VI. PRACTICE AIDS

§ 31:25 Checklist for Practice in the Commercial Division

- ☐ Actively decide the litigation strategy and whether the client's best interests would be served by litigating in the Commercial Division and then pursue designation to the Commercial Division, or avoid it, according to the Standards for Assignment of Cases to the Commercial Division.
- ☐ Check the Standards on the website or by contacting the local Clerk's Office for the latest version of both the Standards and the proper forms.
- ☐ Check the appropriate Rules on the website or by contacting the local Clerk's Office for the latest version of the Rules, as they may have been altered or amended.
- ☐ Be prepared. Do not send junior associates or attorneys to a court conference in the Commercial Division without full knowledge and authority. The attorney who attends any court conference should be prepared to discuss procedural and substantive details of the case, argue any outstanding motions and/or make binding agreements.
- ☐ Attempt, in good faith, to negotiate disputes with an adversary and be prepared to explain those efforts to the court.
- ☐ Do not assume that, upon application of Rule 11(d), the court will exercise its discretion to stay discovery pending motions. The court's goal is to put pressure on the parties to resolve their dispute rapidly.
- ☐ Do not miss conference appearances or deadlines. The court's sanction power is broad and potentially severe under the Commercial Division Rules.
- ☐ Follow filing rules, including, if applicable, those of the Filing by Electronic Means system.
- ☐ File the appropriate Statement of Material Facts, when directed by the court (or standing local rule), on motions for summary judgment.
- ☐ Do not seek a temporary restraining order without notice to the opposing party absent ability to make a showing that "significant prejudice" will accrue to your client(s) due to the giving of such notice.
- ☐ Be prepared to negotiate a resolution of the case through an alternative dispute resolution program.

§ 31:26 Selected Forms

UCS-840 (REV 1/2000)

REQUEST FOR JUDICIAL INTERVENTION

COURT, _____ COUNTY INDEX NO. DATE PURCHASED:

PLAINTIFF(S):

DEFENDANT(S):

For Clerk Only
IAS entry date
Judge Assigned
RJI Date

Date issue joined: _____ Bill of particulars served (Y/N): [ ] Y [ ] N

NATURE OF JUDICIAL INTERVENTION (check **ONE** box only **AND** enter information)

[ ] Request for preliminary conference

[ ] Note of issue and/or certificate of readiness

[ ] Notice of motion (return date: _____) Relief sought _____

[ ] Order to show cause (clerk enter return date: _____) Relief sought

[ ] Other ex parte application (specify: _____)

[ ] Notice of petition (return date: _____) Relief sought _____

[ ] Notice of medical or dental malpractice action (specify:)

[ ] Statement of net worth

[ ] Writ of habeas corpus

[ ] Other (specify: _____)

NATURE OF ACTION OR PROCEEDING (Check **ONE** box only)

MATRIMONIAL

[ ]	Contested	-CM
[ ]	Uncontested	-UM

COMMERCIAL

[ ]	Contract	-CONT
[ ]	Corporate	-CORP
[ ]	Insurance (where insurer is a party, except arbitration)	-INS
[ ]	UCC (including sales, negotiable instruments)	-UCC
[ ]	*Other Commercial _____	-OC

REAL PROPERTY

[ ]	Tax Certiorari	-TAX
[ ]	Foreclosure	-FOR
[ ]	Condemnation	-COND
[ ]	Landlord/Tenant	-LT
[ ]	*Other Real Property _____	-ORP

OTHER MATTERS

[ ]	*_____	-OTH

TORTS

Malpractice

[ ]	Medical/Podiatric	-MM
[ ]	Dental	-DM
[ ]	*Other Professional _____	-OPM
[ ]	Motor Vehicle	-MV
[ ]	*Products Liability _____	-PL
[ ]	Environmental	-EN
[ ]	Asbestos	-ASB
[ ]	Breast Implant	-BI
[ ]	*Other Negligence _____	-OTN
[ ]	*Other Tort (including intentional) _____	-OT

SPECIAL PROCEEDINGS

[ ]	Art. 75 (Arbitration)	-ART75
[ ]	Art. 77 (Trusts)	-ART77
[ ]	Art. 78	-ART78
[ ]	Election Law	-ELEC
[ ]	Guardianship (MHL Art. 81)	-GUARD81
[ ]	*Other Mental Hygiene	-MHYG
[ ]	*Other Special Proceeding	-OSP

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a

YES	NO		YES	NO	
[ ]	[ ]	Municipality (Specify_____)	[ ]	[ ]	Public Authority: (Specify_____)

YES	NO	
[ ]	[ ]	Does this action/proceeding seek equitable relief?
[ ]	[ ]	Does this action/proceeding seek recovery for personal injury?
[ ]	[ ]	Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:
(This applies to all cases except contested matrimonials and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

Expedited: 0-8 months Standard: 9-12 months Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? No Yes, Date _____

Was a Notice of No Necessity filed? No Yes, Date _____

ATTORNEY(S) FOR PLAINTIFF(S):

Self Rep.*	Name	Address	Phone #

ATTORNEY(S) FOR DEFENDANT(S):

Self Rep.*	Name	Address	Phone #

*Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

INSURANCE CARRIERS:

RELATED CASES: (IF NONE, write "NONE" below):

Title	Index #	Court	Nature of Relationship

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated:

_____
(SIGNATURE)

_____
(PRINT OR TYPE NAME)

_____
ATTORNEY FOR

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION

195771.1 2/10/00 7:25 PM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X

Index No. _____/___

Plaintiff(s),

-against-

AFFIRMATION

Defendant(s).
----------X

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

_____, an attorney at law duly licensed to practice in the State of New York, does hereby state under penalty of perjury as provided in CPLR 2106 and certifies pursuant to 22 NYCRR §130-1.1:

1. Plaintiff's cause(s) of action is/are

_____

_____.

2. Plaintiff's claimed relief is $_____.

3. Defendant's counterclaim(s) is/are_____

_____.

4. Defendant's claimed relief is $_____.

Based upon the foregoing, it is respectfully requested that this matter be assigned to the Commercial Division of the Supreme Court, Nassau County.

Dated: _____, NY

_____, 2001

_____

Print Name:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
COMMERCIAL DIVISION : IAS PART _____

PRESENT: HON. _____,
Justice.

_____ **Index No.** _____

Plaintiff(s),

- against -

Preliminary Conference Stipulation and Order (Section 202.8[f] and 202.12 of the Uniform Rules)

Defendant(s).

_____

(All items on the form must be completed unless inapplicable.)

It is hereby STIPULATED and ORDERED that disclosure shall proceed as follows:

(1) **Nature of case:**

(a) Plaintiff's Claims

_____

_____

Amount Demanded
$_____

(b) Defendant's Claims/Defenses

_____

_____

Defendant's Claims/Defenses

_____

_____

Defendant's Claims/Defenses

_____

_____

Defendant's Claims/Defenses

_____

_____

(Add additional sheets, if needed)

(2) **Insurance Coverage (CPLR 3101[f]):** If not provided, shall be furnished by on or before _____. Not applicable _____.

(3) **Bill of Particulars:** (If relevant) shall be served by _____.

(4) **Discovery and Inspection:**
(a) All Demands for Discovery and Inspection (CPLR 3120) shall be served not later than _____ days from the date of this Order.

(b) All responses to Discovery and Inspection demands shall be served not later than _____ days after receipt of the opposing party(ies) demand(s).

(c) All demands for production of books, documents, records and other writings relevant to the issues in this case shall be deemed to include a demand for production of any photograph(s), audio tape(s), video tape(s), computer disk(s) or program(s) and e-mail. The failure to comply herewith may result in preclusion from the introduction of such evidence.

(5) **Depositions:**
(a) Depositions shall be held as follows:
(Priority shall be in accordance with CPLR 3106 unless otherwise agreed or ordered.)

Party	Date	Time	Place
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(Add additional sheets, if needed)

(b) Unless otherwise agreed or ordered, if a party fails or refuses to be deposed, he/she may not utilize the deposition of the adverse party(ies) at trial in additional to such other sanctions as may be available (CPLR 3126).

(c) Depositions of non-party witnesses shall not be noticed until the conclusion of all party depositions unless otherwise agreed by all party(ies) or ordered by the Court.

(d) Any disputes with regard to the propriety of questions at a deposition shall be promptly resolved via an application to the Court either in person, if the deposition is conducted in the Courthouse, or via telephone, if the deposition is conducted elsewhere. In the event the Justice presiding or his/her law secretary is not available, such applications shall be addressed to the Justice presiding in Special Term Part II.

(6) **A Status Conference** shall be held on _____.

(7) **Other disclosure:**

(a) Commissions or letters rogatory (CPLR 3108): identify and set forth the location of each witness.

_____

_____

(b) Expert disclosure (CPLR 3101[d]):

Plaintiff(s) shall provide expert disclosure by _____

Defendant(s) shall provide expert disclosure by _____

(c) Interrogatories (CPLR 3130 - 3133): Each party shall serve no more than _____ interrogatories, inclusive of subdivisions and subparts.

(8) **End Date for All Disclosure**, other than expert disclosure_____. (Set by Court or Part Clerk)

(9) **Motions:**

(a) All dispositive motion(s) (CPLR 3211 and 3212) shall be made on or before _____. (Not more than 60 days after the Certification Order is granted or conclusion of discovery.)

(b) All other motions, including those for impleader and amendment of pleading(s) shall not be made until compliance with Commercial Division Rule 24.

(10) **Compliance/Certification Conference** shall be held on _____.
(Set by Court or Part Clerk)

(11) **Confidentiality/Non-Disclosure Agreement:**

(a) In the event that there is a need for a Confidentiality/Non-Disclosure Agreement prior to disclosure, the party(ies) demanding same shall prepare and circulate the proposed agreement. If the party(ies) cannot agree as to same, they shall promptly notify the Court. The failure to promptly seek a confidentiality agreement may result in a waiver of same.

(b) _____ anticipates the need for a Confidentiality Agreement as to the following issues: _____
_____
_____
_____

(12) **Preservation of Electronic Evidence:**

(a) For the relevant periods relating to the issues in this litigation, each party shall maintain and preserve all electronic files, other data generated by and/or stored on the party's computer system(s) and storage media (i.e. hard disks, floppy disks, backup tapes), or other electronic data. Such items include, but are not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, data bases, calendars, telephone logs, contact manager information, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information.

(b) When electronically stored documents are produced, they are to be produced in Native Format with MetaData intact and Bates stamped on the CD and/or other media upon which they are produced, in a searchable format, unless the parties agree otherwise.

(13) **Miscellaneous:**

(a) If the matter settles, the Court shall be promptly notified and a courtesy copy of the Stipulation of Discontinuance shall be promptly forwarded to the Court. Failure to comply with any of these directions may result in the imposition of costs, sanctions or other actions authorized by law.

(b) The failure of any party(ies) to perform any of the requirements contained in this Order shall not excuse any other party(ies) from performing any other requirement contained herein.

(c) Any dates established herein shall not be changed or adjourned without the prior approval of the Court.

(d) Each counsel/party acknowledges receipt of the Commercial Division Rules.

(14) **Trial:**

(a) Plaintiff anticipates his/her/its case on the trial of this matter to be _____ days.

Defendant _____ anticipates the trial of this matter to be _____ days.

Defendant _____ anticipates the trial of this matter to be _____ days. (Add additional sheets, if needed)

(b) The matter is hereby set down for trial on _____.

(c) All pre-trial filings and submissions (including trial notebooks), jury selection, if appropriate, and marking exhibits shall be on _____, at _____ A.M./P.M.

(d) A pre-trial conference of this matter shall be held on _____, at _____ A.M./P.M.

(15) This Order includes the attached _____ page(s) which is/are incorporated herein by reference.

Attorney for Plaintiff(s) _____

_____

Attorney for Defendant(s) _____

_____

Attorney for Defendant(s) _____

_____

Attorney for Defendant(s) _____

_____

Attorney for Defendant(s) _____

_____

Attorney for Defendant(s) _____

_____

Dated: _____

SO ORDERED:

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

----------x

Plaintiff/Petitioner,

- against -

Defendant/Respondent.

----------x

Index No. _____

STATEMENT IN SUPPORT OF REQUEST FOR ASSIGNMENT TO COMMERCIAL DIVISION

_____, counsel for _____, the _____ in this matter, submits this Statement and the accompanying copy of the pleadings, pursuant to Section 202.70 (d) (2) of the Uniform Rules for the Trial Courts, in support of the request of said party for the assignment of this matter to the Commercial Division of this court.

(1) I have reviewed the standards for assignment of cases to the Commercial Division set forth in Section 202.70. This case meets those standards. I therefore request that this case be assigned to the Division.

(2) The sums at issue in this case (exclusive of punitive damages, interest, costs, disbursements, and counsel fees claimed) are equal to or in excess of the monetary threshold of the Division in this county as set out in Subdivision (a) of said Section, or equitable or declaratory relief is sought, in that _____
_____
_____
_____
_____.

(3) This case falls within the standards set out in Subdivision (b) of the Section and does not come within the groups of cases set out in Subdivision (c) that will not be heard in the Division, in that _____
_____
_____
_____
_____.

Dated: _____

_____ (Signature)
_____, Esq.

_____ (Firm)
_____ (Address)
_____
_____ (Phone)
_____ (Fax)
_____ (E-Mail)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

Present: _____
Justice

IAS _____

Plaintiff(s

Index No. _____

- against-

DCM Track: _____

Defendant(s)

----------x

PRELIMINARY CONFERENCE ORDER
COMMERCIAL DIVISION

APPEARANCES:
Plaintiff(s):_____
_____
_____.
Defendant(s): _____
_____
_____
_____.

It is hereby ORDERED that disclosure shall proceed as follows:
(1) BILL OF PARTICULARS (See CPLR 3130(1)):
(a) Demand for a bill of particulars shall be served by _____ on or before _____
_____.
(b) Bill of particulars shall be served by _____ on or before _____.

(2) DOCUMENT PRODUCTION:
(a) Demand for discovery and inspection shall be served by _____ on or before _____
_____.
(b) Response to demand shall be served by _____ on or before _____
_____
_____
_____.

(3) INTERROGATORIES:
(a) Interrogatories shall be served by _____ on or before _____.

(b) Answers to interrogatories shall be served by _____ on or before _____
_____
_____.

(4) DEPOSITION ON ORAL QUESTIONS:

[ ] Plaintiff(s) [ ] Defendant(s) [ ] All Parties

shall be held _____
_____
_____
_____
_____
_____
_____
_____
_____.

(5) OTHER DISCLOSURE:

_____
_____
_____
_____
_____
_____.

(6) If a motion relating to disclosure has raised additional disclosure issues, the parties shall: _____
_____
_____
_____
_____.

(7) IMPLEADER: Shall be completed on or before _____.

(8) END DATE FOR ALL DISCLOSURE: _____.

(9) COMPLIANCE CONFERENCE: Shall be held on _____.

(10) MOTIONS: Any dispositive motion(s) shall be made on or before _____
_____

(11) NOTE OF ISSUE: _____ shall file a note of issue/certificate of readiness on or before _____
_____.

A copy of this order shall be served and filed with the note of issue.

THE DATES SET FORTH HEREIN MAY NOT BE ADJOURNED EXCEPT WITH APPROVAL OF THE COURT

SO ORDERED:

Dated: _____ _____, *J.S.C.*

ADDITIONAL DIRECTIVES

In addition to the directives set forth above, it is further ORDERED as follows:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____.

SO ORDERED:

Dated: _____ _____, *J.S.C.*

2007 EDITION

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

Rule amendments received to February 2, 2007

Includes laws through Public Law 109–482, approved January 15, 2007

THOMSON
WEST

Mat#40521481

uld not be prejudiced in defending new or should have known that the brought against him initially had ke concerning the identity of the ule 15(c) goes on to provide specifi- cases that the first and second d when the government has been ere described (see Rule 4(d)(4) and vernment cases, revised Rule 15(c) ectives of the 1961 amendment of public officers).

endments changing plaintiffs is not ed Rule 15(c) since the problem is he chief consideration of policy is tations, and the attitude taken in change of defendants extends by anging plaintiffs. Also relevant is 7(a) (real party in interest). To claims, revised Rule 17(a) would l be dismissed on the ground that name of the real party in interest been allowed for correction of the stated.

Amendment

unical. No substantive change is

mendment

to prevent parties against whom g unjust advantage of otherwise ors to sustain a limitations de-

provision is new. It is intended does not apply to preclude any permitted under the applicable ne applicable limitations law will sdiction is based on the citizen- ary reference is the law of the urt sits. *Walker v. Armco Steel* federal jurisdiction is based on ence may be to the law of the een the parties. *E.g., Board of* . 478 (1980). In some circum- tions law may be federal law. 7 S.Ct. 1538 (1987). Cf. *Bur- ods*, 480 U.S. 1 (1987); *Stewart* t. 2239 (1988). Whatever may tations law, if that law affords relation back than the one be available to save the claim. 508 F.2d 39 (1st cir.1974). If .Ct. 2379 (1986) implies the ntended to make a material

ragraph has been revised to *ne v. Fortune, supra*, with named defendant. An intend- an action within the period ision (m) in Rule 4 was a withdrawn by the Supreme ons and complaint may not

under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S.Cal. L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 86 Mich.L.Rev. 1507 (1987).

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

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

1993 Amendments

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

HISTORICAL NOTES

Effective and Applicability Provisions

1991 Acts. Section 11(a) of Pub.L. 102–198 amended subd. (c)(3) of this rule, as transmitted to the Congress by the Supreme Court pursuant to section 2074 of title 28, United States Code, to become effective on December 1, 1991.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control s that the case will not be protracted because of lac of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial throug more thorough preparation, and;

(5) facilitating the settlement of the case.

(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 motions; and

(3) to complete discovery.

The scheduling order also may 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;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

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

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after 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.

(c) **Subjects for Consideration at Pretrial Conferences.** At any conference under this rule 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 doc-

for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants—which may include the cost to adversaries of securing testimony on the same subjects by other experts—would be unduly expensive given the needs of the case and the other evidence available at trial.

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

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

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651–58; Section 104(b)(2), Pub.L. 101–650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

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

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

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

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

2006 Amendment

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking

production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

HISTORICAL NOTES

Change of Name

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub.L. 101–650, set out as a note under section 631 of this title.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) **Capacity to Sue or be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Nov. 18, 1988, Pub.L. 100–690, Title VII, § 7049, 102 Stat. 4401.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from [former] Equity Rule 37 (Parties Generally—Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A., (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89–501, 89–502, 89–503; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 8. See, also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b [see now 40 U.S.C.A. § 3133(b)] (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing"); and U.S.C., Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare U.S.C., Title 26, Int.Rev.Code [1939], § 3745(c) [former § 1645(c)] (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). For capacity see generally Clark and Moore, *New Federal Civil Procedure*—II. Pleadings and Parties, 44 Yale L.J. 1291, 1312–1317 (1935) and specifically *Coppedge v. Clinton*, 72 F.2d 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489, 32 S.Ct. 711, 56 L.Ed. 1177, Ann.Cas.1914A, 699 (1912) (corporation); *Puerto Rico*

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(hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

Rearrangement of the Discovery Rules

The present discovery rules are structured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out following this statement.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrificed. Revision of treatises and other reference works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No.	New Rule No.
26(a)	30(a), 31(a)
26(c)	30(c)
26(c)	32(a)
26(d)	32(b)
26(e)	32(c)
26(f)	30(b)
30(a)	26(c)
30(b)	32(d)
32	

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, 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 that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(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.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to proceedings in other courts; and

(ix) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures—if any—are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must 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 by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(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

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Unless otherwise directed by the court, these disclosures must 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 promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) **Form of Disclosures.** Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(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, that is relevant to the claim or defense of any 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) **Limitations.**

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the

person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

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

(A) A party may 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 subdivision; and (ii) 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.**

(A) **Information Withheld.** 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.

(B) **Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(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 revealed or be 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) **Timing and Sequence of Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(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

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(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 is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement 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 that the response 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.

(f) **Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider 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 Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) 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) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(5) 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

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) **Signing 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, response, or objection 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 shall sign the request, response, or objection 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

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wise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter"—not "information"—relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note .

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

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

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to- face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to- face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electroni-

cally stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery

will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called "clawback agreements"— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to ent
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Rule 27. Deposi
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the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 2005, eff. Dec. 1, 2005.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California*, 1934, 54 S.Ct. 735, 292 U.S. 341, 78 L.Ed. 1298; *Todd Engineering Dry Dock and Repair Co. v. United States*, C.C.A.5, 1929, 32 F.2d 734; *Hall v. Stout*, 4 Del.Ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§ 666 to 670; Calif.Code Civ.Proc. (Deering, 1937) 2083–2089; Smith-Hurd Ill.Stats. c. 51, §§ 39 to

1970, eff. July 1, 1970; Nov. 20, 1972, . 29, 1980, eff. Aug. 1, 1980; Mar. 2, 7; Apr. 22, 1993, eff. Dec. 1, 1993.)

Y COMMITTEE NOTES

1937 Adoption

lance with common practice. In most e note to rule 26, provisions similar to in the statutes which in their respect- ons follow those cited in the Note to

'70 Amendment

rangement of the discovery rules,), (e), and (f) of Rule 26 are trans- w subdivisions (a), (b), and (c). The e retained as subdivision (d) of Rule nges in the lettering and numbering w rule is given a suitable new title of the rearrangement is that provi- related to one another are placed in

new Rule 32(a), whereby it is made vidence are to be applied to deposi- s though the deponent were then trial. This eliminates the possibility say objections which are based, not ent's testimony, but on his absence ge of present Rule 26(d) does not e technical objections, but it is not ent Rule 26(e), transferred to Rule & Holtzoff, *Federal Practice and* ht ed. 1961).

(a)(2) provides for use of a deposi- d by a corporation or other organi- , to testify on its behalf. This cedure for taking the deposition of anization provided in Rules 30(b)(6) s appropriate, since the deposition t that of the corporation or other ty.

he standard under which a party on in evidence may be required to of the deposition. The new stan- posal made by the Advisory Com- e. See Rule 1–07 and accompany- *aft of Proposed Rules of Evidence rict Courts and Magistrates* 21-22

s are changed to conform to the verbal changes have been made for objecting to written questions htly extended.

Amendment

ncept of "making a person one's ve had significance principally in t and waiver of incompetency. y under the Rules of Evidence impeaching one's own witness is e 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party-witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

1980 Amendment

Subdivision (a)(1). Rule 801(d) of the Federal Rules of Evidence permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. And Rule 801(d)(2) makes the statement of an agent or servant admissible against the principal under the circumstances described in the Rule. The language of the present subdivision is, therefore, too narrow.

Subdivision (a)(4). The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it. See Wright & Miller, *Federal Practice and Procedure: Civil* § 2150. The final sentence is added to reflect the fact that the Federal Rules of Evidence permit a broader use of depositions previously taken under certain circumstances. For example, Rule 804(b)(1) of the Federal Rules of Evidence provides that if a witness is unavailable, as that term is defined by the rule, his deposition in any earlier proceeding can be used against a party to the prior proceeding who had an opportunity and similar motive to develop the testimony of the witness.

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

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

HISTORICAL NOTES

Effective Date of Amendment Proposed November 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub.L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of Title 28.

Rule 33. Interrogatories to Parties

(a) **Availability.** Without leave of court or written stipulation, any 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, interrogatories may not be served 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 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. 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.

(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.

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule restates the substance of [former] Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules.

1946 Amendment

Note. The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26(a). *United States v. American Solvents & Chemical Corp. of California*, D.Del.1939, 30 F.Supp. 107; *Sheldon v. Great Lakes Transit Corp.*, W.D.N.Y.1942, 2 F.R.D. 272, 5 Fed.Rules Serv. 33.11, Case 3; *Musher Foundation, Inc., v. Alba Trading Co.*, S.D.N.Y.1941, 42 F.Supp. 281; 2 *Moore's Federal Practice*, 1938, 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See *Hoffman v. Wilson Line, Inc.*, E.D.Pa.1946, 9 Fed.Rules Serv. 33.514, Case 2; *Brewster v. Technicolor, Inc.*, N.Y.1941, 2 F.R.D. 186, 5 Fed.Rules Serv. 33.319, Case 3; *Kingsway Press, Inc. v. Farrell Publishing Corp.*, S.D.N.Y.1939, 30 F.Supp. 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer v. Hershey Creamery Co.*, D.N.J.1939, 2 Fed.Rules Serv. 33.31, Case 2, 1 F.R.D. 14; *Tudor v. Leslie*, D.Mass.1940, 1 F.R.D. 448, 4 Fed.Rules Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox v. Alter*, W.D.Pa.1942, 2 F.R.D. 337, 6 Fed.Rules Serv. 33.352, Case 1; *Byers Theaters, Inc. v. Murphy*, W.D.Va.1940, 3 Fed.Rules Serv. 33.31, Case 3, 1 F.R.D. 286; *Coca-Cola Co. v. Dixi-Cola Laboratories, Inc.*, D.Md.1939, 30 F.Supp. 275. See also comment on these restrictions in Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 1942, 41 Mich.L.Rev. 205, 216–217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc. v. Brauer*, W.D.Mo.1940, 1 F.R.D. 292, 3 Fed.Rules Serv. 33.31, Case 2, the court said: "Rule 33 * * * has been interpreted

Maryland & Va. Milk Producers A
90 (D.D.C.1958).

atories involving mixed questions of law
disputes between the parties which are
uch or all of the other discovery has
court is expressly authorized to defe
se, the court may delay determination
ice, if it believes that the dispute is
resence of the judge.

question raised with respect to the
interrogatories is whether they reintro
cts of the prior pleading practice, wh
ined to misconceived contentions or the
termination on the merits was frust
Revival of Bills of Particulars under
71 Harv.L.Rev. 1473 (1958). But there
ces in the recorded cases demonstrating
has occurred. The general rule gover
ers to interrogatories is that under ord
ey do not limit proof. See, *e.g., McElh*
s, Inc., 21 F.R.D. 100 (W.D.Mo.1967); *
3 F.R.D. 316, 317 (W.D.N.C.1963). Alt
circumstances reliance on an answer
udice that the court will hold the answ
his answer, *e.g., Zielinski v. Philadel*
F.Supp. 408 (E.D.Pa.1956), the interro
arily not be entitled to rely on the uncha
answers he receives and cannot base p
iance. The rule does not affect the pow
it withdrawal or amendment of answe

nswers to interrogatories at trial is
ules of evidence. The provisions gove
ns, to which Rule 33 presently refers, ar
e to answers to interrogatories, since d
ontemplates that all parties will ord
ugh cross-examination. See 4 *Moore's*
29[1] (2d ed. 1966).

sions are deleted from subdivision (b) be
covered by new Rule 26(c) providi
rs and Rules 26(a) and 26(d). The lan
on is thus simplified without any cha

(c). This is a new subdivision, adapted
Proc. § 2030(c), relating especially to
h require a party to engage in burdenso
rch into his own business records in or

The subdivision gives the party an opp
ds available and place the burden of res
ho seeks the information. "This pro
ining the liberal scope of interrogator
the burden of discovery upon its pol
lisell, *Modern California Discovery*, 1
viates a problem which in the past has
ourts. See Speck, *The Use of Discov*
District Courts, 60 Yale L.J. 1132, 114
errogating party is protected against a
vision through the requirement that th
ing the answer be substantially the sa
respondent may not impose on an inter
ss of records as to which research is fr
miliar with the records. At the same ti
ble to invoke this subdivision does not o

count lose the protection available to him under new Rule
6(c) against oppressive or unduly burdensome or expensive
terrogatories. And even when the respondent successfully
voke the subdivision, the court is not deprived of its usual
wer, in appropriate cases, to require that the interrogating
rty reimburse the respondent for the expense of assem-
ing his records and making them intelligible.

1980 Amendment

Subdivision (c). The Committee is advised that parties
on whom interrogatories are served have occasionally re-
onded by directing the interrogating party to a mass of
siness records or by offering to make all of their records
ailable, justifying the response by the option provided by
is subdivision. Such practices are an abuse of the option.
party who is permitted by the terms of this subdivision to
er records for inspection in lieu of answering an interroga-
y should offer them in a manner than permits the same
ect and economical access that is available to the party.
the information sought exists in the form of compilations,
stracts or summaries then available to the responding
rty, those should be made available to the interrogating
rty. The final sentence is added to make it clear that a
sponding party has the duty to specify, by category and
cation, the records from which answers to interrogatories
n be derived.

1993 Amendments

Purpose of Revision. The purpose of this revision is to
duce the frequency and increase the efficiency of interroga-
y practice. The revision is based on experience with local
les. For ease of reference, subdivision (a) is divided into
o subdivisions and the remaining subdivisions renumbered.

Subdivision (a). Revision of this subdivision limits inter-
gatory practice. Because Rule 26(a)(1)–(3) requires disclo-
re of much of the information previously obtained by this
n of discovery, there should be less occasion to use it.
perience in over half of the district courts has confirmed
t limitations on the number of interrogatories are useful
manageable. Moreover, because the device can be costly
may be used as a means of harassment, it is desirable to
ject its use to the control of the court consistent with the
nciples stated in Rule 26(b)(2), particularly in multi-party
es where it has not been unusual for the same interroga-
y to be propounded to a party by more than one of its
ersaries.

Each party is allowed to serve 25 interrogatories upon any
er party, but must secure leave of court (or a stipulation
m the opposing party) to serve a larger number. Parties
not evade this presumptive limitation through the device
joining as "subparts" questions that seek information
ut discrete separate subjects. However, a question ask-
about communications of a particular type should be
ted as a single interrogatory even though it requests that
time, place, persons present, and contents be stated
arately for each such communication.

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

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

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

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

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

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

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

2006 Amendment

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the infor-

mation. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. 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. 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, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. 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.

Unless the parties otherwise agree, or the court otherwise orders:

(i) 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;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

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

(As amended Dec. 27, 1946, effective March 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

1937 Adoption

In England orders are made for the inspection of documents, *English Rules Under the Judicature Act (The Annual Practice,* 1937) O. 31, r.r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932) Appendix, p. 267 setting out the statutes.

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

1980 Amendment

Subdivision (b). The Committee is advised that, "It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." *Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association* (1977) 22. The sentence added by this subdivision follows the recommendation of the *Report*.

1987 Amendment

The amendment is technical. No substantive change is intended.

1991 Amendment

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

1993 Amendments

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

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

2006 Amendment

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504–510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials

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sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Rule 35. Physical and Mental Examinations of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a

present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule—for example, a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g., Southern Ry. Co. v. Crosby,* 201 F.2d 878 (4th Cir. 1953); *United States v. Laney,* 96 F.Supp. 482 (E.D.S.C.1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g., Woods v. Stewart,* 171 F.2d 544 (5th Cir. 1948); *SEC v. Kaye, Real & Co.,* 122 F.Supp. 639 (S.D.N.Y.1954); *Sieb's Hatcheries, Inc. v. Lindley,* 13 F.R.D. 113 (W.D.Ark.1952). The rule as revised conforms to the latter practice.

Subdivision (b). The rule does not how indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. *E.g., Ark–Tenn Distributing Corp. v. Breidt,* 209 F.2d 359 (3d Cir. 1954); *United States v. Lemons,* 125 F.Supp. 686 (W.D.Ark.1954); 4 *Moore's Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g., Alamo v. Del Rosario,* 98 F.2d 328 (D.C.Cir.1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark–Tenn* and *Lemons, supra,* reasoned in this way, although the results reached may be supported on different grounds. In *McSparran v. Hanigan,* 225 F.Supp. 628, 636–637 (E.D.Pa.1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* § 8.07 (1963); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field v. McKusick, *Maine Civil Practice* § 36.4 (1959); Finman, *supra,* 71 Yale L.J. 371, 418–426; Comment, 56 Nw.U.L.Rev. 679, 682–683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686 (2d Cir. 1966).

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

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

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 shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the 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 com-

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(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 (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (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 a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney 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, 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.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L. 96–481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711."

1970 Amendment

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth v. Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa.1948); *Campbell v. Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y.1951). In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson v. Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once ag
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Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

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

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

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

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions—such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure—that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

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

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

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

2000 Amendment

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see 8 Federal Practice & Procedure* § 2050 at 607–09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure "to amend a prior response to discovery as required by Rule 26(e)(2)." In addition, one minor phrasing change is recommended for the Committee Note.

2006 Amendment

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservatio
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Rule 38. Jury T

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(e) **Admiralty and**
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subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

HISTORICAL NOTES

Effective and Applicability Provisions

1980 Acts. Amendment by Pub.L. 96–481 effective Oct. 1, 1981, and applicable to adversary adjudication defined in section 504(b)(1)(C) of Title 5, and to civil actions and adversary adjudications described in section 2412 of Title 28, Judiciary and Judicial Procedure, which are pending on, or commenced on or after Oct. 1, 1981, see section 208 of Pub.L. 96–481, set out as an Effective Date note under section 504 of Title 5, Government Organization and Employees.

VI. TRIALS

Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(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 such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve and file a demand as required by this rule 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.

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, § 723c [sec. 2072]), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, § 188; 6 Tenn.Code Ann. (Williams, 1934) § 8734; compare Wyo.Rev.Stat.Ann. (1931) § 89–1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) § 5624; Hawaii Rev.Laws (1935) § 4101; 2 Mass.Gen.Laws (Ter.Ed.1932) ch. 231, § 60; 3 Mich.Comp.Laws (1929) § 14263; Mich. Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud. Act (1927) § 57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev. Code Ann. (Struckmeyer, 1928) § 3802; Calif. Code Civ.Proc. (Deering, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev.Comp.Laws (Hillyer, 1929) § 8782; N.M. Stat.Ann. (Courtright, 1929) § 105–814; N.Y.C.P.A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); R.I. Pub. Laws (1929), ch. 1327, amending R.I. Gen.Laws (1923) ch. 337, § 6; Utah Rev.Stat. Ann. (1933) § 104–23–6; 2 Wash.Rev.Stat.Ann. (Remington,

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the foreign law; but it seems
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ded the notice is reasonable.
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notice of an issue of foreign
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may still be reasonable. The
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by any other and serves as a
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iew rule describes the materi-
ort in determining an issue of
district courts, applying Rule
ases to State law to find the
content of foreign-country law
ate laws vary; some embody
it, time consuming and expen-
n, *Proving the Law of Foreign*
60 (1954). In all events the
often inapposite to the prob-
and have in the past prevent-
which could have provided a
ation. The new rule permits
ny relevant material, including
ts admissibility under Rule 43.
les, R. 4511 (effective Sept. 1,
§ 8–273; 2 W. Va. Code Ann.

peculiar nature of the issue of
vides that in determining this
by material presented by the
own research and consider any
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aterials than counsel have pre-
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sel in partisan fashion or in
her hand, the court is free to
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at the court give formal notice
to engage in its own research
ch has been raised by them, or
termine independently an issue
ily the court should inform the
id diverging substantially from
presented; and in general the
an opportunity to analyze and
nich it proposes to rely. See
w 142 (2d ed. 1959); Wyzanski,
and Responsibility, 65 Harv.
f. *Siegelman v. Cunard White*
197. To require, however, that
from time to time as it proceeds
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n imposing an obligation on the
e" of foreign law because this

would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, *Foreign Law in the Courts: Judicial Notice and Proof,* 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the *third sentence,* the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). *Cf. Uniform Judicial Notice of Foreign Law Act* § 3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that § 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, *Conflict of Laws,* § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, *Evidence,* § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, *Evidence* § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl.1961, at 134); N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, loc. cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Jansson v. Swedish American Line,* 185 F.2d 212, 216 (1st Cir.1950); *Bank of Nova Scotia v. San Miguel,* 196 F.2d 950, 957, n. 6 (1st Cir.1952); *Liechti v. Roche,* 198 F.2d 174 (5th Cir.1952); *Daniel Lumber Co. v. Empresas Hondurenas, S.A.,* 215 F.2d 465 (5th Cir.1954).

1972 Amendment

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

1987 Amendment

The amendment is technical. No substantive change is intended.

HISTORICAL NOTES

Effective Date of Amendment Proposed November 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub.L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of Title 28.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

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

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

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

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

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

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

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

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

(b) Service.

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

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

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S.C. § 1783.

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

(c) Protection of Persons Subject to Subpoenas.

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

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

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

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

(i) fails to allow reasonable time for compliance;

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

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

(iv) subjects a person to undue burden.

(B) If a subpoena

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

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

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

(d) **Duties in Responding to Subpoena.**

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

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.** Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U.S.C., Title 15, § 49 (Federal Trade Commission)

U.S.C., Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

U.S.C., Title 16, §§ 797(g) and 825f (Federal Power Commission)

U.S.C., Title 19, § 1333(b) (Tariff Commission)

U.S.C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U.S.C., Title 26, §§ 614, 619(b) [see 7456] (Board of Tax Appeals)

U.S.C., Title 26, § 1523(a) [see 7608] (Internal Revenue Officers)

U.S.C., Title 29, § 161 (Labor Relations Board)

U.S.C., Title 33, § 506 (Secretary of Army)

U.S.C., Title 35, §§ 54 to 56 [now 24] (Patent Office proceedings)

U.S.C., Title 38, [former] § 133 (Veterans' Administration)

U.S.C., Title 41, § 39 (Secretary of Labor)

U.S.C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U.S.C., Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

U.S.C., Title 46, § 1124(b) (Maritime Commission)

U.S.C., Title 47, § 409(c) and (d) (Federal Communications Commission)

U.S.C., Title 49, § 12(2) and (3) [now 10321] (Interstate Commerce Commission)

U.S.C., Title 49, § 173a [see 1484] (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U.S.C., Title 28, [former]

is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

2006 Amendments

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, § 204; Neb.Comp.Stat. (1929) § 20–1139; N.M.Stat.Ann. (Courtright, 1929) § 105–830; 2 N.D.Comp.Laws Ann. (1913) § 7653; Ohio Code Ann. (Throckmorton, 1936) § 11560; 1 S.D.Comp.Laws (1929) § 2542; Utah Rev.Stat.Ann. (1933) §§ 104–39–2, 104–24–18; Va.Rules of Court, Rule 22, 163 Va. v. xii (1935); Wis.Stat. (1935) § 270.39. Compare N.Y.C.P.A. (1937) §§ 583, 445, and 446, all as amended by L.1936, ch. 915. Rule 51 deals with objections to the court's instructions to the jury.

U.S.C., Title 28, [former] § 776 (Bill of exceptions; authentication; signing of by judge) and [former] § 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

Rules

Part & Title:

200
Uniform Rules for Courts Exercising Criminal Jurisd.

201
[Reserved]

202
Uniform Civil Rules for the Supreme Court and County Court

203
[Reserved]

204
[Reserved]

205
Uniform Rules for the Family Court

206
Uniform Rules for the Court of Claims

207
Uniform Rules of the Surrogate's Court

208
Uniform Rules for the New York City Civil Court

209
[Reserved]

210
Uniform Civil Rules for the City Courts Outside of NYC

211
[Reserved]

212
Uniform Civil Rules for the District Courts

213
[Reserved]

214
Uniform Civil Rules for the Justice Dept.

215
Use of Recycled Paper

216

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Uniform Rules for N.Y.S. Trial Courts

PART 221. UNIFORM RULES FOR THE CONDUCT OF DEPOSITIONS

§221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Added Part 221 Oct. 1, 2006

§221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining

Sealing of Court Records in Civil Actions in the Trial Courts

217
Access To Court Interpreter Services for Persons With Limited English Proficiency

218
Uniform Rules for the Trial Courts in Capital Cases

219
[Reserved]

220
Uniform Rules for Jury Selection and Deliberation

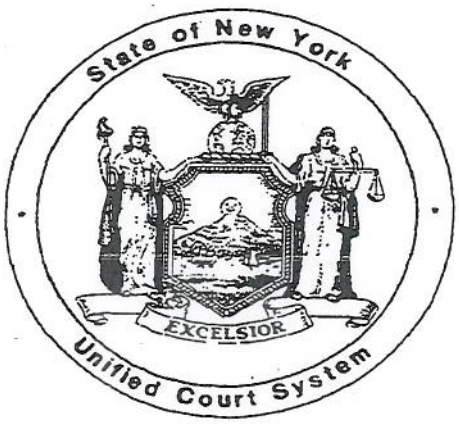
221
Uniform Rules for the Conduct of Depositions

party shall have the right to complete the remainder of the deposition.

§221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY
COMMERCIAL DIVISION



GUIDE TO THE
ALTERNATIVE DISPUTE RESOLUTION
PROGRAM

FEBRUARY 1999

33

THE COMMERCIAL DIVISION ALTERNATIVE DISPUTE RESOLUTION PROGRAM

The Alternative Dispute Resolution Program of the Commercial Division ("the Program") is governed by rules issued by the Administrative Judge of the Civil Branch of the Supreme Court in the First Judicial District ("the Rules"), a copy of which is appended. This Guide explains the Program's operations.[1]

A. ADR in the Division -- An Overview

Alternative dispute resolution ("ADR") refers to a variety of mechanisms for the resolution of legal disputes other than by litigation. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR are the following:

1) ***Mediation*** - A process in which a Neutral attempts to facilitate a settlement of a dispute by conferring informally with the parties, jointly and in separate "caucuses," and focusing upon practical concerns and needs as well as the merits of each side's position.

2) ***Neutral Evaluation*** - A process in which an expert Neutral receives a presentation about the merits from each side and attempts to evaluate the presentations and predict how a court would decide the matter.

3) ***Arbitration*** - A process in which the parties present evidence to a Neutral or panel of Neutrals, who then issues a decision determining the merits of the case. An arbitration may be binding or advisory, depending upon the agreement of the parties. If binding, the decision of the arbitrator(s) ends the

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[1] For information about the Division itself, consult the Division's Operating Statement, available in the Commercial Division Support Office, Room 148, 60 Centre Street, New York, New York 10007, on Datacase, and on the Division's home page on the Unified Court System's Internet website (http://ucs.ljx.com).

case, subject only to circumscribed review pursuant to Article 75 of the Civil Practice Law and Rules.

Evaluation or mediation by an informed, skilled and disinterested outsider can cause the parties to re-examine their positions, thereby bridging differences. Almost 60 % of the matters referred to the Program settle during the ADR process and an additional percentage settle shortly afterward as a result of the Program.[2]

Cases may be referred to the Program by a Justice of the Division, the Administrative Judge, or a non-Commercial Division Justice who is authorized by the Administrative Judge to make referrals.[3] The Administrative Judge may make referrals of new cases after the purchase of a Request for Judicial Intervention and before motions are fully briefed, as well as in other circumstances. The Program is mandatory. Volume permitting, cases can also be referred on consent of the parties. In order to facilitate ADR, the Program's Rules provide a brief window of opportunity during which discovery is stayed. Parties ordered into the court-annexed Program may use its resources or pursue ADR through a private service if they prefer. Parties who take part in the Program may choose the form of ADR they wish to pursue and select their own Neutral from a very extensive Roster of Neutrals. The Program imposes no charge on litigants for the standard ADR service.[4] These and

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[2] The Division conducted a survey of participants in the Program. These and other results are summarized in Meade, "Commercial Division ADR: A Survey of Participants," N.Y.L.J. Oct. 17, 1997, p. 1.

[3] Cases pending outside the Division that may be sent to the Program are limited to commercial cases (cases that had begun as Commercial Division cases but had been transferred out of the Division) and real estate matters (other than landlord-tenant disputes arising out of alleged non-payment of rent by individual tenants).

[4] The Neutrals on the Division's Roster serve without pay. Neutrals are expected to handle two-three matters per year on a *pro bono* basis. The stature of the persons whose names comprise the Roster is impressively high. Many are in great demand. Some may have completed their allotted share of *pro bono* matters at the time of a reference and only be available for a fee. Under such circumstances, counsel may retain that particular Neutral for a fee acceptable to all concerned or select another Neutral from the Roster. (If a fee is to be paid, parties and neutral should execute a writing setting forth the terms on which the neutral will serve.) In many instances, parties and counsel may be very satisfied with the efforts of a Neutral and the parties may easily be able to afford to pay a fee to

other features of the Program are explained hereafter.

B. The Referral of a Case

The Program will accept referrals on consent from parties in any eligible case as defined in the Rules. Parties should advise the assigned Justice of their desire to participate in the Program either at a conference or by presentation of a stipulation. After joinder of issue, any party anxious to proceed to ADR but unable to convince the other side to agree is encouraged to file an RJI and a request for a preliminary conference with the Commercial Division Support Office and to raise the ADR question at the conference. ***The Rules empower the Court, if it determines that ADR might be useful, to order the parties to proceed to ADR***. The experience of those who have taken part in the Program confirms that cases that are perceived by the parties to be incapable of settlement and which might not be brought into ADR on a voluntary basis in fact often do settle, to the satisfaction of all concerned.[5]

The Justices will direct ADR at the earliest practical point in a case; as a general rule, the earlier a case is referred, the better. Discovery of course is a source of considerable delay in litigation and causes great expense and frustration for litigants. The Court will attempt whenever practicable to promote resolution by ADR before the wheels of discovery commence their expensive turning. The Court recognizes that some cases

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the Neutral on a voluntary basis. The Program encourages parties to pay fees in such amount as may be agreeable under these circumstances. In addition, a fee payable to the Neutral will be required if the parties complete mediation pursuant to the Program without resolving their case and then decide to undergo binding arbitration in the Program. See Section L, *infra*.

[5] See Meade, supra note 1.

may require focused discovery before they realistically can be resolved by ADR; it may often be possible, though, for that discovery to take place most efficiently and expeditiously under the guidance of the ADR Neutral, on consent of the parties and subject to any disclosure order previously issued by the Justice assigned. The Rules encourage Neutrals and parties to pursue just such information exchange.

Whenever a Justice decides to direct ADR, whether on consent of the parties or without it, he or she will sign an Order of Reference.

Litigants whose case is referred to the Program are at liberty to opt for the free market. That is, the parties to a referred case are free to pursue ADR through the good offices of an individual selected by the parties or a private ADR service. However, the Court's Rules contain deadlines and confidentiality provisions that will be binding on all parties who proceed to ADR, whether inside or outside the Program run by the court. In order to avoid later controversy, other terms of a private retention should be put in writing before the process begins. If the parties elect to proceed to ADR outside the Court, they should so advise the Program Administration in the Commercial Division Support Office[6] immediately after the signing of the Order of Reference. The Office will closely monitor the progress of the ADR proceeding to ensure compliance with the Order of Reference.

C. Nature of the ADR Proceedings

The ADR Program will accommodate any form of ADR that parties are interested in pursuing. ***If the parties do not agree otherwise, the process will be mediation.***

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[6] The Program is overseen by the Clerk-in-Charge of the Commercial Division Support Office. Administration of the Program is coordinated by an ADR Coordinator or Coordinators located in the Office.

After execution, the Order of Reference will promptly be delivered to the Commercial Division Support Office. Often the Justice will direct the parties at a conference to proceed immediately to the Support Office. In other cases the Office will immediately contact parties and will transmit a copy of the Order to them. The parties should then confer and decide upon the kind of ADR process they wish to undergo. Unless the Program Administration indicates that it will select the Neutral, the parties should also designate a Neutral in the manner explained in Section F. The parties should then submit to the Program Administration an ADR Initiation Form (copy attached), which will start the ADR process.

Of course, Neutrals ought not to have vague or fluctuating functions. The Neutral will be chosen to fulfill a specific, designated role, one that can change only within set limits, and will confirm that role with the parties at the outset of the proceeding.[7]

D. Confidentiality and Ethical Standards for Neutrals

The Rules provide for complete confidentiality of the ADR process (binding arbitration apart). No use may be made of the information generated or communicated in the process for any purpose other than resolution of the matter, whether in that case or any other case. Nothing about the substance of the proceeding (e.g., the nature of the strengths of the parties' cases, whose "fault" it was that the parties could not agree to settle) will be revealed to the assigned Justice by the Neutral or the Program Administra-

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[7] Parties may acquire confidence in the Program and in ADR even though they are unable to reach a settlement through mediation. These parties may be able to agree to submit to binding arbitration and the Program encourages such decisions, which can save parties much time, inconvenience and money and conserve judicial energies. See Footnote 11.

tion. The Neutral will communicate only with the Program Administration. The Neutral will merely discuss necessary administrative details with the Administration and at the end report to the Administration the outcome of the process (success in whole or in part, failure, non-compliance with the Rules). The Program Administration will convey that information to the assigned Justice (again, only success, failure, or non-compliance). Thus, if the case remains alive, the parties can rest assured that there will be no risk of the Justice's receiving confidential, out-of-court communications.

The Rules provide that the prospective Neutral shall at the outset make a review for possible conflicts of interest and shall disqualify himself/herself if unable to function in a completely fair, impartial, objective, and disinterested manner. The Neutral shall also avoid the appearance of a conflict. The Neutral is obliged to disclose all potentially disqualifying facts to the parties and, where such facts exist, shall not serve unless the parties consent. The Neutral shall adhere to ethical principles set out in the Division's Code of Ethical Standards for Neutrals, currently in preparation.

E. Stay of Proceedings

Unless otherwise directed by the Justice assigned, the Order of Reference will stay all proceedings in the case in this court, including discovery and motions, from the issuance of that Order until 45 days from the date on which the availability of a specific Neutral is confirmed. See Section G. This stay of course will have no effect upon the appellate process. However, notwithstanding the stay, if the Neutral believes that some limited exchange of information will be productive in bringing the matter to a conclusion in ADR and the parties consent, the Neutral may, and indeed should, direct that that exchange take

place during the stay period. (Of course, any such disclosure must be consistent with any previous discovery directives of the assigned Justice.)

F. Choosing the Neutral

The qualifications required of those who would join the Division's Panel of Neutrals in the future are as follows. These persons must be (i) attorneys who have been admitted to practice for, and have had substantial commercial law experience for, seven years; (ii) accountants with a comparable level of experience; and (iii) persons with substantial executive or similar business experience. In addition, all such persons must have had at least 24 hours of training in mediation (training in arbitration is not the equivalent of mediation training).[8] Each person who joins the Panel undertakes to handle on a *pro bono* basis two-three matters each year.

In cases of administrative necessity, the Program Administration will advise the parties upon issuance of an Order of Reference that it will select the Neutral. Within three business days from the date on which notification is given of the issuance of the Order, the parties shall submit a completed and signed Initiation Form (Neutral selections omitted). The completed Form is required, among other things, so that a tentatively selected Neutral can conduct a complete conflicts check. Failure to submit the Form will delay the process.

In other cases, upon execution of an Order of Reference, the parties shall attempt to agree on the names of three or more prospective Neutrals. The Roster of Neutrals identifies each Neutral and indicates the Neutral's admissions, education, professional

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[8] Those who joined the Panel in the past have in many instances received training from various organizations or from programs presented under the auspices of the Division. Those who have had no training in mediation will be required to receive it over the next two years. The Division intends to sponsor additional training in the future.

background, and ADR training and experience. The Roster is available on the Division's home page on the Unified Court System's Internet website (at http://ucs.ljx.com), in the Commercial Division Support Office, and on Datacase.

As suggested earlier, because the Neutrals in the Court's ADR program are volunteers, there will be limits on the number of matters that each can accept on a *pro bono* basis. Parties thus may not be able to obtain the Neutral of their choice. However, the Roster is extensive and is filled with the names of practitioners with sterling backgrounds and substantial experience in a wide variety of fields. In addition, if the Neutral of choice is unavailable due to limits on *pro bono* workload, the parties may be able to obtain that Neutral's services for a fee acceptable to all concerned.[9]

The prospective Neutrals selected should be listed on the ADR Initiation Form in the order of preference; following the order of preference, the Program Administration will endeavor to obtain the services of a Neutral. More than one name is required because a particular Neutral may be unavailable at the moment needed or be required to disqualify himself/herself. ***Whenever the parties fail to agree upon a group of prospective Neutrals or all those chosen are unavailable on a pro bono basis or at all, the Program Administration itself shall designate the Neutral.***

Except in cases in which the Program Administration selects the Neutral, the parties will be afforded time to arrive at a selection of a satisfactory group of prospective Neutrals; this must be done within ***five business days*** from the day on which notification is given of issuance of the Order of Reference. In the event of failure to comply with this deadline, the

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[9] If parties choose to compensate a Neutral, they should agree in advance in writing on the terms of the retention.

Program Administration will choose the Neutral. ***This deadline will not be extended.*** This deadline is necessary and must be adhered to because experience has shown that without it, cases, at their very inception, will fall behind the schedule fixed by the Rules. The Program must and will avoid delays that might prejudice any party.

G. Initiating the ADR Process

In addition to designating prospective Neutrals, counsel for the parties must set forth on the ADR Initiation Form the names of all parties involved in the matter, the names of all corporate parents, subsidiaries or affiliates of each party, and a brief description of the nature of the case. This is required so that the prospective Neutral may make a thorough conflicts check. The Support Office will immediately contact the proposed Neutral by fax or phone and attempt to obtain a response as soon as possible as to the availability of the Neutral.

Once the Neutral has indicated his or her willingness and ability to serve, the parties will be so notified by the Program Administration. Counsel for plaintiff shall immediately telephone the Neutral to arrange a conference call with all parties at which initial issues and scheduling can be addressed. ADR sessions will usually take place in the office of the Neutral but may also be conducted in the courthouse. Parties seeking the latter venue should contact the Program Administration.

H. Submissions to the Neutral

Under the ADR Rules, each side must submit copies of its pleadings and a memorandum on the case (maximum ten pages) directly to the Neutral at least ten days

prior to the first ADR session. This memorandum should include a statement as to the facts and issues that are not in dispute, the party's views about liability and damages, and any opinions the party may have about the terms on which the matter might be resolved. ***This memorandum shall not be served upon the other side nor filed in court, shall be held in confidence by the Neutral, shall be read by no one else, and shall be destroyed by the Neutral upon completion of the process.***

I. Deadlines

The first ADR session must take place within 30 days of the Confirmation Date (the date of notification by the Program Administration that a specific Neutral is available and willing to serve in the matter). Further ADR sessions may follow if needed. The entire ADR proceeding should be completed within the 45-day period during which other proceedings in the case (discovery, motion practice, etc.) are usually stayed. At the end of the 45-day period, the stay will automatically expire and the litigation will resume. Even after a stay expires, however, ADR may continue if unusual circumstances make compliance with the 45-day deadline impossible. See Section K below. The stay is designed as a window of opportunity, not a bottomless pit.

The initial ADR session is mandatory. Furthermore, if the Neutral believes that an additional ADR session will be productive, he or she may schedule one ***and attendance is again required. Failure of parties or counsel to appear at a mandatory session or otherwise to comply with the Rules will require the Neutral to submit a report so stating to the Program Administration, which will advise the assigned Justice, and***

this may result in the imposition of sanctions. At the conclusion of the mandatory session(s), any party or the Neutral may bring the ADR process to an end. No report will be made to the court as to who ended the ADR process unless there has been non-compliance with the Rules.

If a party is represented by counsel, counsel must attend all ADR sessions and must be fully informed about all aspects of the case. In addition, unless exempted by the Neutral for good cause (e.g., residence of a defendant in a foreign country in a matter involving a modest sum), ***the party must attend all mandatory sessions in person or, in cases involving corporations or other entities, by a representative (or more than one if necessary) who is both in possession of all pertinent facts and empowered to settle the case without consultation***. Experience has demonstrated that the presence of the decision-maker with knowledge of the facts very greatly increases the likelihood of a successful outcome for mediation.[10]

J. Follow-up on ADR Sessions

The Program Administration will closely monitor the ADR process to ensure expedition. Neutrals and parties can expect to receive communications from the Program Administration investigating the status of cases.

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[10] See Meade, supra note 1. The objective is to make the sessions as productive as possible. If a corporate representative has the power to settle the matter but did not participate in the negotiation of the contract or other transaction, then that person and the representative with direct knowledge of the pertinent facts should be present unless exempted by the Neutral for good reason.

K. Report of the Neutral

Using a specific form (and preferably by fax), the Neutral will report the outcome of the ADR proceeding to the Program Administration. This report is due as soon as possible after the completion of the ADR proceeding and in any event within seven days thereof.

The Program Administration will report the outcome to the assigned Justice upon receipt of the Neutral's report. If the ADR process has succeeded in completely resolving the case, the case will be marked disposed. If the ADR process has succeeded only in part or not at all, the parties shall contact the Part of the assigned Justice for a conference concerning further proceedings in the case.

There may be unusual instances in which the parties for good reason are unable to reach a conclusion of the ADR process by the end of the 45-day period of the stay. The ADR process may result in substantial, but not complete, progress and the parties may be desirous of continuing. In such instances, the parties are free to and should continue the ADR process. **However, all parties should clearly understand this: *No stay will be issued for longer than the initial 45-day period even if ADR continues, except where the Justice, upon application of the parties at a conference or otherwise, concludes that truly extraordinary circumstances make such an order both efficient and fair to all parties***. In all cases in which ADR continues beyond the 45-day period, the Program Administration will very closely monitor progress in the case. Even in the absence of a stay, it is vital that the ADR proceeding, should it ultimately prove unsuccessful, not cause prejudice to any party. The Program Administration will do all it can to ensure that that does not occur as a result of any avoidable delay.

L. Binding Arbitration after Mediation

Parties may undergo mediation of a dispute in the Program without resolving the matter but conclude at the end of the effort that it would be in their interests to submit that dispute to binding arbitration before a Program Neutral. Such a course will often be fair, sound, and both less expensive and less time-consuming than proceeding to a trial in court. The Division will gladly accommodate such parties as follows. Upon the written stipulation of the parties to undergo this procedure, the Division will make a Neutral or panel of Neutrals (a maximum of three), as the parties agree, available to serve as arbitrators for a binding arbitration process. The parties must submit with the stipulation the names of three prospective Neutrals from the Roster of Neutrals for each arbitrator position. If the parties are unable to agree, the Program Administration will make the selection.[11] The arbitration shall be completed within 45 days after the selection of the arbitrator(s) is confirmed. An award must be rendered in writing within seven days after the completion of the proceeding. The Neutral shall inform the Program Administration of the issuance of the award. The Program Administration will then mark the case disposed in the court's records.

In cases of this type, the Program will have already made one Neutral available to the parties without charge. In order not to exhaust the Program and its Neutrals, parties who agree to binding arbitration after mediation will be required to pay each Neutral a fee

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[11] Although the Division is anxious to be helpful and is most interested in expedition and efficiency, it cannot allow the arbitration to proceed before the same Neutral who conducted the mediation. The reason for this rule is that there otherwise might arise an appearance of unfairness even when parties consent because the Neutral may have received information in an *ex parte* caucus during the mediation process that might unintentionally affect the judgment in the arbitration. Such caucuses have a major role in mediation, but no place in binding arbitration. This limitation does not apply if no *ex parte* information has been received as of the time the choice for arbitration is made.