be tried in this court or in the district court in the district in which the claim arose.

D. Any motion seeking a stay of a case or proceeding pending determination of a motion for withdrawal of reference shall be presented first to the bankruptcy court.

E. The bankruptcy court may, on its own motion, recommend withdrawal of the reference of a case or proceeding before it.

F. Upon entry of an order withdrawing reference, the clerk of this court shall forthwith provide a conformed copy of the order to the clerk of the bankruptcy court.

G. Upon receipt of a copy of an order withdrawing reference of a case or proceeding, the clerk of the bankruptcy court shall transmit the original file of such case or proceeding to the clerk of this court, and shall retain only a copy of the order withdrawing reference and a copy of the docket in the bankruptcy court's file.

H. After entry of an order withdrawing reference of a bankruptcy case or proceeding, all papers filed in the case or proceeding so withdrawn shall be filed in this court. Any such papers filed in the bankruptcy court shall be transmitted to this court.

Rule _____ Proposed Findings of Fact and Conclusions of Law in Non Core Proceedings

A. All proceedings pursuant to 28 U.S.C. § 157(c)(1) shall be conducted in accordance with Rule 9033 of the Federal Rules of Bankruptcy Procedure.

B. After expiration of all applicable periods for filing written objections or responses to objections to the bankruptcy

judge's proposed findings of fact and conclusions of law, the clerk of the bankruptcy court shall promptly transmit the proposed findings and conclusions, objections, responses, and appropriate portions of the record to the clerk of this court. Any subsequent proceedings and filings with regard to the § 157(c)(1) matter shall take place in this court.

Rule _____ Bankruptcy Appeals

A. Procedures for appeals of final judgments, orders, and decrees, and, with leave of this court, from interlocutory orders and decrees, of bankruptcy judges pursuant to 28 U.S.C. § 158(a) are set forth in Part VIII of the Federal Rules of Bankruptcy Procedure and in the local rules of the bankruptcy court.

B. Parties to a bankruptcy appeal shall not designate or include briefs, memoranda, or points of authority in the record on appeal; such items may only be included in the record on appeal by order or directive of this court.

C. Any motion seeking a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal shall be presented first to the bankruptcy court.

Rule _____ Administrative Procedures

A. The chief judge of this court shall assign one or more district judges to preside over bankruptcy administration, and all matters arising under these local rules or under the Bankruptcy Code which pertain to bankruptcy administration shall be referred by the clerk of this court directly to the judge or judges so assigned. If the judge to whom a matter is referred determines that the matter presents an issue which must be tried in this court, the judge may order the assignment of the matter by the clerk in accordance with the local rules of this court.

**APPENDIX E**

**(a)CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS. - Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:**

## CHAPTER 23 - CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

Sec.



### § 471. Requirement for a district court civil justice expense and delay reduction plan

There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

### § 472. Development and implementation of a civil justice expense and delay reduction plan

(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include--

(1) an assessment of the matters referred to in subsection (c)(1);

(2) the basis for its recommendation that the district court develop a plan or select a model plan;

(3) recommended measures, rules and programs; and

(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

(c)(1) In developing its recommendations, the advisory group of a district court shall

promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall–

(A) determine the condition of the civil and criminal dockets;

(B) identify trends in case filings and in the demands being placed on the court's resources;

(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and

(D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to--

(1) the Director of the Administrative Office of the United States Courts;

(2) the judicial council of the circuit in which the district court is located; and

(3) the chief judge of each of the other United States district courts located in such circuit.

**§ 473. Content of civil justice expense and delay reduction plans**

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in--

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that--

(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

(ii) the trial cannot reasonably be held within such time because of the

complexity of the case or the number or complexity of pending criminal cases;

(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

(D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer--

(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to--

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery into two or more stages; and

(D) sets, at the earliest practicable time, deadlines for filing motions and ~~a~~ time framework for their disposition;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs that--

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary jury trial.

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an

attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial by signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

**§ 474. Review of district court action**

(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee--

(A) review each plan and report submitted pursuant to section 472(d) of this title; and

(B) make such suggestions for additional actions or modified actions of that of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to preform the chief judge's responsibilities under paragraph (1) of this subsection.

(b) The Judicial Conference of the United States--

(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

**§ 475. Periodic district court assessment**

After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the

court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

**§ 476. Enhancement of judicial information dissemination**

(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer–

(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

(3) the number and names of cases that have not been terminated within three years after filing.

(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

**§ 477. Model civil justice expense and delay reduction plan**

(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts, pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice expense and delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

**§ 478. Advisory groups**

(a) Within ninety days after the date of enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely be reason of service on or for the advisory group, be prohibited from practicing law before such court.

**§ 479. Information on litigation management and cost and delay reduction**

(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committee on the Judiciary of the Senate and the House of Representatives.

(b) The Judicial Conference of the United States shall, on a continuing basis--

(1) study ways to improve litigation management and dispute resolution services in the district courts; and

(2) make recommendations to the district courts on ways to improve such services.

(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration program conducted under section 104 of the Civil Justice Reform Act of 1990, and the pilot program conducted under section 105 of the Civil Justice Reform Act of 1990.

(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

**§ 480. Training programs**

The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and

training programs to ensure that all judicial officers, clerks of court, courtroom deputies, and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

**§ 481. Automated case information**

(a)The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

(b)(1) In carrying out subsection (a), the Director shall prescribe--

(A) the information to be recorded in district court automated systems; and

(B) standards for uniform categorization or characterization of judicial actions in the district court automated systems.

(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

**§ 482. Definitions**

As used in this chapter, the term "judicial officer" means a United States district court judge or a United States magistrate.

(b) IMPLEMENTATION.--(1) Except as provided in section 105 of this Act, each United States district court shall, within three years after the date of the enactment of this title, implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

(c) EARLY IMPLEMENTATION DISTRICT COURTS.--

(1) Any United States district court that, no earlier than June 30, 1991, and no later than December 31, 1991, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a).

(3) Within 18 months after the date of the enactment of this title, the Judicial

Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives--

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such district courts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.- The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof the following:

**"23. Civil Justice expense and delay reduction plans.....471"**

**SEC. 104. DEMONSTRATION PROGRAM.**

(a) IN GENERAL--(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.--(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.--The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.--Not later than December 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

**SEC. 105. PILOT PROGRAM.**

(a) IN GENERAL--(1) During the 4-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a pilot program in accordance with

subsection (b).

(2) A district court participating in the pilot program shall be designated as an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENTS.--(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 23 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. In addition to complying with all other applicable provisions of chapter 23 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(2) At least 5 of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas.

(3) The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

(c) PROGRAM STUDY REPORT.--(1) Not later than December 31, 1995, the Judicial Conference shall submit to the Committees on the Judiciary of the Senate and House of Representatives a report on the results of the pilot program under this section that includes an assessment of the extent to which costs and delays were reduced as a result of the program. The report shall compare those results to the impact on costs and delays in ten comparable judicial districts for which the application of section 473(a) of title 28, United States Code, had been discretionary. That comparison shall be based on a study conducted by an independent organization with expertise in the area of Federal court management.

(2)(A) The Judicial Conference shall include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

(B) If the Judicial Conference recommends in its report that some or all district courts be required to include such principles and guidelines in their expense and delay reduction plans, the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation, pursuant to chapter 131 of title 28, United States Code.

(C) If in its report the Judicial Conference does not recommend an expansion of the pilot program under subparagraph (A), the Judicial Conference shall identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendation, pursuant of chapter 131 of title 28, United States Code.

**SEC. 106. AUTHORIZATION**

(a) EARLY IMPLEMENTATION DISTRICT COURTS.–There is authorized to be appropriated not more than $15,000,000 for fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.–There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.–There is authorized to be appropriated not more than $5,000,000 for fiscal year 1991 to carry out the provisions of section 104.

# UNITED STATES DISTRICT COURT

# DISTRICT OF COLORADO

# CIVIL JUSTICE REFORM ACT

# EXPENSE AND DELAY REDUCTION PLAN

NOVEMBER 1993

## Preface

The United States District Court for the District of Colorado has adopted and implemented, effective immediately, an expense and delay reduction plan in accordance with the Civil Justice Reform Act of 1990 (the "Act"). The plan has been developed by the court to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes. The plan is based on the Local Rules which became effective June 1, 1992.[1] These rules were written after considering public comment and with participation of the Advisory Group. This court's compliance with the requirements of the Civil Justice Reform Act and responses to the recommendations of the advisory group have been made with a recognition of the importance of the primary mission -- the fair trial of both civil and criminal cases using the fundamental principles of the adversary system inherent in the constitutional protection of due process of law. While case management techniques are necessary, they must not be applied to require the sacrifice of the right to a full and fair hearing. Cases require individual consideration -- custom tailoring, not mass production.

The court does not have the power to block access to the litigation process, including jury trial, in the name of efficiency. Accordingly, any alternative dispute resolution technique must be used only with the informed voluntary consent of the parties.

[1] A summary of the Rules is found in APPENDIX A.

Moreover, the public interest and the mandate of the Speedy Trial Act require that priority be given to criminal proceedings. Currently, the strain on judicial resources caused by the criminal caseload prevents the court from adopting rules requiring disposition of motions and trial of civil cases within any set periods of time as recommended by the advisory group.

**Content of the Civil Justice Expense and Delay Reduction Plan**

In formulating its plan, the court, in consultation with the CJRA Advisory Group, considered each of the principles and guidelines of litigation management and cost and delay reduction techniques set forth in the Act (28 U.S.C. § 473). The Advisory Group analyzed the Local Rules in the context of the principles, guidelines and techniques of the Act and made new recommendations which the court considered.[2] The court found the Advisory Group's assessment very helpful in formulating its plan.

The court's plan corresponds to the Act's principles and guidelines of litigation management (28 U.S.C. § 473(a)) followed by the litigation management and cost and delay reduction techniques (28 U.S.C. § 473(b)) presented in the statute.[3] The District of Colorado's Local Rules of Practice are the key components of the court's plan.

[2]The court's responses to the Advisory Group's recommendations are found in APPENDIX D.

[3]A summary of the CJRA statutory provisions corresponding to sections of the Plan is found in APPENDIX C.

## THE PLAN

Section I.

Civil case management shall be tailored to the complexity of the particular case. Uniform pretrial orders (D.C.COLO.LR 16.1)[4] and scheduling orders (D.C.COLO.LR 16.2(B)) provide case management tools for all cases. Discovery is managed at a level appropriate to the needs of the individual case (D.C.COLO.LR 29.1). Assignment of cases (D.C.COLO.LR 40.1) is done randomly, while reviewing workloads to assure that litigants are not affected adversely. Selected cases may be expedited by the assigned judge sua sponte or on motion of any party (D.C.COLO.LR 40.3). Case management is further enhanced by the magistrate judges through their ability to handle criminal proceedings and their pairing with designated district judges in processing civil cases (D.C.COLO.LR 72.1).

Section II.

Early and on-going judicial control of the pretrial process shall be reinforced by the scheduling conference held within forty-five days[5] after a defendant enters a court appearance. The attorneys who will be responsible for the case through pretrial and trial shall attend the conference and be prepared to address all matters related to discovery, motions, settlement conferences, and all other aspects of the litigation. All attorneys must meet in advance and attempt in good faith to agree on a proposed

[4]This refers to the Local Rules of Practice; this and other rules are found in APPENDIX B.

[5]The time limits here provided may be affected by changes in the Fed. R. Civ. P.

scheduling order. If counsel cannot agree on certain points, they shall submit a proposed order setting forth those items agreed upon, and each shall separately set forth a proposal on items where there is disagreement. The conference will expedite litigation and promote more active case management by having the trial judge take firm control of the process of the litigation at an early date. The judicial officer presiding will discuss alternative dispute resolution possibilities. Following the conference, the trial judge will enter a scheduling order under will govern the case unless modified by further written order. (D.C.COLO.LR 29.1).

Section III.

Complex and any other special cases require careful, deliberate monitoring through discovery case management conferences. The court may limit the number of depositions, interrogatories, requests for admissions, and requests for production. (D.C.COLO.LR 29.1).

Section IV.

Informal, voluntary discovery is encouraged (D.C.COLO.LR.29.1). Before scheduling any discovery, attorneys must confer in an effort to limit time and expense. This requirement focuses on reducing litigation cost and streamlining the process (D.C.COLO.LR 30.1A).

Section V.

The court, recognizing the possibility of deposition and discovery abuse, has included in its Local Rules an extensive outline of prohibited behavior and activity. Sanctions for abusive conduct will be strictly enforced. (D.C.COLO LR 30.1C).

Section VI.

Attorneys shall confer in good faith to resolve disputed matters prior to filing motions with the court. Except for Motions to Dismiss or for Summary Judgment, attorneys shall, by certification filed concurrently with any motion, specify what efforts have been made to resolve the dispute without court intervention. The court's goal is to foster cooperation among attorneys, minimize the number of motions filed, expedite litigation, and reduce litigation expense. (D.C.COLO.LR 7.1(A)).

Section VII.

The court may order the parties to engage in settlement discussions. To facilitate settlement, the court may call a "time-out period" and stay non-settlement aspects of the action at any stage of the proceedings. By directing early settlement exploration, the court seeks not only to settle cases, but also to reduce discovery and pretrial costs. Settlements reached at the eleventh hour before trial unnecessarily waste resources. If all parties consent, a magistrate judge may conduct a summary jury trial or any other form of alternative dispute resolution procedure.

(D.C.COLO. LR 53.2).

Section VIII.

Counsel for all parties shall meet and attempt to agree on a proposed scheduling order to be filed with the court no later than five days before the conference. The conference will be convened by the judge to whom the case is assigned or a magistrate judge to whom it has been referred. (D.C.COLO.LR 29.1).

Section IX.

Counsel are directed to meet in advance of the pretrial conference and agree on the contents of the proposed pretrial order. Counsel for the plaintiff draft the proposed pretrial order. (D.C.COLO.LR 16.1 and D.C.COLO.LR APPENDIX A.).

Section X.

Any counsel appearing at conferences and hearings are held responsible for and must be authorized to bind their clients on all matters that arise.

Section XI.

Requests for extensions of deadlines for completion of discovery and motions for extension of time shall be signed by the attorney. Proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all pro se litigants must be filed. (D.C.COLO.LR 7.1(C)).

Section XII.

Any judicial officer may require a person with full settlement authority to be present at any hearing or conference.

Section XIII.

The court recognizes the importance of prompt rulings on motions but also recognizes the obligation to apply judicial resources under priorities that are in the public interest.

Section XIV.

Greater coordination and cooperation between state and federal courts shall be promoted by requiring attorneys to list related cases pending in any state or other federal courts. Counsel who removes an action from state court to federal court, after a hearing has been set in the state court, must notify both state and federal judges of the removal. (D.C.COLO.LR 7.1(K), 40.1, AND 81.2).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | General Order 1993 - 4 |
| Civil Justice Reform Act | ) | |
| | ) | |

Pursuant to 28 U.S.C. §§ 472(d), 473, and 474, it is hereby ordered that the District of Colorado's plan be adopted and implemented, and effective immediately.

Dated this 22ND day of NOVEMBER, 1993.

BY THE COURT

Sherman G. Finesilver
Chief Judge

Richard P. Matsch, Judge

John L. Kane, Jr., Judge

Jim R. Carrigan, Judge

Zita L. Weinshienk, Judge

Lewis T. Babcock, Judge

Edward W. Nottingham, Judge

Daniel B. Sparr, Judge

**CERTIFICATE OF MAILING**

I hereby certify that on this 22ND day of NOVEMBER, 1993, I placed a copy of the Civil Justice Reform Act report and plan in the United States mail, to the following:

The Honorable Monroe G. McKay
Chief Judge, Tenth Circuit, U. S. Court of Appeals (1);

The Honorable Patrick F. Kelly
Chief Judge, District of Kansas (1);

The Honorable Juan G. Burciaga
Chief Judge, District of New Mexico (1);

The Honorable Frank H. Seay
Chief Judge, Eastern District of Oklahoma (1);

The Honorable James O. Ellison
Chief Judge, Northern District of Oklahoma (1);

The Honorable Lee R. West
Chief Judge, Western District of Oklahoma (1);

The Honorable David K. Winder
Chief Judge, District of Utah (1);

The Honorable Alan B. Johnson
Chief Judge, District of Wyoming (1);

Judicial Conference's Committee on Court Administration and Case Management (1);

Federal Judicial Center (3);

Administrative Office of the United States Courts (5); and the

West Publishing Company (3).

James R. Manspeaker, Clerk

# APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO
Statement by Sherman G. Finesilver, Chief Judge

New Era of Federal Practice Ushered in by
Revisions to the Local Rules of Practice

In preparation for over two years, the Local Rules of Practice for this Court embody the most up-to-date thinking by experienced federal trial judges, veteran trial attorneys, and law professors. The Rules are innovative in many respects and will serve as a national prototype.

The Rules of Practice include provisions that strengthen the case management responsibility of the trial judge, mandate greater cooperation among attorneys in pretrial fact finding and motions, create a positive settlement atmosphere early in the litigation, and permit the judge to facilitate settlement discussions by calling a "time-out period" that is dedicated exclusively to exploring settlement options. The Rules also provide strong sanctions for abuse of depositions during discovery.

The objectives of the changes are to reduce the costs of litigation, bring cases to trial sooner, and provide an earlier opportunity to explore settlement options. The Rules discourage unnecessary motions and court filings.

Some of the noteworthy provisions are:

- A scheduling or planning conference must be held within forty-five days after a defendant enters a court appearance. At the conference, a blueprint of the entire case will be discussed, provisions for discovery will be addressed, other aspects of the litigation outlined, and an appropriate court order entered. Attorneys must meet

in advance and attempt to agree on a scheduling order. If counsel cannot agree on certain points, areas of disagreement shall be set forth separately in the proposed order. The purpose of this conference is to expedite litigation and promote more active case management by having the trial judge take firm control of the progress of the litigation at an early date. Rule 29.1.

- The judge has the discretion to limit the number of depositions, interrogatories, requests for admissions, and requests for production. In ordinary cases with simple facts, the parties may be limited to taking a modest number of depositions. The judge retains discretion to broaden discovery in more complex cases. Under this approach, attorneys will not have a blank check in taking depositions and litigation costs should be kept under control. Rule 29.1.
- The Court may order the parties to engage in settlement discussions or other alternative dispute resolution techniques. To facilitate settlement, the court may call a "time-out period" and stay other aspects of the action at any stage of the proceedings during this period of exploring settlement options. By directing the parties to explore settlement at an earlier stage in the proceedings, the court has the opportunity not only to settle cases, but also to reduce significantly discovery and pretrial costs and resolve disputes more

expeditiously. Such an approach provides a more attractive alternative in terms of cost and time than settlements reached at the eleventh hour before trial. Rule 53.2.

- Prior to scheduling any depositions, attorneys must confer in an effort to limit the time and expense of taking depositions. Counsel must attempt to agree on less expensive and time-consuming means of obtaining discovery. This requirement forces counsel to focus on reducing the cost of litigation and streamlining the litigation process. Rule 30.1A.
- Sanctions and penalties may be imposed for five types of abusive conduct at depositions: (1) objections that have the effect of coaching or instructing the witness, (2) interrupting the examination for off-the-record conferences, (3) instructing a deponent not to answer a question absent a clear legal basis, (4) filing a motion for protective order without a substantial basis in law, and (5) asking questions that unfairly embarrass, humiliate, intimidate, or harass the deponent, or that invade the privacy of the deponent. The sanctions provision will be treated as a standing order of the court. Whenever it appears that an attorney or party has engaged in abusive conduct, the court may appoint a special master under Fed. R. Civ. P. 53, at the expense of the abusive party, to attend future depositions and exercise such supervisory authority as directed by the

court. This approach promotes cooperation in discovery by providing for a swift and definitive response to discovery abuses. Rule 30.1C.

- Attorneys must confer in good faith to resolve disputed matters prior to filing motions with the court. The Rule does not apply to Motions to Dismiss or for Summary Judgment. By certification filed concurrently with any motion, attorneys must specify what efforts have been made to resolve the dispute without court intervention. This procedure fosters cooperation among attorneys, reduces the number of motions that the court must address, expedites litigation, and reduces the cost of litigation. Rule 7.1A.

- Attorneys must list pending or related cases in state or other federal courts. Counsel who removes an action from state court is required to notify both the state and federal judges of the removal if a hearing has been set in the state court action. These rules are designed to promote greater cooperation between state and federal courts and facilitate the coordination of related cases. Rules 7.1K, 40.1, and 81.2.

- Attorneys and parties are prohibited from orally contacting any judicial officer in person, by telephone, or other means, unless all other parties are present. This rule promotes efficiency by directing all communications through the Clerk's Office and prevents inappropriate ex parte contacts with judges. Rule 77.7.

- The Rules set forth requirements for admission to the bar of the United States District Court for the District of Colorado. Attorneys cannot practice in this federal court unless they are admitted to practice before the Colorado Supreme Court and are members in good standing of every court and jurisdiction where they have been admitted. Attorneys may be admitted to appear in a particular case. Rule 83.5.

By enacting the new Local Rules (which are effective June 1, 1992), the District of Colorado has taken significant strides toward securing the just, speedy, efficient, and inexpensive resolution of all actions. The Local Rules provide a reference for practice in this court and foster a spirit of cooperation among attorneys and between the bench and the bar. The above Rules conform to the spirit of Rule 1 of the Federal Rules of Civil Procedure and recent legislation, such as the Civil Justice Reform Act.

# APPENDIX B

Local Rules of Practice Referenced in the Plan

United States District Court

District of Colorado

D.C.COLO.LR 7.1

MOTIONS

A. The court will not consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party, before filing the motion, has conferred or made reasonable, good faith efforts to confer with opposing counsel to resolve the disputed matter. Counsel for the moving party shall file a certificate describing specifically the efforts to comply with this rule.

B. A motion seeking not more than twenty additional days to answer a complaint may be granted ex parte by the clerk. A motion seeking not more than three additional days in which to: (a) answer or object to interrogatories under Fed. R. Civ. P. 31 and 33; (b) respond to requests for production or inspection under Fed. R. Civ. P. 34; or (c) respond to requests for admission under Fed. R. Civ. P. 36, may be granted ex parte by the clerk. A motion for further extensions of time shall be presented to the court and must describe all previous extensions.

C. A motion for continuance or request for extension of time will not be considered without proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all pro se litigants.

D. A motion to consolidate filed in either a civil or criminal case shall be decided by the judge to whom the oldest numbered case involved in the proposed consolidation is assigned. Rulings on motions to consolidate shall be given priority. Cases consolidated shall be assigned for all further purposes to the judge to whom the lowest numbered consolidated case previously was assigned. A case not consolidated shall remain assigned to the judge before whom it was pending when the motion to consolidate was filed.

E. A certificate of service or mailing shall not be sufficient unless it specifies the name and address of the person to whom the pleading or document was sent.

F. A motion filed under Fed. R. Civ. P. 56 shall be accompanied by a concise brief. An opposing brief shall be filed within twenty days after service of the motion or such additional time as the court may set. A reply brief may be filed only upon leave of court requested promptly after service of the opposing brief.

G. Any criminal or civil motion, other than a Rule 56 motion, shall briefly cite in its text authority to support it. No separate brief is required or allowed without leave of court.

H. Briefs and motions shall be concise. A verbose, redundant, ungrammatical, or unintelligible brief or motion may be stricken or returned for revision, and its filing may be grounds for imposing sanctions. Limitations may be imposed on the length of any brief or motion.

I. Every citation in a motion or brief shall include the specific page and statutory subsection to which reference is made.

J. A motion for leave to file an amicus curiae brief shall state the interest of the applicant and grounds for the motion. A copy of the motion and brief shall be served on the attorney of record for every other party.

K. Counsel shall notify the court in writing of related cases pending in federal or state courts, stating the names and addresses of all counsel, the caption of each such case, and the jurisdiction where it is pending. "Related" cases are those involving common questions of law or fact.

L. Oral argument will be at the court's discretion.

M. No agreement of counsel to shorten or extend any time limitation provided by the federal rules of civil or criminal procedure or these rules will be recognized or enforced, nor will such an agreement be considered just cause for failing to perform within the time limits established by those rules.

Only time variances specifically approved by court order upon motion made within the time limits prescribed by those rules will be recognized as having any binding or legal effect.

D.C.COLO.LR 16.1

UNIFORM PRETRIAL ORDER

Unless otherwise ordered by a judicial officer, all pretrial orders shall follow the "Instructions for Preparation and Submission of Pretrial Order" attached to these local rules as Appendix A.

D.C.COLO.LR 16.2

SCHEDULING ORDERS

B. Scheduling orders for discovery, joinder and amendment of pleadings are unnecessary in: (1) appeals from the bankruptcy court; (2) appeals from decisions of administrative agencies; (3) other cases where the action of the court is limited to reviewing a record; (4) habeas corpus proceedings; (5) pro se prisoner cases; (6) forfeiture proceedings; and (7) cases where service has been obtained by publication but no responsive pleading has been filed.

D.C.COLO.LR 29.1

DISCOVERY

Within 45 days after the appearance of a defendant, a scheduling conference will be convened by the district judge to whom the case is assigned or a magistrate judge to whom the case has been referred to develop a scheduling order pursuant to Fed. R. Civ. P. 16(b) and 26(b). Counsel for all parties who have appeared are directed to meet and attempt to agree on a scheduling order to be filed with the court no later than five days before the conference. Any area of disagreement shall be set forth separately with brief statements of the reasons for disagreement. It should be expected that the court will make modifications in the proposed order and will discuss limitations on discovery, simplification of the issues, stipulations of fact, and other matters affecting the management of the litigation. Accordingly, counsel responsible for the trial of the case will be present. The schedule established by a scheduling order shall not be modified except by leave of court for cause shown.

The following matters will be included in the scheduling order:

1. Concise and brief statements of all claims or defenses and identification by any party of those claims or defenses which, under the requirements of Fed. R. Civ. P. 11, are or should be withdrawn.

2. A plain, concise statement of all facts which are undisputed.
3. A limit on the time to join other parties or amend the pleadings.
4. A statement of damages with a description of the basis for calculating the damages claimed.
5. A statement concerning any agreements to conduct informal discovery, including joint interviews with potential witnesses, exchanges of documents, and joint meetings with clients to discuss settlement.
6. Limit the time for completion of discovery and limits on the numbers of depositions, interrogatories, requests for admissions, and requests for production.
7. A list of the names of the persons to be deposed and a prospective schedule for taking depositions.
8. A schedule for interrogatories and requests for production of documents.
9. A statement with respect to a need for expert witnesses, including areas of expertise being considered and the names of potential expert witnesses.
10. The desirability of convening status conferences and a pretrial conference.
11. Any other matters appropriate in the circumstances of the case.

D.C.COLO.LR 30.1A

REASONABLE NOTICE FOR DEPOSITIONS

Unless otherwise ordered by the court, "reasonable notice" for the taking of depositions shall be not less than five days, as computed under Fed. R. Civ. P. 6. Before sending a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties.

Prior to scheduling or noticing any deposition, all counsel involved shall confer in a good faith effort to agree on reasonable means of limiting the time and expense to be spent for that deposition. During that conference they shall attempt in good faith to agree on a less expensive and time consuming method of obtaining the evidence sought, including without limitation, interviewing the witness under oath by telephone or in person.

D.C.COLO.LR 30.1C

SANCTIONS FOR ABUSIVE DEPOSITION CONDUCT

A. The following abusive deposition conduct is prohibited:

1. Objections or statements which have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness.

2. Interrupting examination for an off-the-record conference between counsel and the witness, except for conferences during normal recesses in the deposition.

3. Instructing a deponent not to answer a question absent a clear legal ground for such an instruction stated on the record.

4. Filing a motion for protective order or to limit examination without a substantial basis in law.

5. Questioning that unfairly embarrasses, humiliates, intimidates, or harasses the deponent, or invades his or her privacy absent a clear statement on the record explaining how the answers to such questions will constitute, or lead to, competent evidence admissible at trial.

B. The prohibitions reflected in section A of this rule shall be treated as a standing order of the court for purposes of Fed. R. Civ. P. 37(b). Whenever it comes to the attention of the court that an attorney or party has engaged in abusive deposition conduct, the court may appoint a special master under Fed. R. Civ. P. 53, at the expense of the attorney or person engaging in such conduct (or of both sides), to attend future depositions, exercise such authority, and prepare such reports as the court shall direct.

The court, if it anticipates deposition abuse, may order that any deposition be taken at the courthouse or special master's office so that, at the request of any party, witness, or counsel,

any dispute may be heard and decided immediately by the court or special master.

Whenever the presiding judicial officer shall determine that any party or counsel unreasonably has interrupted, delayed, or prolonged any deposition, whether by excessive questioning, objecting, or other conduct, that party or its counsel, or both, may be ordered to pay each other party's expenses, including without limitation, reasonably necessary travel, lodging, reporter's fees, attorneys' fees, and videotaping expenses, for that portion of the deposition determined to be excessive. In addition, that party or its counsel, or both, may be required to pay all such costs and expenses for any additional depositions or hearing made necessary by its misconduct.

## D.C.COLO.LR 40.1

## ASSIGNMENT OF CASES

A. Insofar as practicable and efficient, cases shall be assigned to judges by random selection. Work parity shall be maintained among active judges, and senior judges shall be provided the opportunity to participate in the court's business. Whenever a majority of active judges determines that a workload imbalance is affecting litigants adversely, the chief judge shall review the pending case loads of the judges and suggest appropriate reassignment of existing cases. All reassignments or transfers of cases from one judge to another shall be subject to the chief judge's approval.

B. The clerk shall provide a form on which the attorney or pro se party filing a civil case shall indicate, in addition to other information required, whether the case being filed is related to any other action or actions pending before the court or terminated within the previous twelve months.

C. If a relationship is indicated, the case shall be referred to the judge with the earliest filed case who shall determine if the case is related. If the case is related, that judge shall be assigned to handle it. If found not related, the case shall be returned to the clerk for assignment by random draw. "Related" cases are those involving common questions of law or fact.

D. The clerk shall maintain in a drawing wheel the civil case assignment cards bearing the names of all judges. The number of cards shall be equally apportioned among the active judges, except the chief judge who may receive a lesser apportionment commensurate with administrative responsibility.

E. At 8:15 a.m. each business day, or as soon thereafter as is practical, the clerk or his designated deputy shall publicly draw the assignment card for each new unrelated civil case.

F. A separate set of assignment cards bearing the judges' names shall be maintained for criminal cases. The number of cards shall be equally apportioned among the active judges, except the chief judge who may receive a lesser apportionment commensurate with administrative responsibility.

G. Assignment of a judge to a criminal case shall be made publicly in open court by the magistrate judge at the defendant's initial appearance after the indictment or information is filed. The judge's card shall be drawn randomly from the assignment cards described in D.C.COLO.LR 40.1(F).

H. No plea agreement involving dismissal of charges will be accepted unless written notification of the agreement is received by the court no later than ten days before the Monday of the week set for the trial.

I. All pleas of guilty or nolo contendere shall be made before the judge assigned to the case.

J. The chief judge may remove temporarily a judge from the draw for civil or criminal cases because of illness, disability, incapacity, or emergency.

K. Recusal of a judge shall be only by written order setting forth the reasons. Upon such recusal, the clerk shall redraw the case at the next regular draw. After the redrawing, the clerk shall add to the block of assignment cards then in use an additional assignment card bearing the name of the recusing judge.

L. CITIZENSHIP

Hearing contested applications for citizenship shall be assigned on a rotating basis by the chief judge.

M. GRAND JURY MATTERS

Grand jury supervision shall be assigned equally among the active judges. No indictment shall be sealed without the written order of a judicial officer. Upon the first defendant's initial appearance the indictment shall be unsealed.

D.C.COLO.LR 40.3

TRIAL CALENDARS AND EXPEDITED CASE HANDLING

Each judge shall maintain an individual trial calendar with due regard for the priorities and requirements of law. Selected cases may be expedited by the judge sua sponte or on motion of any party.

D.C.COLO.LR 53.2

ALTERNATIVE DISPUTE RESOLUTION

At any stage of the proceedings, on a district judge's motion or pursuant to motion or stipulation of counsel, a district judge may direct the parties to a suit to engage in an early settlement conference or other alternative dispute resolution proceeding. To facilitate settlement or resolution of the suit, the judge may stay the action in whole or in part during a time certain or until further order. Relief from an order under this section may be had upon motion showing good cause.

D.C.COLO.LR 72.1

MAGISTRATE JUDGES' GENERAL AUTHORITY

A. Except as restricted by these rules, United States magistrate judges may exercise all powers and duties authorized by federal statutes, regulations, and rules of criminal or civil procedure.

B. A chief magistrate judge may be appointed by the court. The chief magistrate judge shall have general administrative responsibility for the court's full-time and part-time magistrate judges. These administrative duties include but are not limited to the following:

1. Designation of magistrate judges to handle duties assigned to them in criminal proceedings to insure that there is a magistrate judge available 24 hours a day to carry out promptly the duties required by these rules; and

2. Assignment or reassignment of cases among magistrate judges with consent of the judges to whom the cases are assigned.

C. Each full-time magistrate judge will be paired with designated district judges.

D.C.COLO.LR 81.2

COPIES OF STATE COURT PROCEEDINGS IN REMOVED ACTIONS

If a hearing in the state court has been set before a case is removed, counsel removing the case shall notify the state judge forthwith of the removal and shall notify the federal judge to whom the case is assigned of the nature, time, and place of the state court setting. The removing party shall promptly file with this court copies of all state court pleadings, motions, and other papers.

D.C.COLO.LR 83.6

ATTORNEY DISCIPLINE

The rules of professional conduct, as adopted by the Colorado Supreme Court, are adopted as standards of professional responsibility applicable in this court.

D.C.COLO.LR APPENDIX A.

INSTRUCTIONS FOR PREPARATION AND SUBMISSION OF PRETRIAL ORDERS

Unless otherwise ordered, counsel for plaintiff is responsible for preparing the pretrial order.

Counsel are directed to meet in advance of the pretrial conference and jointly develop the contents of the proposed pretrial order. The proposed pretrial order shall be presented for court approval at the pretrial conference.

Listed below are matters to be included in the pretrial order. For convenience of court and counsel, it is suggested that the following sequence and terminology be used in the preparation of the pretrial order, with each of the items listed below capitalized as a heading:

I. DATE AND APPEARANCE
Date of the pretrial conference and appearances for the parties.

II. JURISDICTION
A statement of the basis for subject matter jurisdiction with appropriate statutory citations. If jurisdiction is denied, give the specific reason for the denial.

III. CLAIMS AND DEFENSES
Summarize the claims and defenses of all parties, including the respective versions of the facts and legal theories. Do not copy the pleadings. Identify the specific relief sought.

IV. STIPULATIONS
Set forth all stipulations concerning facts, evidence, and the applicability of statutes, regulations, rules, ordinances, etc.

V. PENDING MOTIONS
List any pending motion to be decided before trial, giving the dates of filing. Include any motions on which the court postponed ruling until trial on the merits. If there are no pending motions, please state "none."

VI. WITNESSES
List the witnesses to be called by each party. List separately (a) non-expert witnesses; and (b) expert witnesses.

Specify those who definitely will be present at trial and those who may be called. The following paragraph shall be included in the pretrial order:

> Written summaries of opinions of expert witnesses and a description of experts' qualifications must be provided

to opposing counsel no later than thirty (30) days after the entry of the pretrial order. The names of any additional witnesses must be disclosed to opposing counsel within ten (10) days of their becoming known or their existence should have become known. In addition, a final written list of witnesses must be filed at the status conference referred to in Section XII (b).

VII. EXHIBITS

List the exhibits to be offered by each party and identify those to be stipulated into evidence. The following paragraph shall be included in the pretrial order:

> Copies of exhibits must be provided to opposing counsel no later than the status conference referred to in Section XII (b).

VIII. DISCOVERY

Set forth applicable language Discovery has been completed.
OR: Discovery is to be completed by _____.
OR: Further discovery is limited to _____.
OR: The following provisions were made for discovery: (specify).

IX. SPECIAL ISSUES

List any unusual issues of law which the court may wish to consider prior to trial. If none, please state "none."

X. OFFER OF JUDGMENT

The following paragraph shall be included in the pretrial order:

> Counsel acknowledge familiarity with the provisions of Rule 68, Federal Rules of Civil Procedure (Offer of Judgment), and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRETRIAL ORDER

The following paragraphs shall be included in the pretrial order:

(a) Counsel acknowledge familiarity with the provisions of Rule 16, Federal Rules of Civil Procedure (Pretrial Procedure; Formulating Issues).

(b) Hereafter, this order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the records of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL AND ESTIMATED TRIAL TIME STATUS CONFERENCE

(a) State whether trial to court or jury, estimated trial time, and any other orders pertinent thereto. The following paragraph shall be included in the pretrial order:

(b) A status conference will be held by the court no later than thirty (30) days before the trial date. At this status conference counsel are directed to file final lists of all exhibits and witnesses. The court may also consider motions in limine, if any, on particular issues and other matters to expedite the trial.

The following format and language shall be used in the pretrial order:

DATED this ____ day of _____, 199__.

BY THE COURT

_____

Name of District Judge
or Magistrate Judge

Pretrial Order Approved:

(Provide signature lines listing name, address, and phone number of counsel. Signatures of counsel are to be affixed before submission of the pretrial order to the district judge or magistrate judge)

* * * INFORMATION NOTE TO ATTORNEYS * * *

The practices vary among the judges with respect to the time for submission of jury instructions, voir dire questions, trial briefs, proposed findings of fact, conclusions of law, and other matters. Individual judges may cover these items in an addendum, the pretrial order, or in other court orders. If the case has been referred to a magistrate judge, the pretrial order shall be signed by the magistrate judge.

## APPENDIX C

SUMMARY OF CJRA STATUTORY PROVISIONS IN THE PLAN

| Plan Section Number | Statutory Provision |
|---|---|
| Section I. | (28 U.S.C. § 473 (a)(1)) |
| Section II. | (28 U.S.C. § 473(a)(2),(3)) |
| Section III. | (28 U.S.C. § 473 (a)(3)) |
| Section IV. | (28 U.S.C. § 473 (a)(4)) |
| Section V. | (28 U.S.C. § 473 (a)(2)) |
| Section VI. | (28 U.S.C. § 473 (a)(5)) |
| Section VII. | (28 U.S.C. § 473 (b)(4)) |
| Section VIII. | (28 U.S.C. § 473 (a)(2)) |
| Section IX. | (28 U.S.C. § 473 (b)(1)) |
| Section X. | (28 U.S.C. § 473 (b)(2)) |
| Section XI. | (28 U.S.C. § 473 (b)(3)) |
| Section XII. | (28 U.S.C. § 473 (b)(5)) |
| Section XIII. | (28 U.S.C. § 473 (b)(6)) |
| Section XIV. | (28 U.S.C. § 473 (b)(6)) |

**APPENDIX D**

# UNITED STATES DISTRICT COURT

# DISTRICT OF COLORADO

# ADVISORY GROUP RECOMMENDATIONS

# UNDER THE

# CIVIL JUSTICE REFORM ACT

CIVIL JUSTICE REFORM ACT

ADVISORY GROUP

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JAMES R. MANSPEAKER, CLERK OF COURT

JANET BIERINGER, CJRA ADVISORY GROUP REPORTER

*All of the district court judges attended various meetings of the group. The judges did not participate in writing the CJRA Report or the recommendations of the Advisory Group.

**Consideration of the Advisory Group's Recommendations**

RECOMMENDATION NUMBER 1

The Court should broaden the scope of matters referred to a magistrate judge to include the trial of cases with consent of the parties and reference of dispositive motions for recommended findings and ruling in selected cases.

**Court's Response:**

**The court declines to make that change. Magistrate judges play an essential role in the court's plan to meet the demands made on the district court's resources in both civil and criminal matters. The court believes that its civil and criminal case management capacity would be undermined by delegating trials to magistrate judges. In addition, judges may refer dispositive motions for recommended findings, conclusions, and orders in selected cases. Adding trial responsibility to magistrate judges would diminish their availability to decide discovery disputes, conduct settlement conferences, serve as special masters, or conduct confidential case evaluations. The magistrate judges' capacity to facilitate dispute resolution is too valuable to be compromised.**

RECOMMENDATION NUMBER 2

The court's district judges should review their administrative procedures for disposition of pending motions to determine whether speedier rulings can be attained. The resources available in the Clerk's office should be used in developing and implementing any review process or implementing changes in administrative procedures.

**Court's Response:**

**Each judge will review the process used in chambers for tracking and deciding pending motions.**

RECOMMENDATION NUMBER 3

The Local Rules of the District of Colorado should be modified to provide that a final pretrial conference be held not more than 60 days and not less than 30 days prior to trial. All motions, except evidentiary motions in limine, must be filed at least thirty (30) days before the date of the final pretrial conference and must be ruled on before or at the final pretrial conference.

**Court's Response:**

**Time limits, subject to later modification by the court, are established at the scheduling conference through attorney cooperation. (D.C.COLO LR. 7.1, 29.1, and D.C.COLO LR. Appendix A.). They may be controlled by the Federal Rules of Civil Procedure.**

RECOMMENDATION NUMBER 4

The Local Rules of the District of Colorado should be modified to provide that the court rule on all non-dispositive motions within 60 days after they are at issue. All dispositive motions should be ruled upon no later than 90 days after they are at issue.

**Court's Response:**

**The court recognizes the importance of prompt rulings. No set time limits for civil cases can be followed because of the impact on judicial resources of criminal cases and emergency matters which must be given priority by statute and in the public interest.**

RECOMMENDATION NUMBER 5

The court should expand its public access to information to include the Public Access to Court Electronic Records (PACER) system.

**Court's Response:**

**The PACER system will be installed. Public access should be available by spring 1994.**

RECOMMENDATION NUMBER 6

The court should adopt a policy statement expressing the court's support for litigants seeking ways to resolve their disputes outside the judicial system, but reinforcing the public's confidence that the court is accessible and available for all who properly choose to use its resources.

**Court's Response:**

**The court takes a very active role in helping to secure the just, speedy, and inexpensive determination of every civil action while providing accessible and available service to the public. The court, while wanting to create a positive**

**settlement atmosphere early in the litigation and facilitate settlement (D.C. COLO. LR 53.2), does not want to thwart citizens' ability to litigate. The court, through its Local Rules, recognizes and supports the attorney's responsibility to advise a client of reasonably available alternative forms of dispute resolution.**

**(D.C.COLO.LR 83.6).**

RECOMMENDATION NUMBER 7

The Local Rules of the District of Colorado should be modified to require that the parties file, no later than the first Rule 16 conference, stipulations or individual written statements as to their plan for use of alternative dispute resolution (ADR) techniques or the reasons why they believe such techniques are inappropriate in their case.

**Court's Response:**

**The court believes that the opportunity for implementing this recommendation is included in the Local Rules under a provision that counsel for all parties are directed to meet and attempt to agree upon a proposed scheduling order not later than five days before the scheduling conference to be convened by a judicial officer. (D.C.COLO.LR 29.1).**

RECOMMENDATION NUMBER 8

The court should use a Differentiated Case Manager from within existing staff to develop and implement a pilot program with one or more judges and magistrate judges to recommend to the judges methods by which cases might be focused or streamlined and whether a case is suitable for disposition through ADR techniques. The pilot program should include procedures to measure its effectiveness and a sunset provision.

**Court's Response:**

**The court directs the Clerk's office to develop and implement a Differentiated Case Management program.**

RECOMMENDATION NUMBER 9

The court should include the subject of alternative dispute resolution (ADR) in seminars and other educational programs presented for the attorneys practicing before the court.

**Court's Response:**

**The court accepts this recommendation.**

RECOMMENDATION NUMBER 10

The court should provide opportunities for the judges and magistrate judges to learn more about available alternative dispute resolution (ADR) processes.

**Court's Response:**

**The court will review educational opportunities available to the judges and magistrate judges. Subject to budgetary limitations the court will continue to encourage all judicial officers to take advantage of programs, videotapes, and written information pertaining to ADR, made available by the Federal Judicial Center.**

RECOMMENDATION NUMBER 11

The court should establish a systematic procedure for monitoring the effectiveness of new local rules created to curb discovery abuse.

**Court's Response:**

**The court has directed the Clerk to develop, for consideration by the court, a systematic procedure to monitor the effectiveness of the Local Rules addressing discovery abuse. The court will review the procedure prior to implementation. Data gathered by the procedure will be made available for public distribution.**

RECOMMENDATION NUMBER 12

The court should assume the leadership role in establishing a practice resource group with the goal of providing attorneys additional training, mentoring, and practice in developing the skills, competence, and professionalism necessary to practice in the cou .

**Court's Response:**

**The court has initiated this process.**

RECOMMENDATION NUMBER 13

The court should continue to assume early and ongoing control of the pretrial process through the involvement of a judicial officer in setting deadlines for filing motions, at the earliest practicable time.

**Court's Response:**

**The court considers this a current and on-going process.**

RECOMMENDATION NUMBER 14

The Local Rules of the District of Colorado (D.C.COLO LR 29.1) should be modified to provide that each party, including state and federal governmental agencies, must be represented by a person with the authority to bind such party as to all issues previously identified for discussion at each hearing or conference.

**Court's Response:**

**The court agrees in principle with this recommendation but appreciates the impact and cost to governmental agencies. The court is monitoring pending litigation pertaining to this recommendation and is actively pursuing an agreeable procedure with the United States Department of Justice.**

RECOMMENDATION NUMBER 15

The Local Rules of the District of Colorado (D.C.COLO. LR 53.2) should be modified to provide that (additions in capital letters), "At any stage of the proceedings, on a district judge's motion or pursuant to motion or stipulation of

counsel, a district judge may direct the parties to a suit to engage in an EARLY NEUTRAL EVALUATION, AN early settlement conference or other alternative dispute resolution proceeding. To facilitate settlement or resolution of the suit, the judge may stay the action in whole or in part during a time certain or until further order. Relief from an order under this section may be had upon motion showing good cause."

**Court's Response:**

**The court agrees but recognizes the trial judge's discretion to determine the appropriateness of such proceedings on a case specific basis. (D.C.COLO. LR 53.2).**

RECOMMENDATION NUMBER 16

The Local Rules of the District of Colorado should be modified to provide that the court shall require the presence of the parties at any settlement conference conducted under the auspices of the court. The only exception to this requirement shall permit parties who reside outside the District of Colorado to participate in the settlement conference by telephone if, at least ten days prior to such conference, such party has made a showing that presence at the conference would create an undue financial hardship for such party. If the party is a corporation, governmental agency, association or other entity, such party shall be represented at the settlement conference by a person with the authority to bind such party to a settlement agreement.

**Court's Response:**

**The court agrees and presently considers these issues on a case specific basis.**

RECOMMENDATION NUMBER 17

The court should adopt and place rules pertaining to bankruptcy matters in a separate Article or Appendix of the Local Rules. At a minimum, these rules should address withdrawal of reference, findings of fact, and conclusions of law in non-core proceedings, bankruptcy appeals, and general administrative procedures. The Local Rules should reflect a systematic method of handling matters between the district court and bankruptcy court.

**Court's Response:**

**The court agrees and will work with the Local Rules subgroup of the CJRA Advisory Group and the bankruptcy court toward such rules.**

RECOMMENDATION NUMBER 18

The Local Rules of the District of Colorado should be modified to provide that the court hold a status conference, if requested by one or more parties, for any bankruptcy matter brought to the district court from the bankruptcy court (whether on appeal or otherwise) within fifteen days of receipt of the bankruptcy court file, to determine the nature of the matter and its potential impact on the underlying case or other proceedings still before the bankruptcy court.

**Court's Response:**

**The court does not believe that a local rule is needed. The enactment of such a rule may create additional expense for the litigants. Currently, parties can jointly or separately file a status report with the district court stating the potential impact on the underlying case or other proceedings still before the bankruptcy court.**

RECOMMENDATION NUMBER 19

Congress should draft legislation with more precision to avoid litigation-causing errors or omissions. Statutory ambiguity, and failure to address threshold issues such as retroactivity, statutes of limitations, or jurisdictional limits, spawn unnecessary litigation.

**Court's Response:**

**The court expresses no comment regarding the constitutional responsibility of a separate branch of government.**

RECOMMENDATION NUMBER 20

Congress should expand resources available to the judiciary when creating additional areas of federal jurisdiction that will increase the workload of the federal courts.

**Court's Response:**

**The court expresses no comment regarding the constitutional responsibility of a separate branch of government.**

RECOMMENDATION NUMBER 21

The executive branch should evaluate the effectiveness of and work towards further implementation of the executive order[6] encouraging use of expeditious dispute resolution methods in cases involving the United States.

**Court's Response:**

**The court expresses no comment regarding the constitutional responsibility of a separate branch of government.**

RECOMMENDATION NUMBER 22

The executive branch should nominate candidates for judicial vacancies in a timely manner and the Senate should act promptly on such nominations.

**Court's Response:**

**The court expresses no comment regarding the constitutional responsibility of a separate branch of government.**

RECOMMENDATION NUMBER 23

The court should request additional judgeships to meet the demands created by the sharp increase of complex civil and criminal cases.

**Court's Response:**

**The court expresses no comment regarding the constitutional responsibility of a separate branch of government.**

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[6]Exec. Order No. 12778, 56 Fed. Reg. 55,195 (1991).