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The December 1993 Amendments to the Federal Rules of Civil Procedure--A Critical Analysis

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THE DECEMBER 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE — A CRITICAL ANALYSIS

Leslie M. Kelleher*

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INTRODUCTION

On December 1, 1993, the most significant and sweeping changes to the Federal Rules of Civil Procedure since they were first promulgated in 1937 came into effect.¹ Several significant changes, most notably those made to Rule 4 on service and personal jurisdiction, would have been given close attention at any other time, but were virtually ignored while public attention was focused on other, more controversial changes. The changes to Rule 11, for example, sparked considerable debate.² However, such debate was mild compared to the maelstrom of controversy that swirled around proposed Rule 26(a)(1), which required mandatory disclosure of "relevant" evidence, without a court order or even a request by the opposing party.³ The controversy over the new disclosure provisions engaged all sectors of the bar and bench, including the Supreme Court. When the Court transmitted the proposed amendments to Congress, Justices Scalia, Thomas and Souter took the uncommon step of appending a vigorous dissent criticizing the wisdom of several of the amendments, particularly the disclosure requirements of Rule 26(a)(1).⁴

For a while it looked as though that provision would be deleted by Congress, but any such hopes (or fears) were dashed on November 24, 1993 when the Senate adjourned for the year. The Civil Rules Amendment Act of 1993, H.R. 2814, which would have deleted the automatic disclosure provision of Rule 26(a)(1), had passed the House of Representatives and was sent to the Senate in November. Suddenly, various trial lawyers and civil rights groups realized that the mandatory disclosure provision was but one piece of an entirely new discovery procedure. The new scheme also included caps on the number of interrogatories and depositions.⁵ While lobbyists and senators seemed to agree that Rule

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1. At the same time, amendments to the Federal Rules of Evidence and the Federal Rules of Appellate and Criminal Procedure also came into effect. Those amendments are not considered in this paper.

2. FED. R. CIV. P. 11 provides for "Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions."

3. FED. R. CIV. P. 26(a)(1).

4. Order of April 22, 1993, Amendments to the Federal Rules of Civil Procedure, reprinted in 146 F.R.D. 501, 510-12 (1993) [hereinafter Order of April 22, 1993] (Scalia, J., with Thomas and Souter, JJ., dissenting). See also *id.* at 503 (White, J.) (stating that "[i]t has been quite rare for any Justice to dissent from transmitting any such rule . . .").

5. FED. R. CIV. P. 30(a)(2)(A) (oral depositions), 31(a)(2)(A) (written depositions), 33(a) (interrogatories). The policy behind these new quantitative limits is to promote the use of the mandatory disclosure rules, thus obviating the need for extensive

26(a)(1) should be deleted, they could not agree on what to do with the caps on formal discovery or on whether Congress should give itself additional time to deal with the issue. As a result, the bill never came to a vote in the Senate.⁶ Because Congress failed to act, the amendments came into effect on December 1, 1993.

Almost thirty civil rules were amended.⁷ This article provides an overview and analysis of the most significant changes. Part I of the article is an analysis of the amendments to Rule 4, which deal with personal jurisdiction and service of the summons and complaint.⁸ Part II discusses the amendments to Rule 11 on sanctions.⁹ Part III gives a brief overview of pertinent changes to Rule 16 dealing with pretrial conferences.¹⁰ Part IV analyzes the significant changes to the discovery provisions and the new disclosure provisions in Rules 26 through 37.¹¹

I. RULE 4 - SERVICE OF THE SUMMONS AND COMPLAINT

The 1993 amendments include major changes to Rule 4, which underwent its last major revision ten years earlier.¹² The former Rule 4 governed the service of the summons, as well as other process, except subpoenas. The 1993 Rule 4 applies only to the service of the summons and complaint. The provisions of the former Rule 4 that dealt with serv-

formal discovery and reducing the cost of formal discovery. See FED. R. CIV. P. 30, 33 advisory committee's notes (referring to these two rules). These limits on the number of interrogatories and depositions can be raised or lowered by leave of the court.

6. For an overview of the history of the bill see Michael Wagner, *Too Much, Too Costly, Too Soon? The Automatic Disclosure Amendments to the Federal Rules of Civil Procedure* 26, 29 TORT & INS. L.J. 468 (1994). See also Hon. William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1 (1993) (defense of H.R. 2814 by the Representative who introduced it).

7. The rules amended were: 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 34, 36, 37, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, 76, and a new Rule 4.1 was added. In addition, forms 2, 33, 34 and 34A were amended, new forms 1A, 1B and 35 were added, and form 18A was abrogated. Amendments to other rules, and minor or technical amendments, are not discussed in this article. Extensive Committee Notes discussing the amendments in detail are a helpful guide to the amendments, as well as an influential source in their interpretation, and can be found at 146 F.R.D. 401 (1993) [hereinafter 1993 Committee Notes].

8. See *infra* notes 12-265 and accompanying text.

9. See *infra* notes 266-408 and accompanying text.

10. See *infra* notes 409-22 and accompanying text.

11. See *infra* notes 423-732 and accompanying text.

12. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527. This Act did not take effect until 1983.

ice of other process are now contained in a new Rule 4.1.¹³ Rule 45, which was amended in December 1991,¹⁴ still covers service of subpoenas, and Rule 71A still governs service of process in eminent domain proceedings.

The changes to Rule 4 are quite extensive, and, as challenges to service so often implicate statute of limitations issues, the stakes are high for counsel who must apply the new provisions. The revisions, examined in detail below, include: a new waiver of service provision, which replaces the former "service by mail;"¹⁵ provisions designed to simplify service upon the United States;¹⁶ new requirements for service upon defendants outside the United States;¹⁷ authorization of service in any judicial district of the United States, pursuant to the federal methods of service, the law of the forum state or the law of the state where service is effected;¹⁸ and a new federal "long-arm" provision, which expands the reach of federal district courts by allowing jurisdiction to be based on an aggregation of contacts with the nation as a whole, rather than just the forum state, provided there is no state in which the defendant would be subject to jurisdiction.¹⁹

The technical changes to the service provisions, including the new waiver of service provision, will be considered first.²⁰ The article will then discuss the federal "long-arm" provision, and the manner in which it has expanded the reach of the federal courts.²¹

13. FED. R. CIV. P. 4.1(b) provides for nationwide service of "[a]n order of civil commitment of . . . contempt of a decree or injunction issued to enforce" a federal law. The district courts already have this power with respect to criminal contempt sanctions. All other orders of civil contempt can be served within the forum state or within 100 miles of the place where the order was issued. *Id.*

14. For a discussion of the 1991 amendments to FED. R. CIV. P. 45, see David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992). For another extensive commentary on Rule 45 by Professor Siegel, see David D. Siegel, *Practice Commentaries*, 28 U.S.C.A. 347 (1992).

15. FED. R. CIV. P. 4(d).

16. FED. R. CIV. P. 4(i).

17. FED. R. CIV. P. 4(f).

18. FED. R. CIV. P. 4(e).

19. FED. R. CIV. P. 4(k).

20. See *infra* notes 22-147 and accompanying text.

21. See *infra* notes 148-262 and accompanying text.

A. Summons and Service

1. Form of Summons and Method of Service

Under Rule 4(a),²² the form of a summons in all federal actions is now uniform; a federal summons is no longer required to conform to the form of a summons in the state in which the district court is located. As noted by the Committee, the form of a summons in most states conforms generally to that in federal court, and requiring the use of a distinctive state form in federal court only served as a trap for an unwary party or attorney.²³

The 1983 revisions to the rule relieved the marshal's office of the duty of serving most summonses. Therefore, the plaintiff can have the summons served by any non-party who is over the age of 18.²⁴ However, in actions brought in forma pauperis, or by a seaman, the court must appoint a marshal or some other person to effect service.²⁵ A party may also move for the appointment of a marshal for service, and the court should make such an appointment if it seems necessary to keep the peace.²⁶ It is no longer necessary that the marshal's office perform service for the United States. Like any private litigant, the United States now may have any person who is over 18 and not a party effect service. In addition, the Department of Justice still has the option of having the marshal's office effect service, pursuant to 28 U.S.C. § 651.²⁷

22. FED. R. CIV. P. 4(a) provides that:

Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney, or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

23. 1993 Committee Notes, 146 F.R.D. at 560.

24. FED. R. CIV. P. 4(c)(2).

25. *Id.*

26. *Id.*

27. 1993 Committee Notes, 146 F.R.D. at 560.

2. New “Waiver of Service” Provision

The “service by mail”²⁸ provisions of former Rule 4(c)(2)(C)(ii) and (D) have been replaced by a new “waiver of service” provision,²⁹ which is intended to encourage defendants to waive the formal service of a summons. While the 1993 amendments to Rule 4 were generally non-controversial, an earlier version of this new waiver of service provision drew fire from foreign governments, certain American governmental agencies, and international lawyers when it was first published for comments in October 1989. The major objection was that the application of the waiver of service provisions to defendants outside of the United States offends the Hague Service Convention³⁰ or other international treaties, because it was a method of serving process and imposing costs on defendants in foreign countries in a manner not provided for in those treaties. Although the earlier version of the amendment was approved by the Advisory Committee, the Standing Committee and the Judicial Conference in 1990, and submitted to the Supreme Court in November 1990, the objections to the proposal as applied to foreign defendants were so fierce that the Supreme Court refused to transmit the proposed rule to Congress and remitted it to the Judicial Conference for further study.³¹

The Court’s action was unusual. Justice White, in his April 22, 1993 statement accompanying the transmission of the proposed amendments to Congress, commented that the refusal by the Court in 1991 to transmit the amendments as they then stood was the only time in his memory that the Court had refused to transmit to Congress some of the rule changes proposed by the Judicial Conference.³²

28. “Service by mail” was a misnomer because service could not actually be effected without the consent of the defendant; if the acknowledgment of service was not returned by the defendant, the plaintiff was required to effect service by other means. See generally David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction (Part I)*, 151 F.R.D. 441, 455 (1994).

29. FED. R. CIV. P. 4(d).

30. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361-67 (1969) [hereinafter Hague Convention]. The Hague Convention is reproduced after FED. R. CIV. P. 4.

31. See May 1, 1992 letter from Sam C. Pointer, Jr, Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, with attachment B, *reprinted in* 146 F.R.D. 519, attachment B at 521 [hereinafter Attachment B to Keeton letter] (transmitting proposed amendments to the Federal Rules).

32. Order of April 22, 1993, 146 F.R.D. at 502 (White, J.). The Court also refused to transmit to Congress proposed amendments to Rule 26, which granted district courts broad discretion with respect to the procedures for obtaining evidence from foreign

In response, the Advisory Committee made some minor changes to the text of the rule to meet the concerns expressed by opponents of the revision, while retaining a provision by which the waiver of service procedure could be used for defendants outside of the United States.³³ As with the abrogated "service by mail," the new waiver of service procedure requires the consent of the defendant to effect service, although the mechanics are quite different. Most significantly, unlike the old "service by mail" procedure, a request for waiver sent to the defendant does not include a formal summons. Thus, according to the Advisory Committee, the request for waiver "is a private, non-judicial act that does not purport to effect service or constitute any directive from a court."³⁴ As the request for waiver does not purport to effect service, the procedure should not offend foreign sovereigns, even those who had objected to the former "service by mail" provision³⁵ and had voiced similar objections to the earlier version of the waiver of service provision. For this reason, the Committee decided that the procedure should be available even in cases where the defendant is outside the United States.³⁶ As a request for waiver is not formal service, the Committee reasoned, it is simply the act of a private party, and not an extraterritorial act by the United States government.³⁷ Thus, it is not necessary for the request to comply with the requirements of the Hague Convention. However, it is unlikely that this issue will ever be tested in a court. Waiver of service is voluntary; if a foreign defendant does not wish to comply, it can simply ignore the request for waiver and force the plaintiff to make formal service, at no penalty to the defendant. As discussed below, the financial penalties for failure to consent to a waiver are inapplicable to foreign defendants.

a. Waiver of Service Procedure

The new Forms 1A and 1B, which replace the abrogated Form 18-A, are a helpful guide to the new waiver of service procedure. Essentially,

countries and nations. That proposed amendment had also sparked objections from foreign states as violative of the Hague Convention. *See supra* note 30. For a discussion of the 1989 proposed amendments to Rules 4 and 26, see Gary B. Born & Andrew N. Vollmer, *The Effect of The Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 231-22, 241-45 (1993).

33. *See* 1993 Committee Notes, 146 F.R.D. at 567.

34. Attachment B to Keeton letter, *supra* note 31, at 521.

35. *Id.* *See also* 1993 Committee Notes, 146 F.R.D. at 562.

36. 1993 Committee Notes, 146 F.R.D. at 562.

37. *Id.*

the plaintiff files the complaint, but instead of effecting formal service, it sends the defendant a notice that the action has been commenced and two copies of a request for a waiver of formal service,³⁸ along with a copy of the complaint.³⁹ If the defendant agrees to waive formal service, it returns the signed waiver form, which is then filed with the court.⁴⁰ The written notice and request for waiver must include the date of the request and must inform the defendant of the consequences of complying, and of failing to comply, with the request.⁴¹ There is little room for error here; all of the required information is contained on Forms 1A and 1B, and the plaintiff simply must fill in the blanks. Form 1A provides the notice of the lawsuit and request for waiver, and Form 1B is the actual waiver of service, to be signed by the defendant and returned to the plaintiff or the plaintiff's attorney.

One potential problem under the old "service by mail" provision has been remedied by the waiver of service procedure. Under former Rule 4(c)(2)(C)(i), if the defendant elected not to complete and return the acknowledgment form, it seemed that the plaintiff was required to serve formally only by the federal method, and could not serve the defendant with the state law method. This quirk tripped up several plaintiffs, and generated litigation as to the meaning of the rule.⁴² Under the new waiver of service provision, if the defendant does not agree to waive formal service, the plaintiff can effect service by any other method, federal or state. Of course, as no formal summons is sent with the request for waiver of service, a plaintiff cannot argue that a request for waiver that was ignored by the defendant should later be treated as a service by mail.⁴³

The notice and request for waiver of service can be sent to the defendant by "first class mail or other reliable means" chosen by the plaintiff, such as facsimile transmission or private messenger.⁴⁴ As no service is effected unless the defendant receives and returns the waiver, the rule is

38. FED. R. CIV. P. 4(d)(2), (d)(2)(G). These rules state that two copies of the notice and request must be included, but as the additional copy is included so that one may be returned to the plaintiff, it seems that only two copies of only Form 1B, which is the actual waiver of service, need be included.

39. FED. R. CIV. P. 4(d)(2)(C).

40. FED. R. CIV. P. 4(d)(3), (d)(4).

41. FED. R. CIV. P. 4(d)(2)(D).

42. *See, e.g., Combs v. Nick Garin Trucking*, 825 F.2d 437, 443-44 (D.C. Cir. 1987) (citing cases).

43. *See Sentry Ins. v. Apolinario*, 1995 WL 91421 (E.D. Pa. 1995) (denying request to treat certified mail receipts, signed when requests for waiver were delivered, as proof of effective service).

44. FED. R. CIV. P. 4(d)(2)(B).

not overly concerned with the mechanics by which it is sent. The plaintiff, presumably, will be concerned that the defendant actually receives the request so that it may be returned. However, there are some limits on the method by which the request is sent. If the plaintiff chooses an alternate means of sending the notice and request, that method must be "reliable,"⁴⁵ and the notice and request must be sent directly to an individual defendant, or to an officer, managing agent or general agent of a defendant corporation or unincorporated association;⁴⁶ it is not enough to just send the package to the general mailroom. The emphasis on reliability is an effort to avoid a dispute as to whether the defendant actually received the request for waiver of service if the plaintiff later requests the costs of effecting formal service be imposed on the defendant.⁴⁷

Two copies of the waiver must be sent to the defendant, so that it can keep a copy for its records after signing and returning the waiver.⁴⁸ The package containing the notice and request for waiver of service must include a "prepaid means of compliance" to allow the defendant to return the waiver without any cost.⁴⁹ Within the United States, a self-addressed, stamped envelope will suffice; a prepaid courier service will likely be simpler for requests sent to foreign countries. A defendant inside the United States has at least thirty days to comply with the request; a defendant outside the country has at least sixty days.⁵⁰ Once the plaintiff receives the signed waiver, it must be filed with the court, and the action will proceed as if a summons and complaint had been served on the date the waiver was filed, with one difference — the defendant who waives service is given additional time to respond to the complaint.⁵¹ As we shall see, however, the promise of additional time is largely illusory.

b. Costs of Service Imposed for Failure to Waive Service

Rule 4 imposes an affirmative "duty to avoid unnecessary costs of serving the summons" upon a defendant who has been sent a request for waiver of service.⁵² The rule also attempts to encourage defendants to waive service by various devices. As previously stated, a defendant who timely agrees to waive service is given additional time to respond to the

45. *Id.*

46. FED. R. CIV. P. 4(d)(2)(A).

47. *See infra* note 54.

48. FED. R. CIV. P. 4(d)(2)(G).

49. *Id.*

50. FED. R. CIV. P. 4(d)(3)(F).

51. FED. R. CIV. P. 4(d)(3), (d)(4). *See also* Rule 12(a)(1)(B).

52. FED. R. CIV. P. 4(d)(2).

complaint; amended Rule 12(a)(1)(B) provides that a defendant inside the country that agrees to waive service has sixty days to respond after the date the request for waiver was sent, and a defendant outside the country has ninety days after the request for waiver was sent, instead of the usual twenty days from the date of service.⁵³ If a defendant situated in the United States refuses to waive service as requested by a plaintiff situated in the United States, the court is required to impose the costs of effecting service on that defendant, unless the defendant shows good cause for the failure.⁵⁴

It should be noted that cost-shifting under the waiver of service provision applies only when both the plaintiff and defendant are located within the United States. To avoid a potential conflict with the Hague Convention, the rule does not allow the imposition of costs of service against a defendant served outside the country. The first sentence of Rule 4(d)(2), which imposes on a defendant who has received a request for waiver of service the “duty to avoid unnecessary costs of serving the summons,” does not distinguish between defendants in the United States and those abroad, and could be read as subjecting defendants served abroad to an assessment of the costs of service. However, the last paragraph of that provision,⁵⁵ as well as its legislative history, make it clear that such costs are to be imposed by the court only on defendants within the United States.⁵⁶

As mentioned above, the rule initially was published in 1989, but the Supreme Court refused to transmit the amendment to Congress with the other 1991 amendments, and sent it back to the Advisory Committee for

53. FED. R. CIV. P. 12(a)(1)(B). Note that FED. R. CIV. P. 6(e), which allows three additional days to respond when service is by mail, is inapplicable, as there is no formal service.

54. FED. R. CIV. P. 4(d)(2). While good cause will be rare, it will be demonstrated if the defendant can show it did not actually receive the request for waiver. If actual receipt of the request is a contested fact, the reliability of the means chosen by plaintiff to send the request will be relevant. Another example of good cause cited by the Committee is where the defendant is not sufficiently conversant with English to understand the request for waiver. Good cause does not exist, however, if the defendant refuses to comply with the request because it believes that the suit lacks merit, or that the court lacks jurisdiction. 1993 Committee Notes, 146 F.R.D. at 564.

55. The second paragraph of FED. R. CIV. P. 4(d)(2) states that “[i]f a defendant located *within* the United States fails to comply with a request for waiver made by a plaintiff located *within* the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.” (emphasis added).

56. See 1993 Committee Notes, 146 F.R.D. at 562 (stating that “the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States”).

further study, apparently in response, *inter alia*, to concerns expressed by the British embassy that imposing costs of service on defendants served in other countries could violate the Hague Convention. The proposed amendment to Rule 4 was revised to address those and other concerns, and was resubmitted to the Supreme Court in November 1992. Given this history, and in light of the language of the last sentence of Rule 4(d)(2), no court should find that it may impose costs of service on a defendant served outside of the United States. Nor can a plaintiff located outside of the United States take advantage of the cost-shifting provision. This limitation is not an attempt to comply with the Hague Convention. Rather, the only rationale seems to be an attempt at some kind of reciprocity; if the fee-shifting provision cannot be used against a defendant outside the United States, it cannot be used by a plaintiff outside the United States.

It is significant that the last sentence of Rule 4(d)(2) does not refer to the citizenship or domicile of plaintiffs or defendants, but refers to the assessment of costs by a plaintiff "located within the United States" who has requested a waiver of service from a defendant "located within the United States."⁵⁷ Thus, the costs of service cannot be imposed on a defendant who refuses to comply with a request for a waiver that was sent outside of the United States, even if the defendant is a United States citizen, out of respect for the sovereignty of foreign nations. However, any plaintiff "located within the United States," even an alien, can take advantage of the cost-shifting provision.⁵⁸

Even though a defendant located outside of the United States is not subject to the cost-shifting penalty of Rule 4(d), a foreign defendant may wish to comply with a request for waiver of service in order to reduce taxable costs that may be imposed against the defendant at the end of the case if it loses on the merits, such as the expense of translating the summons into a foreign language. In addition, the Committee urges, all defendants, including foreign defendants, will want to take advantage of the increased time allowed for a response.⁵⁹ Commentators have been quick to point out the illusory nature of these supposed benefits.⁶⁰ Given the total expense incurred in any litigation, the costs of service and of

57. FED. R. CIV. P. 4(d)(2).

58. *Id.* Professor Siegel argues quite persuasively that a plaintiff "located within the United States" must have more than mere physical presence at the time of posting, such as residency or corporate presence. Siegel, *supra* note 28, at 454.

59. See 1993 Committee Notes, 146 F.R.D. at 562.

60. See Born and Vollmer, *supra* note 32, at 234-35; Siegel, *supra* note 28, at 450, 456.

translating a summons and complaint are relatively trivial. The threat of being taxed such a minor cost at the end of a trial is not likely to induce a reluctant defendant to accept service. For the defendant located outside of the United States, those costs will be discounted heavily for the time it will take to complete the trial, and by the odds of losing at trial; the defendant may win, or the case may settle, in which case the cost of service will not be taxed at all.

c. Additional Response Time for Waiver of Service

The promise of additional response time is equally unimpressive. As a defendant to whom a request for waiver of service has been addressed already has been informed of the action about to be commenced against it, it simply can begin preparing its response in anticipation of formal service. Formal service probably will not even be attempted for another thirty days, or sixty days for a foreign defendant, when the time for returning the waiver has expired, because if formal service is attempted before that time, the plaintiff cannot take advantage of the cost-shifting provision.⁶¹ Indeed, the plaintiff likely will wait a few extra days beyond the date on which the waiver of service must be made, in case the waiver of service was placed in the mail on the last day allowed for a response. An additional day or two may go by before the complaint is in the hands of a service agent. Once formal service is made, the defendant has another twenty days to respond.

Therefore, unless service is made in fewer than ten days after expiration of the time for responding to a request for waiver, which is particularly unlikely for service in a foreign country, the defendant probably will have as much or more time to respond if it does not agree to waive service. In practice, however, plaintiffs may be more willing to agree to an extension of the time to respond for cooperative defendants than for those who refuse a request for a waiver of service.

d. Defendants with Whom Waiver of Service May be Used

The waiver of service procedure cannot be used with all defendants. It is an option only where the defendant is subject to service under Rule 4(e), (f), or (h);⁶² that is, an individual (other than an infant or incom-

61. FED. R. CIV. P. 4(d)(5).

62. FED. R. CIV. P. 4(e) (governing "Service Upon Individuals Within a Judicial District of the United States"); FED. R. CIV. P. 4(f) (governing "Service Upon Individuals

petent), corporation or unincorporated association, whether in the United States or a foreign country. A request for waiver of service cannot be used with infants or incompetents, as they presumably are unable to understand the request for waiver and its consequences, and must be served through fiduciaries pursuant to Rule 4(g).⁶³ Additionally, this procedure cannot be used for service on the United States and its agencies, corporations or officers,⁶⁴ states, municipal corporations, or other governmental organizations,⁶⁵ or on foreign states or their political subdivisions, agencies and instrumentalities, including foreign government-owned corporations.⁶⁶ The rationale offered by the Committee for not making the waiver of service procedure available for service on the United States and other governments and governmental entities is rather weak: the mail receiving facilities of governmental entities, the Committee says, are inadequate.⁶⁷ As Professor Siegel points out, this concern is ignored in Rule 4(i)(1)(A), which significantly expands the use of the mails for service on the U.S. Attorney's office in suits against the United States or its agencies.⁶⁸ The Committee also cites "policy reasons [for not having] governmental entities . . . confronted with the potential for bearing costs of service in cases in which they ultimately prevail,"⁶⁹ but this issue could easily have been dealt with by simply providing that the cost-shifting penalty for failing to agree to a waiver of service was inapplicable to governmental entities, just as it is inapplicable to defendants located outside of the United States.⁷⁰

Regardless of the rationale, it is clear that the waiver of service procedure does not apply where the defendant is a government or governmental entity. If a plaintiff requests a waiver of service from the United States, the government may ignore it, and will not be liable for the costs to the plaintiff of effecting formal service. The result is less obvious in other situations. For example, assume that the appropriate governmental

in a Foreign Country"); and FED. R. CIV. P. 4(h) (governing "Service Upon Corporations and Associations").

63. FED. R. CIV. P. 4(g) (governing "Service Upon Infants and Incompetent Persons"). See 1993 Committee Notes, 146 F.R.D. at 561.

64. FED. R. CIV. P. 4(i) (governing "Service Upon the United States, and Its Agencies, Corporations, or Officers").

65. FED. R. CIV. P. 4(j)(2).

66. See FED. R. CIV. P. 4(j)(1), which formally incorporates the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (1988), as the method of service on foreign states, political subdivisions, agency or instrumentalities.

67. 1993 Committee Notes, 146 F.R.D. at 561.

68. Siegel, *supra* note 28, at 448.

69. 1993 Committee Notes, 146 F.R.D. at 561.

70. See Siegel, *supra* note 28, at 449.

official complies with the request, and returns a signed waiver to the plaintiff's attorney, who then files it. May the government subsequently object to the sufficiency of service, or will it be bound by the consent of the official? A strict reading of the statute leads to the conclusion that regardless of the return of the waiver, service is not effected, because the procedure is not available against a governmental defendant.⁷¹ However, what if the statute of limitations has since expired? Perhaps the plaintiff can argue that the government waived its objection to the efficacy of the procedure when the signed waiver was returned. The general rule is that there is no estoppel against the government,⁷² but the argument is not so much that the government is estopped, as that the government knowingly waived its right to require the plaintiff effect formal service. Even prior to the promulgation of the waiver of service provisions, any defendant, including the government, could agree to dispense with formal service, and defendants often did so. The rationale for not having the waiver of service provisions apply to the government appears to stem from the fear that a request for waiver may get lost somewhere in the bureaucratic mailroom, and the government should not be taxed the costs of formal service in that situation. However, where a governmental official with the power to do so, or the attorney representing the government, agrees to dispense with formal service, that agreement ought to be binding.

e. Waiver of Service and Statutes of Limitations

In any case where it is available, requesting a waiver of service when the statute of limitations period looms is a risky venture, and the plaintiff should use traditional methods of service pursuant to Rule 4(e), (f) or (h) to ensure that service is timely effected. Rule 4(d)(4) makes it clear that when a waiver of service is requested, service is not deemed effected until the waiver of service actually is filed with the court.⁷³ The receipt by the defendant of a waiver of service request, and even the signature by the defendant on the waiver, are not sufficient to effect service and will not necessarily toll the statute of limitations. Whether and when the limitations period is suspended will depend on the applicable law. Rule

71. FED. R. CIV. P. 4(j)(2).

72. See *Rider v. United States Postal Svc.*, 862 F.2d 239, 242 (9th Cir. 1988); *Portman v. United States*, 674 F.2d 1155, 1158-59 (7th Cir. 1982).

73. FED. R. CIV. P. 4(d)(4) states that "[w]hen the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint has been served at the time of filing the waiver, and no proof of service shall be required."

3 provides that “[a] civil action is commenced by filing a complaint with the court.”⁷⁴ Whether or not the statute of limitations will be suspended on the filing of the complaint, however, will depend on whether the action is one as to which the Supreme Court has the power, pursuant to the Rules Enabling Act,⁷⁵ to vary the statute of limitations period by a rule of civil procedure. In diversity actions, and in some federal actions where limitations periods are borrowed from state law, the limitations period is governed by relevant state law, and not by Rule 3.⁷⁶ As the Advisory Committee points out, some state law limitations periods are tolled by notice of the action.⁷⁷ In those states, receipt by the defendant of the request for waiver of service may suspend the limitations period.⁷⁸ In other states, however, the limitations period is not tolled until actual service is made. Where those state laws apply, employing the waiver of service provision will not suspend the limitations period, which will run until the waiver of service has actually been filed with the court.⁷⁹

74. FED. R. CIV. P. 3.

75. 28 U.S.C. § 2072 (1988).

76. See *Wilson v. Garcia*, 471 U.S. 261 (1985) (limitations period governed by state law in § 1983 cases); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (state limitations period borrowed in federal question case); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (state limitations law applied in diversity action). It is doubtful that the federal rules can govern the statute of limitations even in federal actions, as that may run afoul of the prohibition in the Rules Enabling Act, 28 U.S.C. § 2072(b) (1988) against abridging, enlarging or modifying any substantive right, which applies with respect to federal as well as state law. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1160-62. See also Paul Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 314-17 (1989), where he notes that in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the Court left open the possibility that Rule 3 could have a tolling effect in federal actions. In *West v. Conrail, Inc.*, 481 U.S. 35, 39 (1987), Professor Carrington argues that the Court used Rule 3 for that result without questioning its validity under the Rules Enabling Act. Professor Carrington then notes that the case raises some difficulties, however, as Rule 3 is not by its language confined to federal actions, and if Rule 3 can toll a federal action, it should have the same result in a state action. But see Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1022 (1990), in which he disagrees with Professor Carrington’s characterization of the *West v. Conrail* decision, and explains it as a “reverse incorporation” decision; that is, one in which the court used a court rule in incorporating substantive aspects as federal common law. From that perspective, Professor Burbank offers his own criticism of the decision.

77. 1993 Committee Notes, 146 F.R.D. at 565.

78. *Id.*

79. See *id.*

Even where the statute of limitations is suspended by filing the complaint, there is a potential trap for the unwary plaintiff. Under Rule 4(m),⁸⁰ the plaintiff must serve the complaint within 120 days of its filing, unless there is good cause for failure to do so. This 120 day limit is important: If the complaint is filed within the limitations period, the statute is tolled, but the action will be dismissed if the summons and complaint are not served within the 120 day period.⁸¹ The plaintiff who chooses to use the waiver of service procedure must keep in mind that the extended time that procedure gives the defendant to respond to the request will come out of the 120 days.

If the defendant is in the United States,⁸² it has thirty days to respond to a request for waiver of service. If the defendant does not waive service, the plaintiff will not know that is the case until the thirty days allowed for the return of the waiver has expired. At that point, the plaintiff will have only ninety days to effect formal service. Indeed, the plaintiff may have even less time, as it will have to allow a few days for mail delivery, in case the defendant mailed the waiver on the last possible day. The 120 day period for effecting service may be extended for good cause shown by the plaintiff, but a court probably would rule that the refusal of the defendant to waive service is not good cause. Indeed, the Committee Notes caution that the court may not extend the time for service in such circumstances.⁸³ The plaintiff may choose simultaneously to request a waiver of service and proceed with formal service. However, that seems a wasted effort, as the cost-shifting provision does not apply to attempts at service made prior to the expiration of the time allowed for compliance with the request for waiver.⁸⁴ Thus, a cautious

80. FED. R. CIV. P. 4(m) states in pertinent part that:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Id.

81. See generally 4 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 1056 (1987).

82. The presumptive 120 day limit for service does not apply to service in a foreign country. FED. R. CIV. P. 4(m).

83. 1993 Committee Notes, 146 F.R.D. at 565. See also David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction (Part II)*, 152 F.R.D. 249, 259-62 (1994).

84. The last paragraph of FED. R. CIV. P. 4(d)(2) refers to costs "subsequently incurred." It should also be noted that, although the rule is not clear on this point, it seems

plaintiff confronted with the looming expiration of the limitations period would be wisest to choose a traditional means of service.

f. Other Objections Preserved

Finally, a waiver of service is solely a waiver of objections to the sufficiency of process or sufficiency of service of process.⁸⁵ Rule 4(d)(1) provides explicitly that the defendant “does not thereby waive any objection to the venue or [personal] jurisdiction” In addition, Rule 4(k) states explicitly that effecting service by any method does not assure the in personam jurisdiction of the court, which is still to be analyzed under constitutional and statutory principles. Although not explicitly stated, other objections a party may assert under Rule 12 also are preserved, such as objections to subject matter jurisdiction, failure to state a claim, or failure to name a necessary or indispensable party under Rule 19.⁸⁶

3. Formal Service

a. Service Within the United States

Under the old Rule 4, service of a summons pursuant to the federal methods set out in the rule could be made only within the territorial limits of the state in which the district court was located.⁸⁷ Absent a specific federal statute providing for service, service outside of the state was to be made “under the circumstances and in the manner prescribed by the [forum state’s long-arm service] statute,”⁸⁸ which was interpreted

that a defendant who has received both formal service and a request for waiver must respond within the 20 days normally provided for response to formal service, rather than having its choice of responding to the request for waiver in order to extend its response time. However, the Committee Notes suggest that if a defendant returns a request for waiver before receiving formal service, its response will be due 60 days from the date of the request, rather than 20 days after formal service. *See* 1993 Committee Notes, 146 F.R.D. at 565-66.

85. *See* FED. R. CIV. P. 12(b)(4)-(5).

86. *See* FED. R. CIV. P. 12(b)(1), (6), (7); 12(h)(2).

87. Fed. R. Civ. P. 4(f), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

88. Fed. R. Civ. P. 4(e), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). Fed. R. Civ. P. 4(i) also provided alternative methods of service in a foreign country. 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

by most courts as incorporating the Fourteenth Amendment⁸⁹ limitations on state jurisdiction.⁹⁰ The rule has been revised to make service outside of the forum state easier to accomplish. First, under Rule 4(e)(1) and 4(h)(1), service upon an individual, domestic or foreign corporation or an unincorporated association subject to suit under a common name now may be effected in any judicial district of the United States pursuant not only to the law of the forum state, but also pursuant to the law of the state in which service is effected.⁹¹ Again, it must be stressed that effecting service does not guarantee that the court has in personam jurisdiction. Rather, the jurisdiction of the court over the defendant is governed by Rule 4(k), which is the most significant amendment to Rule 4, and is discussed in detail below.⁹² That subdivision makes it clear that, as under the former Rule 4, the personal jurisdiction issue in a diversity or alienage case, and in most federal question cases, still will be determined under the forum state's long-arm jurisdictional statute, and the Fourteenth Amendment minimum contacts analysis of *International Shoe* and its progeny.⁹³ As discussed below, in certain federal question cases, where no state court could exercise personal jurisdiction over the defendant, service may establish personal jurisdiction, to the extent permitted by the Fifth Amendment of the Federal Constitution.⁹⁴

The federal methods of effecting service are also retained, but now they may be used anywhere within the United States, rather than just within the state in which the district court is located. Rule 4(e)(2) provides that service on an individual within the United States may be effected by personal delivery to the defendant, by leaving copies with a "person of suitable age and discretion" at the defendant's home, or by delivering copies to the defendant's agent.⁹⁵ Under Rule 4(h)(1), service upon a corporation or association within the United States may be ef-

89. U.S. CONST. amend. XIV provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

90. See *infra* note 93.

91. FED. R. CIV. P. 4(e)(1), 4(h)(1). Service on infants and incompetents is governed by FED. R. CIV. P. 4(g), which provides that service is to be made "in the manner prescribed by the law of the [forum] state" for service on such persons.

92. See *infra* notes 120-260 and accompanying text.

93. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

94. FED. R. CIV. P. 4(k)(2); U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

95. FED. R. CIV. P. 4(e)(2).

fectured by delivering the summons "to an officer, a managing or general agent," or authorized agent, and, if required by statute, mailing the summons to the defendant.⁹⁶

b. Service in a Foreign Country

The provisions regarding the means of service abroad have been extensively revised.⁹⁷ Under the old Rule 4(i), service outside of the United States could be effected only when it was explicitly authorized by federal or state law. This requirement has been eliminated in favor of an inferred general authority to effect service abroad in accordance with the rule.⁹⁸ However, the new provisions for service abroad do not require that service be made abroad. Plaintiff may still effect substituted service in the United States under Rule 4(e) by leaving the summons and complaint at the defendant's usual place of abode, or with an agent authorized to receive service.⁹⁹

Under 1993 Rule 4(f)(1)¹⁰⁰ and 4(h)(2),¹⁰¹ individuals (other than infants and incompetents) and corporate defendants located outside the United States must be served by an internationally agreed means, such as the Hague Convention, if one exists. If there is no applicable treaty, or if the treaty allows other means of service, the other means of service outlined in Rule 4(f)(2) may be used, "provided that service is reasonably calculated to give notice."¹⁰² The alternate methods are: service "in the manner prescribed by the law of the foreign country;"¹⁰³ in the manner "directed by the foreign authority in response to a letter rogatory or letter of request;"¹⁰⁴ or by personal delivery (for individuals only) or mail delivery, return receipt requested, unless such methods of delivery

96. FED. R. CIV. P. 4(h)(1).

97. For a comprehensive discussion of the differences between the former and revised rule on service abroad, and the ambiguities created under the new rule, see generally Born and Vollmer, *supra* note 32, at 235-41.

98. 1993 Committee Notes, 146 F.R.D. at 567.

99. *Silvious v. Pharaon*, 54 F.3d 697 (11th Cir. 1995) (holding that substituted service on an authorized agent of a foreign defendant is effective).

100. FED. R. CIV. P. 4(f)(1) outlines methods of service on individuals, other than infants and incompetents, in foreign countries.

101. FED. R. CIV. P. 4(h)(2) provides that the same methods, other than personal delivery, are to be used for corporate defendants as well.

102. FED. R. CIV. P. 4(f)(2). In this respect, the rule simply reflects a due process requirement. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

103. FED. R. CIV. P. 4(f)(2)(A).

104. FED. R. CIV. P. 4(f)(2)(B).

are prohibited by the foreign country.¹⁰⁵ Under Rule 4(g), service on an infant or incompetent in a foreign country must be made in one of three ways: “in the manner prescribed by the law of the foreign country;”¹⁰⁶ “as directed by the foreign authority in response to a letter rogatory or letter of request;”¹⁰⁷ or “as may be directed by the court.”¹⁰⁸

Rule 4(f)(3) provides that service on an individual (other than an infant or incompetent) or corporate defendant outside the United States may be made by any means directed by the court that is “not prohibited by international agreement.”¹⁰⁹ Unlike the alternate methods of service provided in Rule 4(f)(2), a method of service directed by the court may violate the foreign country’s law, although the Committee entreats the courts to “minimize[] offense to foreign law.”¹¹⁰ The Committee Notes do not explain why a federal court is authorized to approve a method of service in violation of foreign law or when it is appropriate to do so. For reasons of comity and international relations, it would be most appropriate for the district courts to allow such a method of service only as a last resort.¹¹¹ Where a method of service that violates a foreign country’s law is used, the plaintiff may find the effort futile, as a foreign government may refuse to enforce any judgment obtained against one of its citizens or domiciliaries in an American lawsuit commenced by such means.

c. Service on the United States

Service on the United States, its agencies, corporations or officers is governed by Rule 4(i). Its provisions are much the same as under the former Rule 4(d)(4) and (5), with a few significant changes intended to make service easier. Rule 4(i)(1), which governs service on the United States itself, has three requirements. The first requirement is that the summons and complaint be served, either by delivery to the proper U.S. Attorney, assistant U.S. Attorney, or designated clerical employee.¹¹²

105. FED. R. CIV. P. 4(f)(2)(C)(i) and (ii). The requirement that the alternate method of service comply with foreign law is new. Under former Fed. R. Civ. P. 4(i), most federal courts allowed use of the listed service methods even if they violated foreign law. See Born and Vollmer, *supra* note 32, at 239.

106. FED. R. CIV. P. 4(f)(2)(A) (cited in FED. R. CIV. P. 4(g)).

107. FED. R. CIV. P. 4(f)(2)(B) (cited in FED. R. CIV. P. 4(g)).

108. FED. R. CIV. P. 4(g).

109. FED. R. CIV. P. 4(f)(3).

110. 1993 Committee Notes, 146 F.R.D. 557, 569.

111. See Born and Vollmer, *supra* note 32, at 241.

112. FED. R. CIV. P. 4(i)(1)(A).

Alternatively, one of the two significant changes to the provision also allows for delivery of the "summons and of the complaint by registered or certified mail addressed to the civil process clerk" ¹¹³ The second requirement is that a copy of the summons and complaint also must be sent by "registered or certified mail to the Attorney General" in Washington. ¹¹⁴ Lastly, if the "action attacks the validity of an order" of a United States officer or agency, a copy of the summons and complaint must be sent by "registered or certified mail to the officer or agency," regardless of whether the officer or agency is a named party. ¹¹⁵

The most significant change to the provision for service on the United States and its agencies is a revision designed to make it easier to cure a failure to serve all the required government officers, agencies or corporations. Now, under Rule 4(i)(3), so long as either the U.S. Attorney or the Attorney General has been properly and timely served, the court must allow a "reasonable time for service" of the other government officers, agencies or corporations. ¹¹⁶ This provision applies to actions against the United States itself, as well as against its agencies, corporations or officers. Thus, in an action against the United States, if the Attorney General has properly been served, the court must allow a reasonable time to serve the U.S. Attorney. ¹¹⁷ As the Advisory Committee Notes state, this provision will "reduce[] the hazard of commencing an action against the United States or its officers, agencies, and corporations." ¹¹⁸ The new provision should prove very useful to plaintiffs, particularly when not all of the necessary government officials were served before the statute of limitations period expired. As long as either the U.S. Attorney or the Attorney General has been served within the limitations period, the government has had the requisite notice of the action, and the court must allow a reasonable time to serve any other necessary agencies or officers, including the U.S. Attorney or the Attorney General. The complaint will then "relate back" as though it were served on those defendants within the limitations period. ¹¹⁹

113. *Id.*

114. FED. R. CIV. P. 4(i)(1)(B).

115. FED. R. CIV. P. 4(i)(1)(C) and 4(i)(2). If the action upon which the service is based does not attack "the validity of an order of an officer or agency of the United States," then only the first two requirements apply. FED. R. CIV. P. (4)(i)(1)(C) and FED. R. CIV. P. 4(i)(2).

116. FED. R. CIV. P. 4(i)(3).

117. See Siegel, *supra* note 28, at 467.

118. 1993 Committee Notes, 146 F.R.D. at 558.

119. See 1993 Committee Notes, 146 F.R.D. at 570.

Once again, the waiver of service procedure is not available for service on the United States, its agencies, officers or corporations.

B. Territorial Reach of Service - Rule 4(k)

The most significant change to Rule 4 is the amendment to Rule 4(k), particularly the enactment in Rule 4(k)(2) of a new federal "long-arm" provision, which effectively increases the reach of the federal courts. This section first examines Rule 4(k)(1), which provides that, ordinarily, federal courts may exercise personal jurisdiction over a defendant only if the defendant has sufficient affiliating contacts with the forum state that it would be subject to the jurisdiction of a state court of general jurisdiction in the forum state.¹²⁰ That is, the exercise of jurisdiction by the federal court will be constrained by the forum state's long arm jurisdictional statute and the minimum contacts requirement of the Fourteenth Amendment, just as in a state court. In federal question cases in which there is no state with which the defendant has such contacts, and thus no state that would have personal jurisdiction over the defendant, Rule 4(k)(2) allows a federal court to assert personal jurisdiction subject only to the constraints of the Fifth Amendment,¹²¹ which requires sufficient affiliating contacts with the United States as a whole.

As has been emphasized above, proper service of process is not enough by itself to give the court jurisdiction over the defendant; there also must be a constitutionally sufficient relationship between the defendant and the forum. For the states, this territorial limit on the court's jurisdiction derives from the Due Process Clause of the Fourteenth Amendment¹²² which, under the doctrine of *International Shoe* and its progeny, requires that the defendant have sufficient "minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹²³ The Fourteenth Amendment applies only to the states and does not operate to

This provision should be read in connection with the provisions of subdivision (c) of Rule 15 [the "relation back" provision] to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff's failure to correctly identify and serve all the persons who should be named or served.

Id.

120. See *infra* notes 130-47 and accompanying text.

121. U.S. CONST. amend. V.

122. U.S. CONST. amend. XIV.

123. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

limit the power of the federal government. Any constitutional limitation on the jurisdiction of federal courts derives not from the Fourteenth Amendment, but from the Due Process Clause of the Fifth Amendment.¹²⁴ Where Congress has enacted a statute allowing for nationwide,¹²⁵ or even worldwide,¹²⁶ service of process for federal causes of action, the constitutional inquiry is not whether the defendant has sufficient affiliating contacts with the forum state, but whether the defendant had such contacts with the United States as a whole.¹²⁷ Courts have reasoned that the fairness of the forum for trial within the United States is adequately ensured by statutory venue and transfer provisions.¹²⁸ As is discussed below, however, the Fifth Amendment may also place additional restraints on the fairness of the forum selection within the United States.¹²⁹

124. See *Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992), *infra* note 126.

125. See, e.g., Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1993-94).

126. See, e.g., Securities Act of 1933, § 22, 15 U.S.C. § 77v(a) (1981); Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1981); Clayton Act § 12, 15 U.S.C. § 22 (1973).

127. See *Republic of Argentina v. Weltover*, 504 U.S. 607, 619-20 (1992). In *Weltover*, the Court found jurisdiction over Argentina on the grounds that "Argentina possessed 'minimum contacts' that would satisfy the constitutional test. By issuing negotiable debts instruments denominated in U.S. dollars and payable in New York, and by appointing a financial agent in that city, Argentina 'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" (alterations in original) (citations omitted).

See also *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, n.4 (5th Cir. 1994) (stating that every court that has considered the issue since 1982 has affirmed the national contacts approach); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320 (6th Cir. 1993); *United Elec., Radio & Machine Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992); *Go-Video Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989); *Lisak v. Mercantile Bancorp., Inc.*, 834 F.2d 668 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); *Federal Trade Comm'n v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989 (4th Cir. 1984); *Mariash v. Morril*, 496 F.2d 1138 (2d Cir. 1974); PHILIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* § 3.04.2, at 52 & n.10 (1983 and Supp. 1992) (collecting cases); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 2d § 1067.1, at 318 & n.44 (2d ed. 1987 and Supp. 1993) (collecting cases).

128. WRIGHT & MILLER, *supra* note 127, § 1067.1, at 319-20 & n. 46.

129. See *infra* notes 164-72.

1. General Limitations on the Exercise of Personal Jurisdiction - Rule 4(k)(1)

A number of federal statutes that create civil causes of action do not contain any provisions regarding service of process.¹³⁰ While Congress could enact a general nationwide service of process statute for all civil actions arising under the federal constitution or federal law, including diversity cases, it has not chosen to do so.¹³¹ Thus, in actions arising under many federal statutes, service of process is governed by Rule 4. As we have seen, service under Rule 4 can be effected by the federal methods that are prescribed in the rule or by state methods of service.¹³²

Prior to the 1993 amendment, Rule 4(f) set out the general rule that service of process could be made “within the territorial limits of the state in which the district court” was located.¹³³ Service of a summons outside of the forum state was governed by the former Rule 4(e), which provided that, absent a specific federal service statute, service outside of the state could be made only “under the circumstances and in the manner prescribed” by the forum state’s long-arm service statute.¹³⁴ While the issue was never directly decided by the Supreme Court, and there was some debate over the proper interpretation of the rule, a majority of federal courts interpreted the phrase “under the circumstances and in the manner prescribed” as incorporating and imposing on federal courts not only the restrictions on service and personal jurisdiction embodied in state long-arm provisions,¹³⁵ but also the Fourteenth Amendment requirements of minimum contacts between the defendant and the forum

130. See, e.g., Commodities Exchange Act, 7 U.S.C.A. § 1 *et seq.*, considered in *Omni Capital Int’l v. Rudolf Wolff & Co.*, *infra* notes 151-55 and accompanying text.

131. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (stating that “Congress could provide for service of process anywhere in the United States”) (citations omitted).

132. See *supra* notes 87-91 and accompanying text.

133. Fed. R. Civ. P. 4(f), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

134. Fed. R. Civ. P. 4(e), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). Fed. R. Civ. P. 4(f) also contained the “bulge rule,” which allowed service on persons brought in pursuant to Rules 14 or 19, and persons required to respond to an order of commitment for civil contempt, to be served outside of the state, provided they were served within 100 miles of the district courthouse. Fed. R. Civ. P. 4(f), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

135. In most states, the provisions for out-of-state service are separate from the provisions for assertions of jurisdiction over out-of-state defendants. In this article, “long-arm statute” refers to both kinds of provisions. Where necessary to distinguish the two, this article refers to “long-arm jurisdictional statutes” or “provisions,” and “long-arm service statutes” or “provisions.”

state, in federal question cases as well as diversity cases.¹³⁶ This was not truly a constitutional limitation on the federal court's jurisdiction, but a limitation imposed by the rule.

The 1993 revisions to Rule 4 were an attempt to simplify and clarify the meaning of the rule by explicitly separating the jurisdictional issue from the issue of how service is effected.¹³⁷ Service of process may now be made "in any judicial district of the United States" pursuant to the federal methods, or "pursuant to [either] the law of the state in which the district court" sits or the law of the state "in which service is effected."¹³⁸ Rule 4(k) makes it clear that effecting proper service is not in itself sufficient to establish the in personam jurisdiction of the court.

Under Rule 4(k)(1)(A), service of the summons establishes jurisdiction over a defendant only if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."¹³⁹ That is, the federal district court will have personal jurisdiction over a defendant only if a state court of general jurisdiction in the forum state would have personal jurisdiction. A state court cannot exercise in personam jurisdiction over a defendant unless the requirements of the state's long-arm jurisdictional statute are met, as

136. See, e.g., *United Elec. Radio & Mach. Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992); *In re Damodar Bulk Carriers*, 903 F.2d 675 (9th Cir. 1990); *Cable/Home Communication Corp. v. Network Prod., Inc.*, 902 F.2d 829 (11th Cir. 1990); *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983); see generally Born and Vollmer, *supra* note 31, at 224 (1993); Lisa Rouchell, *Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute is Used to Serve Process?*, 54 LA. L. REV. 407 (1993) (discussing the split among the United States Circuit Courts of Appeals regarding the interpretation of former Fed. R. Civ. P. 4(e)).

A minority of federal courts rejected this interpretation of the Rule when the action involved a federal question and, even when process was served under the state's long-arm statute pursuant to Rule 4(e), considered the aggregate contacts of the defendant with the nation as a whole, rather than just the forum state. See, e.g., *Handley v. Indian & Michigan Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984) (citing cases); see also Born and Vollmer, *supra* note 32, at 223-24 (collecting cases). See generally WRIGHT & MILLER, *supra* note 127, § 1067.1, at 318 & n.44 (collecting cases); BLUMBERG, *supra* note 127, § 3.04 (collecting cases).

137. 1993 Committee Notes, 146 F.R.D. at 558-59. In doing so, however, the rule may have run afoul of the restrictions of the Rules Enabling Act. That issue will be the topic of another article.

138. FED. R. CIV. P. 4(e).

139. FED. R. CIV. P. 4(k)(1)(A) provides in pertinent part: "Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . ."

well as the constitutional requirements of minimum contacts between the defendant and the forum state.¹⁴⁰ Thus, the result is much the same as under the majority interpretation of the former Rule 4(e), in that the limitations on jurisdiction of the Fourteenth Amendment Due Process Clause, as well as the limitations of the forum state's long-arm jurisdictional statute, are incorporated by the rule, and apply to both diversity and federal question actions in federal courts.¹⁴¹ The Committee Notes confirm this interpretation, stating that "[p]aragraph [4(k)](1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law"¹⁴²

In this respect, the only practical difference under the revised rule is that a plaintiff serving a defendant outside of the forum state is no longer limited to the forum state's long-arm service provisions, but may also effect service by the federal method, or pursuant to the service provisions of the state in which the defendant is served.¹⁴³ As a purely mechanical matter, it may be easier now to effect service in another state, and it is possible that some plaintiffs may be able to effect service where they could not do so under the forum state's service statute. However, any potential advantage to the plaintiff is limited by the requirement that the defendant still must be within the jurisdiction granted by the forum state's long-arm jurisdictional statute. In diversity actions, there is some logic to this limitation, in that it discourages forum-shopping by ensuring that the plaintiff in a diversity action gains no advantage regarding the assertion of personal jurisdiction from suing in federal court. If the defendant would not be subject to the jurisdiction of the courts of the state, it will not be amenable to jurisdiction in a federal court in the state. For causes of action created by federal statute, however, having the jurisdiction of the court depends on the vagaries of the forum state's long-arm statutes has no such logic to commend it. In the past, this

140. See, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (analyzing assertion of jurisdiction under state long-arm statute and 14th Amendment).

141. See, e.g., *Unison Indus., L.P. v. Lucas Indus., PLC*, No. 93-C20249, 1994 WL 148718, *2 (N.D. Ill. Apr. 22, 1994) (applying state minimum contacts standard to federal question case); *L.H. Carbide Corp. v. The Piece Maker Co.*, 852 F. Supp. 1425, 1432 (N.D. Ind. 1994) (stating that the court "is to look to the long-arm statute of the State . . . pursuant to Rule 4 . . . and employ the . . . Fourteenth Amendment due process analysis in order to ascertain whether th[e] court may properly assert personal jurisdiction . . .").

142. 1993 Committee Notes, 146 F.R.D. at 570.

143. *Id.* at 570-71.

limitation on federal jurisdiction sometimes resulted in a defendant who could not be reached under the relevant state's long-arm service or jurisdictional statute completely escaping liability under a federal statute.¹⁴⁴ As we will see, that is where the new Rule 4(k)(2) comes in.

The remainder of subdivision 4(k)(1) is substantively the same as the second part of former Rule 4(e). It provides that personal jurisdiction extends to parties added under Rules 14 and 19 who are served within 100 miles of the court (the "bulge rule"),¹⁴⁵ to parties served under the Federal Interpleader Act,¹⁴⁶ and to defendants served under federal legislation that provides for nationwide or worldwide service in actions under specific federal laws.¹⁴⁷

2. New Federal Long-Arm Statute - Rule 4(k)(2)

The most significant change to the provisions governing the territorial reach of federal courts is contained in the new Rule 4(k)(2),¹⁴⁸ which is intended to plug a gap in enforcement of federal law by expanding the jurisdiction of the federal courts in federal cases involving non-resident defendants. Where there is no specific federal jurisdictional statute applicable, jurisdiction over a defendant in a federal action must be established under Rule 4. Under the former rule, as noted above, service outside of the forum state was made under the forum state's long-arm service statute. Both the minimum contacts requirement of the Fourteenth Amendment, as well as any contacts requirement of the state long-arm jurisdictional statute had to be satisfied. While some states have long-arm statutes that allow the assertion of jurisdiction to the extent permitted by the Fourteenth Amendment,¹⁴⁹ other states have long-arm stat-

144. See, e.g., *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

145. FED. R. CIV. P. 4(k)(1)(B).

146. FED. R. CIV. P. 4(k)(1)(C).

147. FED. R. CIV. P. 4(k)(2).

148. FED. R. CIV. P. 4(k)(2) provides:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

149. See, e.g., CAL. CIV. PRO. CODE § 410.10 (West 1973) (stating that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"); R.I. GEN. LAWS § 9-5-33(a) (1956) (stating that "[e]very foreign corporation [or non-resident] . . . shall be subject to the jurisdiction of

utes whose reach is not quite so broad.¹⁵⁰ Thus, it was possible that a defendant had contacts with the nation as a whole sufficient to justify the application of federal law in a district court. However, because the defendant did not have sufficient contacts with any one state to satisfy the requirements of the Fourteenth Amendment, or, even if it had sufficient contacts as a constitutional matter, it did not have sufficient contacts to be subject to jurisdiction or to service under the state long-arm statute, it would be shielded from the application of the federal law.¹⁵¹

That was the situation in *Omni Capital International v. Rudolf Wolff & Co.*¹⁵² In *Omni*, investors sued a British corporation and a British citizen, among others, for violations of the Commodities Exchange Act.¹⁵³ As this was an implied private right of action, the statute was silent with respect to service of process, and the defendants had not been properly served under the terms of the state long arm service statute. Thus, although it appeared that there were sufficient minimum contacts to satisfy the constitutional requirements, there was no way to serve process on the defendants.¹⁵⁴ In finding for the defendants, the court declined to create a common law rule of nationwide service of process and invited Congress or those who propose the Federal Rules to do so.¹⁵⁵

The new Rule 4(k)(2), along with the provisions for worldwide service of process,¹⁵⁶ are intended to respond to the Court's invitation and correct the problem. In effect, the provision is a general long-arm statute for federal cases which allows jurisdiction to be asserted to the full extent permissible under the Fifth Amendment of the Constitution, a point to which we will return shortly.

Rule 4(k)(2) is a fall-back provision that is to be used to assert jurisdiction only when there is no state in which the defendant is subject to personal jurisdiction, either because the defendant does not have sufficient minimum contacts with any state to satisfy the Fourteenth Amendment, or because the state with which the defendant has sufficient

the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States").

150. See, e.g., MASS. GEN. L. ch. 223A, § 1 *et seq.* (1968); N.Y. CIV. PRAC. L. & R. 302 (McKinney 1990).

151. 1993 Committee Notes, 146 F.R.D. at 571.

152. 484 U.S. 97 (1987).

153. 7 U.S.C.A. § 1 *et seq.*

154. *Omni*, 484 U.S. at 104-08.

155. *Id.* at 111.

156. Service outside the United States is governed by FED. R. CIV. P. 4(f) and 4(h). See *supra* notes 97-100 and accompanying text.

contacts does not have a long-arm statute that can reach the defendant. A plaintiff seeking to invoke personal jurisdiction under Rule (4)(k)(2) should analyze the contacts of the defendant with each of the states, and the states' long-arm statutes, to determine whether there is any state in which a court of general jurisdiction could exercise in personam jurisdiction.

An interesting question arises as to who will have the burden of proof if the defendant challenges the assertion of jurisdiction under Rule 4(k)(2). The general rule is that the burden of proof as to jurisdiction lies with the party seeking to assert jurisdiction, normally the plaintiff.¹⁵⁷ Where the basis of the defendant's challenge is that it does not have sufficient contacts with the nation as a whole to satisfy the requirements of the Fifth Amendment, the plaintiff's burden is relatively straightforward: It must demonstrate that the defendant does have the required affiliating contacts with the nation as a whole. On the other hand, if the defendant's argument is that there is a state in which it is subject to personal jurisdiction, and therefore the fall-back jurisdiction of Rule 4(k) cannot be used, it seems unreasonable to require the plaintiff to demonstrate that the defendant is not subject to personal jurisdiction in each one of the states. More logically, the defendant making such a motion should be required at least to name the state in which it contends that it is subject to personal jurisdiction.¹⁵⁸ If this was a requirement, however, such a motion would be an awkward one for the defendant to make, as the defendant would effectively be admitting that it is subject to personal jurisdiction in another district court. In response, the plaintiff could try to prove that the defendant is not subject to jurisdiction in the district named by the defendant, or, more likely, simply move for a transfer to that district court under 28 U.S.C. § 1406 or 1404.¹⁵⁹

By arguing that the defendant is subject to personal jurisdiction in another state, the defendant will have conceded the personal jurisdiction of the federal district courts in that state.

157. See, e.g., *Omni*, 484 U.S. at 100-02.

158. See Siegel, *supra* note 83, at 252-53.

159. See *Goldlawr Inc. v. Heiman*, 369 U.S. 463 (1962) (holding that a transfer could be made under § 1406 where the court in which the action was originally filed lacked personal jurisdiction over the defendant, and the action was filed in an improper venue). If the defendant is an alien, as will typically be the case, 28 U.S.C. § 1391(d) provides the defendant may be sued in any district. Thus, normally jurisdiction will be the only problem, not venue, and 28 U.S.C. § 1404 will be the appropriate statute under which to apply for a change of venue.

a. Defendants Over Whom Personal Jurisdiction under Rule 4(k)(2) May be Asserted

Although Rule 4(k)(2) is not explicitly limited to alien defendants, most defendants subjected to jurisdiction under this provision will be non-resident aliens, as most citizens and alien domiciliaries of the United States will be subject to general in personam jurisdiction in their states of citizenship or domicile, even if they are served outside the boundaries of that state.¹⁶⁰ Furthermore, if an individual defendant, including a non-resident alien, can be served personally within the United States, even in a suit unrelated to the activities of the defendant in that state, it appears that the state in which the defendant can be served could assert “transient” jurisdiction over that defendant,¹⁶¹ and therefore, the

160. See *Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940). In *Milliken*, the Supreme Court found that a Wyoming court constitutionally could assert personal jurisdiction over the defendant Meyer, a Wyoming resident who was served in Colorado, pursuant to a Wyoming statute that permitted service out of state on absent residents. In its ruling, the court referred to citizenship, domicile, and residence, interchangeably, as justifying the assertion of jurisdiction. *Id.* The Court stated that “[t]he state which accords [the defendant] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.” *Id.* at 463. This reasoning would seem to apply with equal force to alien domiciliaries.

161. See *Burnham v. Superior Court*, 495 U.S. 604 (1990). *Burnham* does not conclusively establish the extent to which such “transient” jurisdiction may be asserted, however, as there was no clear majority opinion on that issue. In *Burnham*, the defendant husband, a New Jersey citizen, was in California for three days on business and to visit his children, who resided in that state with his estranged wife. The marital domicile had been in New Jersey. While in California, he was personally served with a summons and divorce petition. *Id.* at 607-08. The Supreme Court unanimously held that the California court had personal jurisdiction, but three separate opinions were written, with none commanding a majority of the court. Justice Scalia, writing for four justices, found that based on tradition and history, personal service of process within the state satisfied traditional notions of fair play required by the Fourteenth Amendment, regardless of the contacts of the defendant with the forum state. *Id.* at 609. Justice Scalia, presumably, would uphold transient jurisdiction any time the defendant was personally served within the territorial limits of the state, regardless of how fleeting his visit there. For example, it would be sufficient under Justice Scalia’s analysis if the defendant were personally served in an airplane flying over the state, on the basis of physical presence, as in the case of *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

In contrast, Justice Brennan, also writing for four justices in the *Burnham* case, upheld the service on Mr. Burnham on the grounds that he had, during the three days of his visit to California, purposefully availed himself of the privileges and benefits of that state, and his affiliating contacts with that state, as well as the fact that he was served in the state while there willingly, justified the assertion of jurisdiction. *Id.* at 637-39. Presumably, Justice Brennan would not uphold jurisdiction in the *Grace v. MacArthur* scenario, as the contacts between the defendant and the state would not be sufficient. Justice

fall-back jurisdiction under Rule 4(k)(2) cannot be asserted. As Professor Siegel points out, however, if the only state in which a non-resident alien defendant could be personally served does not allow for the assertion of transient jurisdiction, the defendant could be served either under the state law or pursuant to the federal methods of Rule 4, and transient jurisdiction may be asserted under Rule 4(k)(2).¹⁶²

It is also possible that Rule 4(k)(2) may be necessary to establish personal jurisdiction over a United States citizen. For example, assume that the defendant, a citizen of State X, is temporarily living in Canada, and it is there that he performed the acts that gave rise to the federal action against him. Under State X's long-arm statute, there is no basis for the assertion of jurisdiction over the defendant, as State X does not assert jurisdiction on the basis of domicile, or on the basis of acts that occurred outside of the state, and there is no other state with sufficient contacts to assert jurisdiction over the defendant. The defendant may be served in Canada under Rule 4(f), which provides for service in a foreign country, and jurisdiction can be asserted under Rule 4(k)(2), on the basis of his United States citizenship, which should create sufficient affiliating contacts to satisfy the requirements of the Fifth Amendment.¹⁶³

Stevens did not resolve the issue, but wrote a separate opinion, in which he stated he found that both of the other two opinions were too broad, and that the rule allowing service in California was fair and good common sense. *Id.* at 640. Thus, the extent to which transient jurisdiction is effective will have to be resolved another day.

The extent to which transient jurisdiction can be asserted against a corporate defendant also is unclear. At least one circuit court of appeals has found that transient jurisdiction cannot be asserted against a corporation based only on the "corporate presence" of an agent for service of process. In *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), Learjet was sued in Texas in an action arising out of a crash of one of its planes that occurred in Egypt during a flight from Saudi Arabia to Greece. All of the decedents were residents of Europe. The cause of action had no connection to Texas, but Learjet had qualified to do business, and had appointed an agent for service of process there. *Id.* at 180-81. The Fifth Circuit held that the service on the corporation's agent did not establish general jurisdiction over the corporation, distinguishing the *Burnham* case as applicable only to individuals and not corporations. *Id.* at 182. "Not only does the mere act of registering an agent not create Learjet's general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter." *Id.* at 183.

162. See Siegel, *supra* note 83, at 253-55.

163. See *Blackmer v. United States*, 284 U.S. 421, 438-39 (1932) (holding that the United States had personal jurisdiction over an absent citizen).

b. Fifth Amendment Limits on the Assertion of Jurisdiction Under Rule 4(k)(2)

The constitutional constraints on the assertion of jurisdiction of the federal court are those that arise under the Due Process Clause of the Fifth Amendment,¹⁶⁴ rather than the Fourteenth Amendment,¹⁶⁵ which applies only to the states. The due process requirements for jurisdiction of the Fifth Amendment are analogous to those of the Fourteenth, but courts generally have found that the relevant constitutional inquiry is whether the defendant has sufficient contacts with the nation as a whole, rather than just with the forum state, to justify the assertion of jurisdiction.

In addition to a requirement of minimum contacts between the defendant and the forum state, the Fourteenth Amendment requires that the assertion of jurisdiction not be overly inconvenient to the defendant, but be reasonable or fair; that it not offend "traditional notions of fair play and substantial justice."¹⁶⁶ In the notes to Rule 4, the Committee suggests that the Fifth Amendment imposes a similar requirement:

There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States.¹⁶⁷

Although the Fifth Amendment constraint suggested by the Committee is similar to the fairness requirement of the Fourteenth Amendment, it is not identical. Rather than simply addressing the fairness of the exercise of territorial jurisdiction by the sovereign, here the United States, the Committee suggests that the forum selection, or venue, is also subject to constitutional constraints.¹⁶⁸ The Committee's hesitation in making this proposition, as indicated by their use of the word "may," is understandable; generally, courts have held that venue selection is not subject to constitutional constraint. The traditional view was that territorial jurisdiction was concerned with the power to require the defendant to appear, and that venue was concerned only with choosing the con-

164. U.S. CONST. amend. V.

165. U.S. CONST. amend. XIV.

166. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

167. 1993 Committee Notes, 146 F.R.D. at 571-72 (collecting cites).

168. *Id.*

venient forum for that power to be exercised.¹⁶⁹ But the line between the two is less clear than the traditional doctrine suggests, as the modern concept of jurisdiction, first articulated by the Supreme Court in *International Shoe Co. v. Washington*,¹⁷⁰ is concerned not only with the power of the state to force the defendant to appear, but also with the fairness and convenience of the forum.

As the analysis of the Fifth Amendment constraints on jurisdiction draws heavily from Fourteenth Amendment jurisprudence, a brief review of some of the major cases considering the Fourteenth Amendment due process clause is in order.¹⁷¹ That review is followed by a discussion of the constraints on the exercise of jurisdiction imposed on the federal courts by the Fifth Amendment, in light of which the Committee's suggestion as to the fairness requirement can be addressed.¹⁷²

(i). Fourteenth Amendment Jurisprudence

Traditionally, a court's assertion of jurisdiction was based on the sovereignty of the state in which the court was established and its physical power over people and things within its territorial limits, as articulated by the Supreme Court in its classic 1877 decision of *Pennoyer v. Neff*.¹⁷³ Over the years, the concept of jurisdiction was refined and expanded, so that an assertion of jurisdiction could be based not only on the defendant's physical presence in the state, but also on consent to jurisdiction,¹⁷⁴ domicile in the state,¹⁷⁵ and even on the basis that the de-

169. See *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (stating that "[t]he question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum"). See also WRIGHT, MILLER & COOPER, *supra* note 81, § 3801.

170. 326 U.S. 310, 320 (1945).

171. See *infra* notes 173-207 and accompanying text.

172. See *infra* notes 208-234 and accompanying text.

173. 95 U.S. 714. The traditional analysis of jurisdiction in *Pennoyer* distinguished three types of jurisdiction: *in personam*, by which a court has authority to render a judgment for or against the defendant by virtue of his presence in the state. *Id.* at 724; *in rem*, by which a court has authority to render a judgment regarding property within the state, which is enforceable as against all others. *Id.* at 733; and *quasi in rem*, by which the court could render a judgment regarding a particular individual's interest in property located within the state. *Id.* at 731-32. Another type of quasi in rem jurisdiction recognized by the court is *attachment jurisdiction*, by which the pre-judgment attachment of property found within the state gives the court authority to render a judgment against its absent owner, but only to the extent of the value of the property. *Id.*

174. See *Hess v. Pawloski*, 274 U.S. 352 (1927) (holding that operation by a non-resident of a motor vehicle on a state's roadway constituted implied consent to jurisdic-

fendant had committed certain acts in the state, such as a tort, transacting business, or owning property.¹⁷⁶ Throughout this period, the exercise of jurisdiction still depended, although often through legal fictions, on a finding that the person or thing that was the subject of the judgment was “present” in the state, or otherwise subject to its sovereign power. Finally, in the 1945 case of *International Shoe Co. v. Washington*,¹⁷⁷ the Court attempted to rationalize the development of the law, and adopted a new theory of jurisdiction. In that case, the Court held that the state could, consistent with the Fourteenth Amendment, exercise in personam jurisdiction over a non-resident corporation, not because its activities there signified its presence, but because those activities established sufficient contacts with the state to make the exercise of jurisdiction reasonable.¹⁷⁸ However, the new standard was ambiguous. At points in its decision, the Court seemed to emphasize the traditional power, or sovereignty, basis of jurisdiction. The Court stated that the Due Process Clause of the Fourteenth Amendment

does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state¹⁷⁹

and, thus, may be subject to the jurisdiction of a court in that state. In other parts of the decision, the Court emphasized that the exercise of jurisdiction must be “reasonable,”¹⁸⁰ an inquiry which involved an “‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business . . .”¹⁸¹ These two branches of the test, the “sovereignty” or “power” branch and the “reasonableness” or “fairness” branch, were tied together by the

tion through appointment of a state official as agent for service of process in proceedings growing out of accidents or collisions involving the motor vehicle). Consent was also recognized in *Pennoy* as a basis for jurisdiction. 95 U.S. at 730-31.

175. See *Milliken v. Meyer*, 311 U.S. 457 (1940), *supra* note 160.

176. See generally Kevin M. Clermont, *Restating Territorial Jurisdiction and l’cneue for State and Federal Courts*, 66 CORNELL L. REV. 411, 414-15 (1981), and cases cited therein. See also Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988).

177. 326 U.S. 310.

178. *Id.* at 320.

179. *Id.* at 319 (citations omitted).

180. *Id.* at 317.

181. *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

Court in the “minimum contacts” formulation that has become a mantra for students of civil procedure:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”¹⁸²

The Court continued on the fairness branch of the minimum contacts formulation:

Th[e] demands [of due process] may be met by such contacts of the [defendant] with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there. An “estimate of the inconveniences” which would result to the [defendant] from a trial away from its “home” or principal place of business is relevant in this connection.¹⁸³

The Court’s subsequent decisions on jurisdiction seemed to confirm that both “power” and “fairness” were elements of the equation in determining the constitutionality of an exercise of jurisdiction,¹⁸⁴ but the relationship of the two elements remained somewhat unclear. In its 1980 decision in *World-Wide Volkswagen Corp. v. Woodson*,¹⁸⁵ the Court described the two elements as functions of the minimum contacts analysis:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the

182. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

183. *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

184. *See McGee v. International Life Ins.*, 355 U.S. 220 (1957); *see also Hanson v. Denckla*, 357 U.S. 235 (1958).

[T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

Id. at 251 (citations omitted).

185. 444 U.S. 286.

limits imposed on them by their status as coequal sovereigns in a federal system.¹⁸⁶

The Court elaborated on the relationship between the minimum contacts requirement and fairness:

[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there¹⁸⁷

From *World-Wide Volkswagen*, it seemed that a finding of sufficient affiliating contacts between the defendant and the forum satisfied not only the "sovereignty" or "power" part of the test, but also the "reasonableness" or "fairness" part of the test, by providing "protection [to the defendant] against inconvenient litigation."¹⁸⁸ The two parts of the test were conflated in that the nature of the contacts between the defendant and the forum had to be such that the defendant would have notice it was subject to suit in the state. Because of its contacts with the state, the defendant would reasonably anticipate being haled before a court there, and the court's assertion of jurisdiction would be fair. Furthermore, particularly in an action that arose out of the defendant's contacts with the forum, those contacts typically served to establish the state's interest in the assertion of jurisdiction.

The 1985 decision in *Burger King v. Rudzewicz*¹⁸⁹ made it clear that, while they are interrelated, the two parts of the jurisdictional analysis are separate. The power element focuses on the contacts of the defendant with the forum, and the reasonableness element involves a consideration of a number of interests, including those of the plaintiff and the forum state. Citing *World-Wide Volkswagen*, the Court in *Burger King* stated:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolu-

186. *Id.* at 291-92.

187. *Id.* at 297 (citations omitted).

188. *Id.* at 292.

189. 471 U.S. 462.

tion of controversies,” and the “shared interest of the several States in furthering fundamental substantive social policies.”¹⁹⁰

At the same time, the interrelation of the two elements was also emphasized. A strong showing of the factors listed above could “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”¹⁹¹ Furthermore, the Court emphasized that a finding of minimum contacts normally would justify the assertion of jurisdiction; where a defendant has been found to have purposefully directed his activities at the forum state, “he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”¹⁹² This assertion makes sense. In the majority of cases, the reasonableness of the assertion of jurisdiction will be demonstrated by the defendant’s contacts with the forum state, which themselves will serve to establish the plaintiff’s and the state’s interests in the assertion of jurisdiction.

Nonetheless, *Burger King* clearly established that, conceptually, the jurisdictional inquiry was a two-part analysis, and that the fairness element of the jurisdictional inquiry was not necessarily satisfied by a finding of minimum contacts:

[M]inimum requirements inherent in the concept of “fair play and substantial justice” may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. . . . [J]urisdictional rules may not be employed in such a way as to make litigation “so gravely difficult and inconvenient” that a party unfairly is at a “severe disadvantage” in comparison to his opponent.¹⁹³

Even where sufficient minimum contacts were established, it was possible that other factors could lead the court to the conclusion that the assertion of jurisdiction was unfair. Still, to this point, the Court had never found the exercise of jurisdiction unreasonable or unfair where minimum contacts between the forum state and the defendant had been established.

The first case in which the Supreme Court can be said to have found that the exercise of jurisdiction was unreasonable, even though the affiliating contacts between the defendant and the forum state were sufficient to otherwise satisfy the requirements of the Fourteenth Amend-

190. *Id.* at 477 (citations omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

191. *Id.*

192. *Id.*

193. *Id.* at 477-78 (citations omitted).

ment, is *Asahi Metal Industry Co. v. Superior Court*,¹⁹⁴ a case involving an alien third-party defendant. In *Asahi*, the plaintiff Zurcher, a California resident who had been involved in a motorcycle accident, filed a product liability action in California state court against a number of defendants, including Cheng Shin Rubber Industrial Co., the Taiwanese manufacturer of the motorcycle's tire tube, which was alleged to be defective.¹⁹⁵ Cheng Shin impleaded Asahi Metal Industry Co., the Japanese manufacturer of the tube's valve assembly, seeking indemnification. Zurcher's claims against Cheng Shin and the other defendants were settled and dismissed, leaving only the indemnity action by Cheng Shin against Asahi.¹⁹⁶

There was no majority opinion on the issue of whether the defendant had established sufficient minimum contacts with the state. Justice Brennan, joined by three other justices, found that the defendant had established sufficient minimum contacts with the forum state by placing the goods in the stream of commerce, knowing that they could end up in California.¹⁹⁷ Justice O'Connor, also joined by three other justices, reasoned that foreseeability that the goods might end up in California was not enough to justify an assertion of jurisdiction without additional conduct of the defendant showing an intent or purpose to serve the state, such as designing the product to meet California standards, or advertising in California.¹⁹⁸ Justice Stevens (joined by Justices Blackmun and White, who also joined Justice Brennan's opinion) found it unnecessary to rule on this issue, but stated that if it were, he would likely find that the contacts of the defendant Asahi with the forum state were sufficient, given the volume of the product shipped to the United States over a period of several years.¹⁹⁹

Eight of the justices did, however, agree that regardless of whether the contacts between the defendant and the state were otherwise sufficient, it would be unreasonable under the circumstances of the case to assert jurisdiction over the defendant.²⁰⁰ The Court noted that under the test set

194. 480 U.S. 102 (1987).

195. *Id.* at 106.

196. *Id.*

197. *Id.* at 108. Justice Brennan was joined by Justices White, Marshall and Blackmun.

198. *Id.* at 112. Justice O'Connor was joined by the Chief Justice, and Justices Powell and Scalia.

199. *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

200. Justice Scalia, who joined that part of Justice O'Connor's opinion in which she ruled that the contacts of the defendant with California were insufficient, did not join in

out in *International Shoe*, a court determining the reasonableness of jurisdiction must consider not only the burden on the defendant, but also the interests of the forum state and the plaintiff's interest in obtaining relief.²⁰¹ In *Asahi*, the burden on the defendant was severe; the defendant was required not only to travel from Japan to defend itself in California, but also because it was an alien defendant being required to defend itself in a foreign nation's judicial system. In many cases in which minimum contacts are established, the interests of the plaintiff and the forum state may justify the serious burdens placed on the alien defendant.²⁰² In this case, however, the interests of the plaintiff and the forum state in the assertion of jurisdiction were slight. The state no longer had an interest in providing a forum to its citizen, or in enforcing its safety standards, as the American plaintiff was no longer involved, and all that remained was an indemnification claim by Cheng Shin, a Taiwanese corporation, against Asahi, a Japanese corporation.²⁰³ Cheng Shin had made no showing "that it [was] more convenient for it to litigate" in the United States than in Taiwan or Japan.²⁰⁴

In an observation that is pertinent to Fifth Amendment jurisdictional analysis, the Court commented on the significance of the fact that jurisdiction was being asserted over an alien defendant and its implications for international relations:

World-Wide Volkswagen . . . admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal [Government's] interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and re-

the part of the opinion finding the exercise of jurisdiction to be unreasonable, presumably on the ground that it was unnecessary to rule on this point.

201. *Asahi*, 480 U.S. at 113.

202. *Id.* at 114.

203. *Id.*

204. *Id.*

serve should be exercised when extending our notions of personal jurisdiction into the international field.”²⁰⁵

Given the international context, the heavy burden on an alien defendant, and the slight interests of Cheng Shin and the forum state in the exercise of jurisdiction, the Court found for the first time that the assertion of jurisdiction over a defendant would be unreasonable, regardless of whether the contacts between the defendant and the forum state were otherwise adequate.²⁰⁶

Burger King and *Asahi*, therefore, established that the inquiry as to whether the assertion of jurisdiction comports with due process is a two-step test involving both an inquiry into whether the defendant has established affiliating contacts between himself and the forum state, and whether the assertion of jurisdiction over the defendant, in light of the contacts and other factors, is fair and reasonable.

Once the personal jurisdiction of the state over the defendant is satisfied, the choice of forum, or venue, within the state is traditionally treated as a separate issue. The fairness of the particular venue within the state where the case is to be heard generally is considered to be governed only by statute, and not constrained by constitutional requirements of the Due Process Clause. In a recent case upholding Montana’s venue statute against an equal protection challenge, the Supreme Court commented on the extent to which the determination of where in the state the trial is a matter of policy within the discretion of the legislature, with very few constitutional constraints:

Venue rules generally reflect equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial. The forum preferable to one party may be undesirable to another, and the adjustment of such warring interests is a valid state concern. In striking the balance between them, a State may have a number of choices, any of which would survive scrutiny, each of them passable under the standard tolerating some play in the joints of governmental machinery. Thus, we have no doubt that a State would act within its constitutional prerogatives if it were to give so much weight to the interests of plaintiffs as to allow them to sue in the counties of their choice under all circumstances.²⁰⁷

205. *Id.* at 115 (citation omitted).

206. *Id.* at 116.

207. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651-52 (1992) (citations omitted). There may be equal protection limitations on the exercise of the legislature’s discretion to assign venue. *See Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) (holding that venue rules restricting suit against domestic corporation to those counties where it maintained a place of business, yet subjecting foreign corporations to suit in any county, lacked a rational basis). As the Court made clear in *Burlington N. R.R.*, however, any

(ii). Fifth Amendment Jurisprudence

The constitutional constraints on the exercise of jurisdiction by federal courts stem from the Due Process Clause of the Fifth Amendment, and are analogous to the constraints placed on state courts by the Fourteenth Amendment. An analysis of jurisdiction under the Fifth Amendment has in the past been necessary only when a specific federal statute provided for nationwide or worldwide service of process, as the former Rule 4(e) was interpreted by the majority of courts as incorporating Fourteenth Amendment constraints in all other cases.²⁰⁸ Under the 1993 revisions, a Fifth Amendment analysis will also be necessary where jurisdiction is asserted under Rule 4(k)(2).

The Supreme Court has said very little about the Fifth Amendment limitations on jurisdiction. Therefore, the lower courts have looked to the Supreme Court's jurisprudence on the Fourteenth Amendment and have adopted a modified *International Shoe* "minimum contacts" analysis. While the analysis under the Fifth Amendment is similar, in that the Due Process Clause of both provisions protects the defendant against inconvenient litigation, there is an important difference: The United States' jurisdiction is not limited, as is the jurisdiction of the states, "by their status as coequal sovereigns in a federal system."²⁰⁹ However, where an alien defendant is involved or where service has been made outside of the United States, the concerns of another sovereign are presented, and there must be sufficient affiliating contacts with the United States to justify the assertion of power by a United States court over the defendant. Rather than look solely to the affiliating contacts with the state in which the federal court is located, courts have looked to the contacts of the defendant with the nation as a whole. The Supreme Court, however, has never directly ruled on the issue of whether nationwide contacts can be aggregated to satisfy the due process requirement

such equal protection constraints are of the mildest kind, and state venue rules are subject only to the slightest of rational basis review. 504 U.S. at 653; *see also* *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) (holding that venue statute, which provides that a foreign corporation is subject to venue in any county within the State while a domestic corporation is subject to venue outside its county of domicile only where plaintiff provides prima facie evidence that it has a cause of action, is not violative of the Equal Protection Clause, as it is not discriminatory in application).

208. *See supra* note 136.

209. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

of the Fifth Amendment, and, in the *Asahi* decision, specifically declined to address the issue.²¹⁰

More recently, in *Republic of Argentina v. Weltover*,²¹¹ the Court found that Argentina possessed sufficient minimum contacts to satisfy the Fifth Amendment. The affiliating contacts were that Argentina had issued negotiable debt instruments in U.S. dollars, payable in New York, and had appointed a financial agent in New York, such that Argentina had “purposefully avail[ed] itself of the privilege of conducting activities within the [United States].”²¹² While the quoted language could be read as an endorsement of the view that contacts with the nation as a whole can be aggregated to support the assertion of jurisdiction by a federal court, on the facts of the case, it is not so clearly an endorsement of that position. Jurisdiction in *Weltover* was asserted by a federal district court in New York, the state with which the defendant Argentina had affiliating contacts. Thus, the Court in *Weltover* did not decide whether jurisdiction would be appropriate in a federal court in a state with which the defendant has no contacts, based on the aggregate contacts of the defendant with the rest of the nation.

This issue is an important one. In the context of the Fifth Amendment, it is perhaps more appropriately addressed in the context of the “fairness” element of the jurisdictional inquiry, rather than the “power” element. Courts applying a “minimum contacts” test under the Fifth Amendment often have been criticized for focusing unduly on the power element of the jurisdictional test, while ignoring the fairness element, content to rely on statutory venue and transfer provisions and the doctrine of *forum non conveniens* to ensure the fairness of the forum.²¹³

This failure of the courts to address the fairness element of the jurisdictional analysis is understandable, for it is at this juncture that the Fourteenth Amendment analysis and the Fifth Amendment analysis diverge. Under a Fourteenth Amendment analysis, the fairness with which the court is concerned relates to whether the exercise of jurisdiction by the state would be fair, or would be unduly inconvenient to the defendant, in light of other interests. Once it is established that the inconven-

210. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 n.* (1987). See also *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.5 (1987) (declining to rule on whether a federal court may, consistent with the Fifth Amendment, exercise personal jurisdiction based on the defendant’s contacts with the nation as a whole, rather than just the contacts with the state in which the district court sits).

211. 504 U.S. 607 (1992).

212. *Id.* at 619 (alterations in original) (citations omitted).

213. See generally Lusardi, *supra* note 176; Clermont, *supra* note 176; WRIGHT & MILLER, *supra* note 127, § 1067.1.

ience to the defendant of litigating in the state is not of constitutional import, the specific forum of the litigation similarly is of no constitutional import.²¹⁴ After all, the defendant already is required to appear in the state, and the additional inconvenience of traveling within the state is relatively insignificant.

On the other hand, in cases calling for the application of the Fifth Amendment where the sovereign is the United States, the geographical distances are much greater, and the defendant often will be just as concerned with where in the country he will have to defend himself as with whether he will have to defend in the country at all. For example, the Japanese corporation that has conducted business and established contacts only with states on the west coast likely will find it far more convenient to defend an action in one of those states, rather than on the east coast or in Florida. One could argue that the relative inconvenience of traveling across the country is insignificant once a foreign defendant is forced to travel to the United States,²¹⁵ but that is not always the case. Consider, for example, the defendant in British Columbia, Canada, who has contacts only with the State of Washington. The inconvenience to him of traveling to New York or Delaware to defend a suit arising out of those contacts can be very great indeed.²¹⁶ The Committee recognized the potential problem, and urged that "[t]he district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result."²¹⁷

The fairness of the venue within the United States is also often of concern to defendants inside the country. Take for example the case of a California defendant, who has never done business in Pennsylvania, or established any other contacts with that state. Under a Fourteenth Amendment analysis, the assertion of jurisdiction over him by a Pennsylvania state court would be unconstitutional because of the complete lack of affiliating contacts with the state. There are, however, sufficient affiliating contacts with the United States, under a Fifth Amendment

214. As noted above, the choice of venue is left to the state, with virtually no constitutional constraints. See *supra* note 207.

215. Cf. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 422 (9th Cir. 1977) (holding that in order for a federal district court in Nevada to assert personal jurisdiction over a foreign defendant arising from its activities within the United States, contacts with states other than Nevada are not relevant to determine whether the Nevada court can assert jurisdiction).

216. Cf. *Theunissen v. Matthews*, 935 F.2d 1454, 1462 (6th Cir. 1991) (finding burden placed on defendant forced to travel 10 miles from Windsor, Ontario to Detroit, Michigan was "slight").

217. 1993 Committee Notes, 146 F.R.D. at 572.

analysis, to justify the assertion of jurisdiction by a federal court. However, the inconvenience to the defendant is the same, regardless of whether he is being haled before a state or a federal court. Nonetheless, defendants rarely have been successful in arguing that the Fifth Amendment places limits on the choice of forum, or venue, as the courts generally have viewed the issue of venue separately and not as part of the jurisdictional analysis.

A minority of courts have held that the Due Process Clause of the Fifth Amendment does play a role in protecting the defendant from an inconvenient venue within the United States. In *Oxford First Corp. v. PNC Liquidating Corp.*,²¹⁸ a Philadelphia-based plaintiff commenced a federal action for securities fraud in a federal court in Pennsylvania. The defendants, who were served in California, argued that they did not have sufficient affiliating contacts with Pennsylvania, and therefore, under the *International Shoe* doctrine, the action should be dismissed for lack of *in personam* jurisdiction.²¹⁹

The district court upheld jurisdiction, noting that any constitutional constraints on a federal court's jurisdiction stem from the Fifth and not the Fourteenth Amendment, as the latter is applicable to state action only. Therefore, the constitutional strictures defined by *International Shoe* were not applicable.²²⁰ While the court found that Congress has the power to provide for nationwide jurisdiction, the court also ruled that the Fifth Amendment does place fairness restrictions on the exercise of jurisdiction. Those restrictions, the court held, do not run along state borders.²²¹ Rather, the court articulated a number of factors to be considered in determining whether the exercise of jurisdiction by a federal court is fair, including: (1) "the extent of the defendant's contacts with the place where the action was brought;"²²² (2) "the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business;"²²³ (3) judicial economy;²²⁴ (4) "the probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will . . . take place outside the state of defendant's residence or place of business," as this factor will affect the defendant's "claim that he is inconvenienced by the distant forum;"²²⁵

218. 372 F. Supp. 191 (E.D.Pa. 1974).

219. *Id.* at 198.

220. *Id.* at 199-200.

221. *Id.* at 203.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 203-04.

and (5) "the nature of the regulated activity in question and the extent of impact that defendant's activities have beyond the borders of [the defendant's] state of residence or business."²²⁶

The majority of courts, however, have refused to incorporate these factors into a constitutional analysis on the ground that venue is an issue distinct from jurisdiction. These courts have found that the defendant's right to a fair forum is adequately protected by statutory venue and transfer provisions, and need not be considered a constitutional issue.²²⁷ In rejecting the *Oxford First* analysis, the Seventh Circuit stated:

The "fairness" measured by these factors does not relate to the fairness of the exercise of power by a particular sovereign . . . but instead to the fairness of imposing the burdens of litigation in a particular forum. As such, these factors are more appropriately used [in determining proper venue], and we therefore decline to import them into determination of the constitutionality of exercise of personal jurisdiction.²²⁸

The Committee Notes to the 1993 Rule 4 indicate the Committee's opinion that the majority view is incorrect, and that the Fifth Amendment does impose fairness limitations on venue.²²⁹ The Committee does note that the statutory venue provisions usually will adequately protect the defendant from an inconvenient forum. Where the defendant is an alien, however, it "may be sued in any district,"²³⁰ and the fairness of the venue is in no way assured by the statute. Additionally, any defendant sued in a forum it finds inconvenient may also seek a transfer of

226. *Id.* at 204. See also *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286 n.3 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981), *infra* note 229.

227. See, e.g., *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984) (finding that in federal cases, the "nonconstitutional doctrine of forum non conveniens" protects a litigant's right to a fair forum), *dismissed on remand*, 626 F. Supp. 718 (D.P.R. 1985), *aff'd*, 804 F.2d 773 (1st Cir. 1986); *Hogue v. Mildon Engineering, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984) (holding that fairness of jurisdiction by a bankruptcy court is a federal venue issue and not a constitutional issue).

228. *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979).

229. 1993 Committee Notes, 146 F.R.D. at 571-72. "A plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States." *Id.* The Committee cites only one case in support of its contention, *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286-87 n.3 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981). The court in *DeJames* stated in dicta that "we are not sure that some geographic limit short of the entire United States might not be incorporated into the 'fairness' component of the Fifth Amendment." *Id.* The court then cited to *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 198-204 (E.D.Pa. 1974), for a discussion of possible Fifth Amendment limitations.

230. 28 U.S.C. § 1391(d) (1988).

venue.²³¹ Nevertheless, the question of whether the fairness of the forum is of constitutional dimension remains significant. Transfer of an action is not as of right, but is a matter left to the discretion of the district court. If the fairness of the venue is of constitutional dimensions, however, a transfer, or dismissal, would be mandatory in an appropriate case. A determination that the fairness of the venue has jurisdictional implications would have other effects as well. For example, the availability of a collateral attack on a judgment by default may turn on whether the court had jurisdiction over the defendant at the outset.²³² Whether the court where the action was originally commenced had jurisdiction also may determine the applicable law on transfer; if the transferor court had jurisdiction, the law of the transferor forum applies.²³³ If the transferor court did not have jurisdiction, then the law of the transferee court applies.²³⁴ Whether or not the Fifth Amendment does impose a limitation on the fairness of the venue, as suggested by the Committee Notes, is a significant issue that the Supreme Court may have to address soon, given the format of the new rule.

c. Validity of Rule 4(k)(2) Under the Rules Enabling Act

Clearly, under the new Rule 4, the federal courts are able to assert jurisdiction over defendants whom they could not reach before. The impleaded British parties in *Omni Capital International v. Rudolf Wolff & Co.*,²³⁵ for instance, who could not be served under the Louisiana state service provisions, now could be served in England pursuant to Rule 4(f), and apparently would be amenable to the federal court's in perso-

231. 28 U.S.C. § 1404 (1988).

232. See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931) (holding that respondent's present defense of lack of personal jurisdiction by the District Court for Southern Iowa was a collateral attack on the Missouri's District Court ruling on a motion to dismiss for lack of personal jurisdiction).

233. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Both *Van Dusen* and *Ferens* involve diversity claims. Where the action involves a federal claim, the circuits are split on whether the law of the transferor or transferee forum should apply. See generally JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS*, at 357 (6th ed. 1994), citing *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd on other grounds sub nom.* *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (Ginsberg, J.) (holding that the law of the transferor forum on federal questions will be given close attention, but does not have stare decisis effect in the transferee district), and *contra In re Dow Co. "Sarabond" Products Liability Litigation*, 666 F. Supp. 1466, 1468 (D. Colo. 1987) (applying law of the transferor forum).

234. See *Nose v. Rementer*, 610 F. Supp. 191 (D. Del. 1985).

235. 484 U.S. 97 (1987). See *supra* notes 152-55 and accompanying text.

nam jurisdiction, under Rule 4(k)(2) and the Fifth Amendment, based on their contacts with the United States as a whole. The drafters of the new provisions were aware of concerns that the new rule might be viewed as extending the personal jurisdiction of the federal courts, and thus run afoul of the Rules Enabling Act's proscription against rules that "abridge, enlarge or modify any substantive right."²³⁶ The Committee chose to highlight the issue in a special note when the amendments were proposed to the Supreme Court,²³⁷ but the Supreme Court transmitted the proposed amendment to Congress, and it became effective without change.

Those commentators who have addressed the issue also have come to the conclusion that Rule 4(k)(2) does not run afoul of the Rules Enabling Act for various reasons. One argument is that the Supreme Court's decision in *Mississippi Publishing Corp. v. Murphree*²³⁸ is determinative.²³⁹ In that case, the Court found that former Rule 4(f), which allowed service of process in other districts within the state, did not violate the Rules Enabling Act, as it was a procedural means to bring the defendant before the court for an adjudication of its rights, and had only an incidental effect on those rights.²⁴⁰ Another argument is that personal jurisdiction is not a substantive right within the meaning of the Rules Enabling Act, as it is not concerned with the "substantive law to be applied in the action against the defendant, but only . . . add[s] the federal courts to the list of forums that can hear the action."²⁴¹ One commentator has argued that although personal jurisdiction is procedural within the meaning of the Rules Enabling Act, a provision extending jurisdiction nationwide is a violation of separation of powers, as it is of sufficient importance that it is reserved for Congress.²⁴²

236. Rules Enabling Act, 28 U.S.C. § 2072(b) (1988). See Committee Notes, 146 F.R.D. at 557-58.

237. 1993 Committee Notes, 146 F.R.D. at 557-58. "SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to the new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule . . ." *Id.*

238. 326 U.S. 438 (1946).

239. See, e.g., Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159 (1994); Howard M. Erichson, *Nationwide Personal Jurisdiction in all Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1146-47 (1989).

240. *Mississippi Publishing Corp.*, 326 U.S. at 444.

241. Siegel, *supra* note 83, at 253. See also Erichson, *supra* note 239.

242. Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Rule 4*, 40 ME. L. REV. 41 (1988).

The major problem with these analyses is that they treat Rule 4(k)(2) as though it merely extends the reach of federal courts by expanding the reach of service of process, just as the former Rule 4(f) had done. However, Rule 4(k)(2) and 4(k)(1) do not merely concern service. Rather, Rule 4(k) purports to set forth a test by which assertions of personal jurisdiction are to be adjudged. Amenability to jurisdiction, however, seems to be a substantive right within the meaning of the Rules Enabling Act, and by dealing directly with amenability to jurisdiction, the rule has violated the prohibition in the Act against court rules that “abridge, enlarge or modify” substantive rights. The House Judiciary Committee Report accompanying the 1988 version of the Rules Enabling Act²⁴³ clarified that the purpose of the limiting language was to allocate authority between Congress and the Court:

[T]he substantive rights protected by proposed section 2072 include rights conferred, or that might be conferred, by rules of substantive law, such as “the right not to be injured . . . by another’s negligence” or the right not to be subject to discrimination in employment on the basis of race More generally, proposed section 2072 is intended to allocate to Congress, as opposed to the Supreme Court . . . lawmaking choices that necessarily and obviously require consideration of policies extrinsic to the business of the courts”²⁴⁴

By this test, amenability to jurisdiction is a substantive right. It implicates a right conferred by substantive law; that is, the individual’s liberty interest protected by the Due Process Clause of the Fifth Amendment (in federal courts), and the Fourteenth Amendment (in state courts). In addition, the prospective formulation of a rule governing amenability to jurisdiction necessarily involves policy choices that are “extrinsic to the business of the courts,” and more appropriately left to Congress. A more in-depth discussion of the issue of whether the rule does affect a sub-

243. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4648-52 (1988).

244. H.R. REP. NO. 422, 99th Cong., 1st Sess. § 22 (1985) (citations omitted). Technical and typographical errors in the Report were corrected at 132 CONG. REC. E177 (daily ed. Feb. 3, 1986). This is the House Judiciary Committee Report on H.R. 3550, whose language amending 28 U.S.C. § 2072 (apart from language relating to the supercession clause, not at issue here) was identical to that ultimately adopted in 1988. The report on the 1988 House bill, which was identical to the Senate bill, incorporated by reference the 1985 Report No. 422. See H.R. REP. NO. 89, 100th Cong., 2d Sess. § 29 (1988). For a discussion of the legislative history of the 1988 amendments to the Rules Enabling Act, see Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1030-36 (1989); see also Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1043-49 (1993).

stantive right, and thus runs afoul of the limitations of the Rules Enabling Act will be left to a future article.

d. Supplemental Personal Jurisdiction under Rule 4(k)(2)

Subdivision 4(k)(2) applies only “with respect to claims arising under federal law;”²⁴⁵ it does not apply to claims under state or foreign law, even if the diversity or alienage requirements of 28 U.S.C. § 1332 are met. The Committee Notes assert, however, that once personal jurisdiction over the defendant is established under Rule 4(k)(2) with respect to a federal claim, “28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant”²⁴⁶ This assertion is questionable. It may be that federal courts can assert “supplemental personal jurisdiction” over related claims, but 28 U.S.C. § 1367 does not grant that authority. The supplemental jurisdiction statute, enacted in 1990, is a grant to the district courts of subject matter jurisdiction, not personal jurisdiction.²⁴⁷ As an attempt to codify, and in some instances supersede, the common law doctrines of pendent and ancillary subject matter jurisdiction, the statute provides that where the district court has original subject matter jurisdiction over a claim, based on diversity, federal question, or some specific grant of jurisdiction, the court also will have “supplemental jurisdiction over all other claims that are so related to claims in the action under such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”²⁴⁸ Article III operates to limit the subject matter

245. FED. R. CIV. P. 4(k)(2).

246. 1993 Committee Notes, 146 F.R.D. at 572. *Accord* Sinclair, *supra* note 239, at 191 & nn.187-89.

247. *See, e.g.,* Central States, S.E. and S.W. Areas Pension Fund v. Joe McLelland, Inc., No. 92-C-3514, 1992 WL 332289 at *1 (N.D. Ill. Nov. 2, 1992) (noting that the supplemental jurisdiction statute “relate[s] only to subject matter jurisdiction. . . . There is nothing in the statute that expands the personal jurisdiction of the court”).

248. 28 U.S.C. § 1367(a) (1988). Subsection (b) limits the scope of supplemental jurisdiction in diversity cases to avoid circumvention of the requirements of 28 U.S.C. § 1332. Subsection (c) gives the court a certain amount of discretion to decline to exercise supplemental jurisdiction. The supplemental jurisdiction statute has sparked considerable commentary and debate. *See generally* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 486 (1991) (questioning the workability of the statute); Thomas M. Mengler et al., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (Dec./Jan. 1991) (explaining Congress’ codification of supplemental jurisdiction as a response to the Supreme Court’s decisions); John Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial*

jurisdiction of the federal courts and does not concern personal jurisdiction. Limits on personal jurisdiction flow from the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁴⁹

Under the statute, for example, if a Virginia plaintiff has a claim under the federal securities laws against a Virginia defendant, he may append a state fraud claim arising out of the same transaction. Even though the court has no original jurisdiction over a state claim involving non-diverse parties, it will have supplemental subject matter jurisdiction under 28 U.S.C. § 1367, as the claim involves the same case or controversy as the federal claim over which the court does have original jurisdiction.²⁵⁰

The Committee assumes that in a similar situation, where the court's jurisdiction over the defendant with respect to the federal claim is established by Rule 4(k)(2), it also will have personal jurisdiction with respect to any related state or foreign law claim.²⁵¹ As an example, assume that several plaintiffs, including New York citizens, sue a New York corporation and a British corporation in a federal district court in State *X* for alleged violations of a federal statute, the Commodities Exchange Act.²⁵² The British corporation may have sufficient contacts with State *X* to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment, but assume that State *X*'s long arm jurisdic-

Improvements Acts of 1988 and 1990, 24 U.C. DAVIS L. REV. 735 (1991) (discussing the exercise of supplemental jurisdiction).

249. See *Omni Capital Int'l v. Rudolf Wolf & Co.*, 484 U.S. 97, 104 (1987) (citing *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

250. In this respect, the supplemental jurisdiction statute codified the court-created doctrine of pendent jurisdiction. Supplemental jurisdiction also may be exercised over related claims that involve the joinder of additional parties. If the Virginia plaintiff in our example adds a California resident as a defendant in the state fraud action, the court may exercise supplemental (subject matter) jurisdiction over that claim. In this respect, the statute overrules prior case law. Cf. *Finley v. United States*, 490 U.S. 545, 556 (1989) (holding that a "grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over . . . different parties"); *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (declining to "lay down any sweeping pronouncement upon the existence or exercise of [pendant-party] jurisdiction"). The court's in personam jurisdiction over the additional party, however, still must be established by proper service, and the requisite minimum contacts with the forum state. Cf. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, at 68 & n.31 (2d ed. 1993) (collecting cases on this point decided under the doctrines of pendent and ancillary jurisdiction, prior to the codification of those doctrines in the supplemental jurisdiction statute), and at pp. 140-41 (explaining that jurisdiction must be established in multiple claim cases).

251. 1993 Committee Notes, 146 F.R.D. at 571.

252. This example is similar to the fact pattern in *Omni Capital Int'l v. Rudolf Wolff & Co.*, *supra* notes 152-55 and accompanying text.

tional statute would not allow a state court to assert jurisdiction over the British corporation. Thus, personal jurisdiction is asserted under Rule 4(k)(2). The New York defendant asserts a cross-claim against the British defendant for breach of a contract to sell the securities at issue and seeks indemnification. The contract was negotiated and entered into in Britain. Many of the same facts are relevant to both claims. On these facts, the contract claim is part of the same case or controversy, within the meaning of the supplemental jurisdiction statute and Article III. However, while it is possible to imagine a situation in which subject matter jurisdiction over the contract claim would depend on the supplemental jurisdiction statute,²⁵³ in our example it does not because the district court has original subject matter jurisdiction over the claim between a citizen of a State and a citizen of a foreign state under 28 U.S.C. § 1332(a)(2).²⁵⁴ If there is supplemental personal jurisdiction over the British defendant with respect to the contract claim, in either situation it does not stem from the supplemental jurisdiction statute.²⁵⁵

Nor does Rule 4(k)(2) purport to authorize the exercise of personal jurisdiction in that situation. The language of the provision provides only that personal jurisdiction is established "with respect to claims arising under federal law."²⁵⁶ Personal jurisdiction with respect to claims arising under state or foreign law is excluded. The express language of the section, as well as the Committee Notes, make it quite clear that the provision was not intended to be an assertion of supplemental personal jurisdiction.²⁵⁷ Nor should the courts strain to interpret Rule 4(k)(2) as permitting assertions of supplemental personal jurisdiction. Interpreted thus, the rule would extend the personal jurisdiction of the federal courts and, therefore, run afoul of the Rules Enabling Act's prohibition against rules that affect any substantive rights.

253. For example, if there was a third defendant, also from New York, against whom the contract claim was being asserted as well, no diversity jurisdiction would exist, and subject matter jurisdiction would be based on the supplemental jurisdiction statute.

254. 28 U.S.C. § 1332(a)(2) (1988). Section 1332(a)(2) states in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between citizens of a State, and citizens and subjects of a foreign state . . ."

255. Nor will the court have the statutory discretion to decline the exercise of supplemental jurisdiction that is provided in that statute. However, as supplemental personal jurisdiction is a common law rule, the court may be able to exercise inherent discretion, or may use concepts of convenience and fairness to decline an exercise of jurisdiction.

256. FED. R. CIV. P. 4(k)(2).

257. *Id.*; 1993 Committee Notes, 146 F.R.D. at 570. The Committee Notes assert that supplemental personal jurisdiction is permitted by 28 U.S.C. § 1367, rather than by FED. R. CIV. P. 4(k)(2).

Furthermore, an assertion of supplemental personal jurisdiction has the potential of altering the substantive law to be applied in a case.²⁵⁸ In our example, where the New York defendant cross-claims against the British defendant on a contract made in Britain, it seems likely, but is certainly not inevitable, that British law will be applied to construe the contract. Some states may have a choice of law rule that would require the application of another law, typically that of the forum state. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*,²⁵⁹ a federal court is required to follow the forum state's choice of law rules.²⁶⁰ Plaintiff in our example might choose to commence his suit in a state with little or no connection to the defendant, basing his choice of forum on what its choice of law rules say about the substantive law to be applied in the contract action, although he could not have done so absent the existence of the related federal claim. Thus, an assertion of supplemental personal jurisdiction, if permitted by Rule 4(k)(2), could lead to a change in the substantive law to be applied, which a rule of procedure is not to do.

That does not mean that federal courts cannot or will not assert supplemental personal jurisdiction over related claims where jurisdiction over the defendant with respect to the federal claim has been asserted pursuant to Rule 4(k)(2). There is a large body of case law dealing with the issue of what was generally called pendent personal jurisdiction before enactment of the supplemental jurisdiction statute and the amendments to Rule 4. But the law of pendent personal jurisdiction is far from settled, and courts are split on the issue.²⁶¹ The Committee Notes on Rule 4 do not even acknowledge the existence of the controversy, but assert that supplemental personal jurisdiction is permitted.²⁶² A com-

258. See Steven Michael Witzel, *Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendent Personal Jurisdiction and Nationwide Service of Process*, 51 *FORDHAM L. REV.* 27 (1982).

259. 313 U.S. 487 (1941).

260. *Id.* at 496 (stating that "[t]he conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts").

261. See CHARLES WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 32 (4th ed. 1983) (collecting cases); WRIGHT & MILLER, *supra* note 126, § 1125 (collecting cases); James S. Cochran, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 *TEX. L. REV.* 1463 (1986); Lewis R. Mills, *Pendent Jurisdiction and Extra-territorial Service Under the Federal Securities Laws*, 70 *COLUM. L. REV.* 423 (1970). *Contra* William D. Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 *VILL. L. REV.* 56 (1965). See generally Witzel, *supra* note 257 (collecting cites).

262. 1993 Committee Notes, 146 *F.R.D.* at 572 (stating that "[i]f . . . personal jurisdiction is established under [FED. R. CIV. P. 4(k)(2)] with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against the

plete analysis of the problem of authority and other issues raised by assertions of pendent personal jurisdiction will be left to another article.

C. Limits on Assertion of Quasi-in-Rem Jurisdiction - Rule 4(n)

A final change to Rule 4 should be noted. Rule 4(n) provides that *quasi-in-rem* jurisdiction may be asserted in the manner and circumstances provided for by state law only upon a showing that personal jurisdiction over the defendant could not with reasonable efforts be obtained by other means authorized in the rule.²⁶³ This amendment is in keeping with the trend away from the use of quasi-in-rem jurisdiction, instigated largely by the ruling in *Shaffer v. Heitner*²⁶⁴ that such an assertion of jurisdiction must comply with the *International Shoe* requirements of minimum contacts between the defendant and the forum state.²⁶⁵

II. RULE 11 - SANCTIONS

Rule 11 was promulgated in 1938 with the original Federal Rules of Civil Procedure. The 1938 version of the rule required only a certification that to the best of the signing attorney's knowledge, information and belief there was good ground to support the pleading, and that it was not interposed for delay. This subjective "good faith" standard, which focused on what the signer actually knew when filing a paper, was replaced in 1983 by a more objective standard that the signer certify that "to the best of the signer's knowledge, information and belief formed after reasonable inquiry [the pleading, motion or other paper was] well grounded in fact, and is warranted by existing law or a good faith argument for [a change in the] law, and [not filed] for an improper pur-

defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c)").

263. FED. R. CIV. P. 4(n) (providing for "Seizure of Property; Service of Summons Not Feasible").

264. 433 U.S. 186 (1977).

265. *Id.* at 211-12. The issue raised in footnote 37 of *Shaffer*, however, still remains unresolved; the question being "whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.* at 211, n.37.

pose”²⁶⁶ Thus, a signing attorney was obligated to make “some prefiling inquiry into both the facts and the law”²⁶⁷

The 1983 revision to Rule 11 has been called “the most controversial amendment in the half-century history of the Federal Rules.”²⁶⁸ Although the Advisory Committee stressed that the amendment was “not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories,”²⁶⁹ many claimed that was exactly the effect; that it disadvantaged civil rights and employment discrimination plaintiffs, created barriers to raising novel claims,²⁷⁰ and that it generated a “cottage industry” in expensive and unnecessary satellite litigation.²⁷¹

The 1983 rule was so heavily criticized that, in 1990, the Advisory Committee called for written comments from the public, and commissioned the Federal Judicial Center [FJC] to conduct empirical studies and surveys on the operation of the rule.²⁷² In a survey of all federal trial judges, the FJC found that eighty percent were of the opinion that the 1983 Rule 11 had had an overall positive effect and should not be

266. Fed. R. Civ. P. 11, 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

267. Amendments to the Federal Rules of Civil Procedure, Advisory Committee Notes, *reprinted in* 97 F.R.D. 165, at 196, 198 (1983) [hereinafter 1983 Committee Notes].

268. Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 856-57 (1992).

269. 1983 Committee Notes, 97 F.R.D. at 199.

270. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 197 (1988).

271. Vairo, *supra* note 270, at 196-97. Whereas the pre-1983 version of Rule 11 was ineffective because it was largely ignored, the 1983 rule generated a tremendous amount of litigation. In 1991, Professor Vairo reported that over 3,000 cases dealing with Rule 11 had been reported, which one can assume are just a fraction of the number of cases in which sanctions were imposed (or refused) under the rule. See Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 480 (1991); see also Herbert Kritzer et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 952 (1992) (finding that in the twelve months before a survey conducted by the authors: 24.3 percent of attorneys surveyed reported involvement in a case in which formal Rule 11 motions were made but no sanctions imposed; 7.6 percent were involved in cases in which Rule 11 sanctions were imposed; 24.5 percent of attorneys surveyed had experience with in-court reference to Rule 11, with no formal motion or request for sanctions; and 30.3 percent had experienced references to Rule 11 out of court).

272. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules as Amended in 1983 (August 1990), *reprinted in* 131 F.R.D. 335 (1990). See also Attachment B to Keeton letter, *supra* note 31. Discussions of the history of the original 1993 proposed amendment to Rule 11 can be found in Tobias, *supra* note 268, at 856-65, and in Vairo, *supra* note 271.

changed.²⁷³ Public comment was not so favorable,²⁷⁴ however, and although the findings of the FJC undercut some of the major criticisms of the rule, the Committee determined that the “widespread criticism” of the rule was “not without some merit,” and that some amendment was necessary.²⁷⁵ Therefore, in August 1991, the Advisory Committee issued a proposed revision to Rule 11, which attracted considerable comment,²⁷⁶ and a competing proposal from a committee of ten prominent members of the bench and bar, including Judge A. Leon Higginbotham, Jr., of the Third Circuit Court of Appeals, Judge Patrick Higginbotham of the Fifth Circuit,²⁷⁷ and Judge Mary M. Schroeder of the Ninth Circuit.²⁷⁸ In response, the Advisory Committee and the Standing Committee made several revisions to the proposed Rule 11,²⁷⁹ and the final proposal was forwarded to the Supreme Court in November 1992.²⁸⁰

The 1993 amendments to Rule 11 have proven to be just as controversial as were the 1983 amendments. While many consider the revisions a significant improvement,²⁸¹ others, most prominently perhaps Justice

273. Interim Report on Rule 11, Advisory Committee on Civil Rules, *reprinted in* Georgene M. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures*, App. at 1-8 to 1-10 (2d ed. 1991).

274. Professor Georgene Vairo reports that “no more than 10%” of the written responses to the Call for Comments “could be construed as indicating satisfaction with the current version of Rule 11.” Vairo, *supra* note 271, at 477 & n.10.

275. Attachment B to Keeton letter, *supra* note 31, at 523.

276. *See* Tobias, *supra* note 268, at 862-64. *See also* Proposed Amendments to Federal Rule of Civil Procedure 11, Committee on Professional Responsibility, 47:1 Record of the Association of the Bar of the City of New York 65 (1992).

277. Judge Higginbotham now is a member of the Advisory Committee on the Civil Rules.

278. Bench-Bar Proposal to Revise Civil Procedure Rule 11, *reprinted in* 137 F.R.D. 159 (1991) [hereinafter Bench-Bar Proposal].

279. The changes made by the Advisory Committee are described in Attachment B to Keeton letter, *supra* note 31, at 523-25. The Standing Committee revised the rule to make sanctions discretionary with the court, rather than mandatory (a revision advocated by two members of the Advisory Committee), and to clarify that certification obligations apply only to an affirmative presentation of papers to the court, and not to a simple failure to withdraw papers. Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 1992), *reprinted in* 146 F.R.D. 515, 517 [hereinafter Excerpt from Committee Report].

280. The changes made by the Advisory Committee and Standing Committee were in response to suggestions made during the comment period. The committees concluded that another period of publication and comment was not required before the amendments were forwarded to the Court. Excerpt from Committee Report, *supra* note 279, at 517.

281. *See, e.g.,* Carl Tobias, *Congress and the 1993 Civil Rules Proposals*, 148 F.R.D. 383, 386-87 (1993).

Scalia, charge that Rule 11 has been rendered “toothless.”²⁸² The revised rule expands the obligations of attorneys and parties, but restricts the court’s power to impose sanctions, and includes a “safe-harbor” provision that is intended to reduce the number of motions presented to the court.²⁸³

A. Certification

The 1993 Rule 11 retains the requirement that all pleadings, written motions or other papers be signed by the party’s attorney or the pro se litigant.²⁸⁴ As under the former rule, if a paper is not signed, it will be accepted for filing, but will be stricken if it is not signed promptly after the attorney or pro se litigant is informed of the omission.²⁸⁵ The nature of the certification under Rule 11 has changed. As under the 1983 rule, the attorney or unrepresented party certifies that the paper “is not being presented for an improper purpose, such as to harass,” delay, or cause unnecessary expense.²⁸⁶ The attorney or party also certifies that the paper is warranted by existing law or by a “nonfrivolous” (rather than a “good faith”) argument for a change in the law.²⁸⁷ This use of the term “nonfrivolous” is intended to make it clear that the standard is an objective one, requiring reasonable prefiling investigation into the facts and the law, and that “an empty head but a pure-heart is no defense” to a frivolous assertion.²⁸⁸ This objective standard was generally accepted prior to the 1993 amendments, and many of the earlier cases remain relevant on this point.²⁸⁹ Replacing “good faith” with “nonfrivolous”

282. Order of April 22, 1993, 146 F.R.D. at 507 (Scalia, J., dissenting).

283. FED. R. CIV. P. 11.

284. FED. R. CIV. P. 11(a). The signer’s address and telephone number also must appear. *Id.*

285. *Id.* See, e.g., *Alexander v. Kelly*, 1995 WL 13267, *1 (D.D.C. Jan. 6, 1995) (striking an “Amended and Consolidated Complaint” because it contained a copy of plaintiff’s signature, instead of plaintiff’s original signature).

286. FED. R. CIV. P. 11(b)(1).

287. FED. R. CIV. P. 11(b)(2).

288. *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986).

289. See, e.g., *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1006 (7th Cir.) (citing *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986) (finding that the test of Rule 11 is an objective one), *cert. denied*, 115 S. Ct. 512 (1994); *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987). In *Eastway Constr.*, the court found that “the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.” *Id.*

should not be read as imposing a more rigorous standard, as such a reading would produce even more of the “chilling effect” for which Rule 11 has in the past been criticized. The Advisory Committee was aware of that criticism, and made it clear that the rule is not to be interpreted in such a way as to create even a greater “chilling effect” on creative advocacy.²⁹⁰ In determining whether an assertion is frivolous, the Committee urges the court to consider whether the advocating party did any research into the issue and has any support for the argument, even in minority opinions, law review articles, or through consultation with other attorneys.²⁹¹ There is no obligation to specifically identify an argument as advocating a change in the law, but an argument so identified should be treated with “greater tolerance.”²⁹²

In response to criticisms that the 1983 Rule 11 unfairly and disproportionately affected plaintiffs, the certification with respect to factual allegations has been changed. The attorney or party certifies that the allegations have evidentiary support, and may identify specific allegations that “are likely to have evidentiary support after a reasonable opportunity for . . . discovery.”²⁹³ Thus, the plaintiff may allege facts based on information and belief, and seek support for the allegation during discovery, much like defendant’s power, under Rule 8(b),²⁹⁴ “to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation.”²⁹⁵ While the intent of the Committee was “to equalize the burden of the Rule on plaintiffs and defendants,”²⁹⁶ this change in the standard may, as Professor Vairo has suggested, lead to litigation over whether discovery is likely to produce evidence in support of the allegation, and whether the pleader sufficiently identified those allegations as to which additional discovery is necessary.²⁹⁷

290. 1993 Committee Notes, 146 F.R.D. at 587.

291. *Id.*

292. *Id.* See, e.g., *Chase v. Auerbach*, 1994 WL 590588, *2 (E.D.Pa. Oct. 26, 1994) (rejecting the imposition of Rule 11 sanctions on a litigant for advancing a novel legal theory in attempting to move an action to federal court to consolidate case with another pending case).

293. FED. R. CIV. P. 11(b)(3). See, e.g., *Wainwright v. Doria*, 1994 WL 178453, *7 (N.D.Ill. May 9, 1994) (finding that the plaintiff’s allegation, that one of the defendants used a key to scratch his car while it was in a parking lot, was based on information and belief, and, therefore, was adequate to satisfy Rule 11(b)(3)), *aff’d*, 65 F.3d 171 (7th Cir. 1995).

294. FED. R. CIV. P. 8(b) provides for “Defenses; Forms of Denials.”

295. 1993 Committee Notes, 146 F.R.D. at 586.

296. *Id.*

297. Vairo, *supra* note 271, at 498.

Even where a party pleads on information and belief, the party still is obliged to conduct an appropriate investigation into the facts that is "reasonable under the circumstances."²⁹⁸ Furthermore, if after discovery no evidentiary support is obtained, the party is required under Rule 11 to drop the allegation.²⁹⁹ The Committee states that this does not require the party to make a formal amendment to the pleadings, but simply prohibits the party from further advocating the contention.³⁰⁰ Similarly, a party cannot deny an allegation it knows to be true. However, a party is under no obligation to admit an allegation it believes to be untrue simply because it does not have specific contradictory evidence;³⁰¹ the burden of proof still rests with the party making the allegation.

The Committee Notes emphasize that "[t]he certification is that there is (or [after discovery] likely will be) 'evidentiary support' for the allegation" Rule 11 does not require a certification that the party will prevail regarding the allegation.³⁰² Thus, if a party loses on summary judgment, it still may have had sufficient "evidentiary support" to withstand a Rule 11 motion. However, the Committee asserts, if a party has sufficient evidence to withstand a motion for summary judgment on a contention, "it would have sufficient 'evidentiary support' [to satisfy] Rule 11."³⁰³ This categorical statement should be qualified. A party may defeat a motion for summary judgment with false affidavits, and should be subject to Rule 11 sanctions once the perjury is discovered.³⁰⁴ In addition, it should be noted that even where the contention has sufficient evidentiary foundation to withstand a summary judgment motion and to

298. FED. R. CIV. P. 11(b).

299. 1993 Committee Notes, 146 F.R.D. at 585.

300. *Id.* at 586.

301. *Id.*

302. *Id.*

303. *Id.*

304. *See Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1240 n.10 (1st Cir. 1991) (showing that the denial of a summary judgment motion has no bearing on whether to impose Rule 11 sanctions against the nonmoving party); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1473 (2d Cir. 1988) (finding that "[w]here baseless allegations are used to prevent summary judgment, sanctions [under Rule 11 will be granted] if the attorney did not make a reasonable pre-filing inquiry when he or she originally put forward the claim"), *rev'd on other grounds*, 493 U.S. 120 (1989); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606 (1st Cir. 1988) (refusing to find the standards of summary judgment and Rule 11 "as necessarily or inevitably congruent").

satisfy Rule 11, it still may run afoul of Rule 11 if it has been asserted to harass, or for an improper purpose.³⁰⁵

B. Continuing Duty

Under the 1983 rule, the certification of compliance with Rule 11 obligations was made solely when the paper was signed by the attorney or party. Provided there was reasonable inquiry into the law and facts at the time of the initial filing, there was no continuing duty to withdraw the paper if it subsequently was discovered to be unsupportable.³⁰⁶ The present Rule 11 provides that “[b]y *presenting to the court (whether by signing, filing, submitting, or later advocating)* a pleading, written motion, or other paper, an attorney or unrepresented party is certifying” that it has satisfied its obligations under the rule.³⁰⁷ It is quite clear that the drafters of the rule intended to impose on attorneys and parties a continuing duty of certification that the contents of pleadings and motions are warranted not just at the time that the papers are signed and filed with the court, but each time a position in those papers is reaffirmed or advocated to the court.³⁰⁸ It is not as clear just how far that continuing duty goes, or the extent to which this amendment actually changes the prior law of Rule 11.

The amendment to the rule ultimately transmitted to the Supreme Court and Congress had undergone some significant changes from the Advisory Committee’s preliminary proposal, and it is helpful to examine the legislative history when analyzing its scope. The preliminary pro-

305. FED. R. CIV. P. 11(b)(1). *See, e.g.*, *Equal Employment Opportunity Comm’n v. Tandem Computers Inc.*, 158 F.R.D. 224, 229 (D. Mass. 1994). In *Tandem Computers*, the court awarded plaintiff Rule 11 sanctions with regard to a motion made by employer after judgment on jury verdict for employer in age discrimination action on the basis that “[i]n filing its motion, [the employer] ha[d] presented nothing new; the issues had been repeatedly tried, argued and decided in favor of the [plaintiff]” and was used to “harass or to cause needless increase in the cost of litigation or both.” *Contra* *National Ass’n of Gov’t Employees, Inc. v. National Fed’n of Fed. Employees*, 844 F.2d 216, 222 (5th Cir. 1988) (finding that if a claim has merit, it does not violate Rule 11 even if the motivation for its assertion is to harass the defending party).

306. This issue had not been ruled upon by the Supreme Court. Although there was some difference among the circuits on this issue, the majority of circuit courts of appeals adhered to this view of the rule. *See, e.g.*, *Griffin v. City of Oklahoma*, 3 F.3d 336, 339 (10th Cir. 1993); *Schoenberger v. Oselka*, 909 F.2d 1086 (7th Cir. 1990). *Contra* *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 959 (6th Cir.), *cert. denied*, 498 U.S. 959 (1990). *See generally* SANCTIONS: RULE 11 & OTHER POWERS 2-3 (Melissa L. Nelken, ed., 3d ed. 1992) (finding most circuits in accord with this view), and cases cited therein.

307. FED. R. CIV. P. 11(b) (emphasis added).

308. 1993 Committee Notes, 146 F.R.D. at 585.

positional provided that “[b]y *presenting or maintaining* a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, *until it is withdrawn*,”³⁰⁹ that he or she has complied with the obligations of Rule 11. Thus, under the preliminary proposal, a party would have been required to dismiss a claim or defense once it was shown to be unsubstantiated in discovery, and to amend pleadings each time a new fact conflicting with an earlier allegation was ascertained. This first draft was heavily criticized for its potential to create unnecessary expense and its inappropriate focus on perfecting pleadings that might otherwise have little independent relevance to the case once discovery was in full swing. Critics contended that this problem would have been exacerbated by the definition of “paper” as including each separate claim, defense, request, objection, contention, or argument, rather than referring to the paper as a whole. Parties and courts would have been encouraged to parse legal documents for possible Rule 11 sanctions, rather than attempt to ascertain whether the paper taken as a whole reflected a reasonable inquiry.³¹⁰

The Advisory Committee did not agree that sanctions should be applied only to papers that when taken “as a whole” violated the standards of Rule 11, an approach that had been adopted by some courts under the 1983 rule.³¹¹ However, the Advisory Committee did agree, albeit somewhat grudgingly, that the reference to a “claim, defense, request, demand, objection, contention or argument” might encourage sanction motions for minor or technical violations, and revised the language to its present reference to any “pleading, written motion or other paper.”³¹² According to the Advisory Committee, the safe harbor provision (discussed below), which affords an offending party an opportunity to correct or withdraw an offending paper before sanctions are imposed, would have minimized the concern.³¹³ The Advisory Committee also

309. Proposed Amendments to Federal Rules of Civil Procedure (1991), *reprinted in* 137 F.R.D. at 75 (emphasis added).

310. See 1993 Committee Notes, 146 F.R.D. at 524; *see also* Tobias, *supra* note 268, at 866-71 (contending that the obligation could “encourage the scrutiny of minutiae”); Bench-Bar Proposal, *supra* note 278, at 168-69 (explaining that the goal is to escape the practice of closely analyzing the document for possible Rule 11 violations).

311. See Attachment B to Keeton letter, *supra* note 31, at 524; *see also* SANCTIONS: RULE 11 & OTHER POWERS 3, *supra* note 306 (noting that the majority of courts had rejected the “paper as a whole” argument under 1983 Rule 11); Tobias, *supra* note 268, at 868 & n.69 (listing cases in which courts have adopted, or rejected the “paper as a whole” theory).

312. FED. R. CIV. P. 11.

313. Attachment B to Keeton letter, *supra* note 31, at 523.

agreed that the preliminary proposal, as drafted, might have required parties to focus too much on re-drafting and refining pleadings and other papers. Therefore, the Advisory Committee modified the language, stating that the extension of Rule 11 duties to "non-signers" should be limited "to persons who 'pursues' [sic] a previously filed paper."³¹⁴ The Standing Committee went even further, and revised the draft to the version that was sent to the Court, under which Rule 11 obligations are triggered when a paper is "present[ed] to the court (whether by signing, filing, submitting, or later advocating)"³¹⁵ The intention of the Standing Committee was "to clarify that the certification obligations of the rule apply only in connection with an affirmative presentation of papers to the court (rather than arguably upon a mere passive failure to withdraw a previously filed paper)."³¹⁶

Clearly, the 1993 Rule 11 does not require parties constantly to revise and perfect their pleadings. Rather, the rule simply imposes the certification obligations on a party each time that party reasserts in court an allegation in its pleading, or advocates a position in a motion previously filed with the court. For example, a plaintiff faced with a motion for summary judgment will have to reassess the allegations of its complaint before filing its papers in opposition, and, while it is not required to formally amend its complaint to dismiss any allegations for which it has no evidentiary support, it cannot continue to assert the truth of any such allegations in its opposing papers without running afoul of Rule 11. In this respect, the revision of the rule has not made any real difference: Under the 1983 rule, parties or attorneys filing papers opposing summary judgment on a claim for which there was no supporting evidence equally would have been subject to Rule 11 sanctions.³¹⁷

Still, the change from the certification being the "signature"³¹⁸ on the paper to being the "present[ation]"³¹⁹ of the paper in court has changed the law to some extent, although it is unlikely to alter Rule 11 practice

314. *Id.*

315. FED. R. CIV. P. 11.

316. Excerpt from Committee Report, *supra* note 279, at 517.

317. See, e.g., *Samuels v. Wilder*, 906 F.2d 272, 276 (7th Cir. 1990) (imposing Rule 11 sanctions for filing a motion brought on factually erroneous premise); *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 49-50 (2d Cir. 1988) (imposing Rule 11 sanctions for failing to withdraw a meritless claim for fraud until after defendant filed for summary judgment); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606 (1st Cir. 1988) (imposing Rule 11 sanctions for resisting a summary judgment motion based on a factual dispute that counsel should have known was illusory).

318. FED. R. CIV. P. 11(b), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

319. FED. R. CIV. P. 11(b) (as amended in 1993).

significantly.³²⁰ Now, the certification is made not just when opposing papers are filed, but also when the parties present their oral argument in court.³²¹ Rule 11, however, applies only when the oral argument reiterates allegations or contentions made in a “pleading, written motion, or other paper;” an assertion made for the first time orally in court will not run afoul of Rule 11.³²² Because a certification is made each time a paper is presented to the court, not just at the time it is signed, parties are under a continuing duty to assess the validity of their positions even after papers have been filed. The revised language also resolves the issue of the applicability of Rule 11 in actions removed to federal court from state court. While some circuit courts have held that the 1983 Rule 11 might have applied to pleadings that had been filed in state court before removal, the majority of circuit courts have held that the rule did not apply, because at the time that the attorney signed the papers, they were not governed by the Federal Rules of Civil Procedure. Courts were in agreement, however, that Rule 11 did apply to papers filed in state court that subsequently were refiled in federal court after removal.³²³ Under the revised rule, when a party in a federal court urges or advocates an allegation contained in a pleading filed in state court before removal, it has presented that paper to the court, and is subject to Rule 11.³²⁴

320. See 1993 Committee Notes, 146 F.R.D. at 584-85.

321. Cf. *Business Guides v. Chromatic Communications Enters., Inc.*, 892 F.2d 802 (9th Cir. 1989) (reversing sanctions awarded for conduct at hearings, as it did not involve signing of papers, and thus did not violate 1983 Rule 11), *aff'd on other grounds*, 498 U.S. 533 (1991).

322. 1993 Committee Notes, 146 F.R.D. at 585. “[The rule] does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection.” *Id.*

323. Compare *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256-57 (4th Cir. 1987) (finding 1983 Rule 11 not applicable to pleadings filed in state court and subsequently removed to federal court) with *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir. 1986) (assuming, arguendo, that the defense of a removed state claim in federal court could be sanctionable under Rule 11).

324. See 1993 Committee Notes, 146 F.R.D. at 585. “[I]f after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court . . . it would be viewed as ‘presenting’ — and hence certifying to the district court under Rule 11 — those allegations.” *Id.*

C. Procedure

1. The Safe Harbor Provision

The most controversial change to Rule 11 is the addition of a “safe harbor” provision, which provides an offending party an opportunity to purge its violation before a motion for sanctions can be made. Under Rule 11(c)(1)(A), a motion for sanctions must “be made separately from any other motions,” and must describe the specific alleged violation.³²⁵ The motion is to be served on the offending party, but cannot “be filed with or presented to the court” for 21 days. During that time period, which begins to run only on service of a formal motion (not just a letter), the party may withdraw or correct the offending paper, so that the sanctions motion could “not be filed with or presented to the court.” Even if the motion is filed after the expiration of the 21 days, the court may extend the time allowed the offending party for correction.³²⁶ Similarly, if requested, the court may set a shorter period for correction or withdrawal. Failure to follow these procedures should result in dismissal of the Rule 11 motion as improper,³²⁷ and may itself be subject to Rule 11 sanctions.³²⁸

a. Purpose of Rule 11 Sanctions

The major criticism of the safe harbor provision was articulated by Justice Scalia in his statement dissenting from the transmission of the new rules to Congress:

[T]hose who file frivolous suits and pleadings should have no “safe harbor.” The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this court said only three years ago: “Baseless filing puts the machinery

325. FED. R. CIV. P. 11(c)(1)(A).

326. *Id.*

327. *See, e.g.,* Dunn v. Pepsi-Cola Metro. Bottling Co., 850 F. Supp. 853, 856 n.4 (N.D.Cal. 1994) (refusing to impose Rule 11 sanctions because the moving party did not properly comply with Rule 11(c)(1)(a)); Relo Ins. Group, Inc. v. Salisbury, 1994 WL 194053 (N.D.Ill. May 13, 1994) (applying safe harbor requirement in a case filed before effective date of the revised rule); Rondolino v. Provide Life and Accident Ins. Co., 1994 WL 143066 (M.D.Fla. April 11, 1994) (same).

328. *See* 1993 Committee Notes, 146 F.R.D. at 591.

of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanction even after a dismissal."³²⁹

Justice Scalia's argument, and that of the Court in *Cooter & Gell v. Hartmarx Corp.*,³³⁰ focuses on the harm done the defendant by a frivolous pleading, and derives its force from the assumption that a major purpose of Rule 11 is to compensate for such harm. However, recent rulings of the Supreme Court, and the Committee Notes to the 1993 amendments, are based on a different assumption — that Rule 11 is not primarily concerned with harm to parties, but with the harm done to the court and the judicial system by frivolous filings.

For years, the purpose of the rule has been somewhat murky, even though the Committee Notes to the 1983 amendment of Rule 11 stated that its purpose was to deter abusive litigation practices.³³¹ In practice, many courts used 1983 Rule 11 not only to penalize the offending party and for deterrence, but to compensate the aggrieved party.³³² This emphasis on the compensatory nature of the rule was reflected in the common use of the imposition of attorney's fees as a sanction, a practice which, perhaps, was encouraged by the Advisory Committee Notes to the 1983 amendment.³³³ As discussed below, the availability of attorney's fees as a sanction has been sharply curtailed under the 1993 rule. The popular view of Rule 11 as a fee-shifting provision was eventually discredited and rejected by the Supreme Court in some of its last pronouncements on 1983 Rule 11. In *Cooter & Gell v. Hartmarx Corp.*,³³⁴ for example, the Court stated that "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and

329. Order of April 22, 1993, 146 F.R.D. at 508 (Scalia, J., dissenting) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990)). Opponents of the safe harbor provision have managed to have a bill passed by the House of Representatives that would repeal it and other amendments to Rule 11. The bill would also make imposition of sanctions for violations of Rule 11 mandatory, require that sanctions compensate aggrieved parties, rather than be paid into court, and make Rule 11 applicable to discovery. Thus, Rule 11 would essentially be returned to its 1983 version. Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995). See also Carl Tobias, *Why Congress Should Reject Revision of Rule 11*, 160 F.R.D. 275 (1995); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

330. 496 U.S. 384 (1990).

331. 1983 Committee Notes, 97 F.R.D. at 192, 198, 199.

332. See generally Vairo, *supra* note 270, at 203-04.

333. 1983 Committee Notes, 97 F.R.D. at 198.

334. 496 U.S. 384 (1990).

thus . . . streamline the administration and procedure of the federal courts.”³³⁵ The next year, in *Business Guides v. Chromatic Communications, Inc.*,³³⁶ the Court reiterated the point that “[t]he main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses.”³³⁷ The deterrent nature of Rule 11 was emphasized in the Committee Notes to the 1993 amendment as well: “[T]he purpose of Rule 11 sanctions is to deter rather than to compensate”³³⁸

b. Rule 11 and the Rules Enabling Act

Indeed, as Justice Stevens argued in his brief but powerful dissent in *Cooter & Gell*, Rule 11 might be inconsistent with the Rules Enabling Act prohibition against rules that “abridge, enlarge or modify any substantive right”³³⁹ if it were used to compensate parties without consideration of the harm done to the judicial system, and without the purpose or effect of deterring such harm in the future. The Rules Enabling Act grants the Supreme Court the power to prescribe general rules of practice and procedure for federal courts; it does not grant the Court the power to prescribe substantive rules which “substantially affect . . . primary decisions respecting human conduct”³⁴⁰ This limitation on the Court’s power is clear. The statute provides that rules promulgated by the Court may not “abridge, enlarge or modify any substantive right.”³⁴¹ In Justice Stevens’ view, the only appropriate concern of the Court in promulgating and applying Rule 11 is to prevent parties from placing improper burdens on the court.³⁴² In *Cooter & Gell*, he argued that there had been no burden placed on the court because the complaint had been voluntarily dismissed, and had never been considered by the court.³⁴³ Any burden on the defendant caused by the filing of a frivolous pleading was, in the absence of harm to the judiciary, irrelevant because “the Rules Enabling Act does not give [the Court] authority to create a generalized federal common law of malicious

335. *Id.* at 393.

336. 498 U.S. 533 (1991).

337. *Id.* at 553. *But cf.* *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992) (stating that “Rule 11 is designed to punish a party who has already violated the court’s rules”).

338. 1993 Committee Notes, 146 F.R.D. at 587.

339. 28 U.S.C. § 2072(b) (1988).

340. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

341. 28 U.S.C. § 2072(b).

342. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 411-12 (1990).

343. *Id.* at 411.

prosecution divorced from concerns with the efficient and just processing of cases in federal court.”³⁴⁴

In *Cooter & Gell*, the plaintiff had voluntarily withdrawn the offending complaint after a motion to dismiss and a motion for sanctions under Rule 11 had been filed.³⁴⁵ The majority in this case did not enter the debate on the mandate of the Rules Enabling Act because they found that the sanction imposed in the case had a deterrent purpose, in addition to compensating the defendant.³⁴⁶ The Court reasoned that a sanction would deter similar conduct in the future because “[i]f a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to ‘stop, think and investigate more carefully before serving and filing papers.’”³⁴⁷ This concern has been raised by Justice Scalia and other critics of the safe harbor provision, who have argued that under 1993 Rule 11, plaintiffs will be free to file frivolous and harassing pleadings without any real threat of sanctions.³⁴⁸

To Justice Stevens, this concern is misplaced. The burden, if any, placed on the defendant who is served with a frivolous pleading is simply irrelevant because “Rule 11 is designed to deter parties from abusing judicial resources, not from filing complaints.”³⁴⁹ In Justice Stevens’ view, Rule 11 cannot, under the limited mandate of the Rules Enabling Act, address frivolous filings because they inconvenience only the defendant, and not the court when the actual burden placed on the court on the filing of a complaint is minimal: simply the effort required to assign the matter a docket number.³⁵⁰ While Justice Stevens makes a valid point that the focus of the Federal Rules should be the management of the judicial system, and not compensation of parties, he may take the point too far in suggesting that the Court cannot, consistent with the Rules Enabling Act, promulgate a rule of federal procedure to control the filing of frivolous complaints, by sanctioning parties or otherwise.³⁵¹

344. *Id.* at 412.

345. *Id.*

346. *Id.* at 398.

347. *Id.*

348. Order of April 22, 1993, 146 F.R.D. at 507-08 (Scalia, J., dissenting).

349. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 411 (1990) (Stevens, J., dissenting).

350. *Id.* at 411-12 (Stevens, J., dissenting).

351. See generally Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1006-07 (1983) (Professor Burbank, a leading authority on the Rules Enabling Act, takes the position that the Supreme Court has the power under the Rules Enabling Act to promulgate rules that allow sanctions, including attorney’s fees, to be imposed on parties for negligent conduct, even if it does not involve bad faith).

A party filing and serving a complaint has invoked the power of the court to compel the defendant to file an answer. When a complaint is frivolous, the plaintiff has invoked the court's authority in an abusive manner. The court must have the power to stop such abuses. Indeed, despite Justice Stevens' protestations to the contrary, both the 1983 Rule 11 and the 1993 Rule 11 were specifically designed to curb such abuses. The drafters of the 1983 version of Rule 11 stated that the new objective standard of the rule would force litigants to "stop-and-think" before filing papers, including complaints.³⁵² Deterring the presentation and maintenance of frivolous positions remains the objective of the 1993 Rule 11; parties are still required to "stop-and-think" before initially making legal or factual contentions.³⁵³ But the 1993 rule now emphasizes what the Committee calls the duty of candor in two ways: by subjecting parties to sanctions for continuing to insist on a position when it is no longer justifiable, and by the safe harbor provision, which provides protection to parties that correct or withdraw contentions once they become aware of potential violations.³⁵⁴

In *Cooter & Gell*, Justice Stevens argued that imposing sanctions after a voluntary dismissal would have the "unfortunate consequences of encouraging the filing of sanction motions and discouraging voluntary dismissals"³⁵⁵ It was precisely these "unfortunate consequences" that the Committee sought to avoid by enacting the safe harbor provision.³⁵⁶ The Committee noted that under the 1983 rule, parties were often reluctant to withdraw a paper on the threat of a Rule 11 motion, fearing that the withdrawal would be perceived as an admission of a violation.³⁵⁷ The Committee hoped the safe harbor provision would encourage the parties to resolve more such disputes themselves, and reduce the number of Rule 11 motions requiring judicial determination.³⁵⁸ On balance, the Committee determined, the burden to the court system of hearing Rule 11 motions exceeds the burden of frivolous papers being filed.³⁵⁹ This does not mean, however, that a party who is victimized by a steady stream of frivolous papers that are served and filed, and then

352. 1983 Amendments, 97 F.R.D. 165, 192 (1983).

353. 1993 Committee Notes, 146 F.R.D. at 584-85.

354. 1993 Committee Notes, 146 F.R.D. at 585. *See also* Attachment B to Keeton letter, *supra* note 31, at 523.

355. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 412 (1990) (Stevens, J., dissenting).

356. 1993 Committee Notes, 146 F.R.D. at 591.

357. *Id.*

358. *Id.* at 592.

359. *See* 1993 Committee Notes, 146 F.R.D. at 584.

withdrawn, is left without recourse. As discussed below, a court retains its inherent powers to grant sanctions for litigation conducted in bad faith,³⁶⁰ and the safe harbor provision does not apply to sanction hearings initiated by the court. Of course, the court cannot sanction behavior of which it is not aware, and the safe harbor provision provides that the motion for sanctions is not to be filed with the court until twenty-one days after the offending party is served.³⁶¹ However, the aggrieved party may apply to the court to shorten the twenty-one day period.³⁶² A party that has been subjected to repetitive harassing filings surely would have good reason to make such an application, which would serve to draw the abusive practices to the court's attention immediately.

Furthermore, Rule 11 is not the exclusive method a court has for sanctioning abusive conduct.³⁶³ Several statutes provide for sanctions, including 28 U.S.C. § 1927,³⁶⁴ which permits the imposition of attorney's fees and costs against an attorney personally for multiplying proceedings "unreasonably and vexatiously . . ."³⁶⁵ In addition, the Supreme Court recently held in *Chambers v. NASCO*³⁶⁶ that a court retains inherent power to manage its affairs and sanction bad faith litigation conduct.³⁶⁷ In extreme cases, courts have gone so far as to prohibit a litigious plaintiff from filing any suits without advance permission of the court.³⁶⁸ Moreover, injured parties may themselves commence a private action for malicious prosecution or abuse of process.

360. See 1993 Committee Notes, 146 F.R.D. at 592; see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 55 (1991).

361. FED. R. CIV. P. 11 (c)(1)(A).

362. *Id.*

363. See 1993 Committee Notes, 146 F.R.D. at 592.

364. 28 U.S.C. § 1927 (1980).

365. 28 U.S.C. § 1927. There is a split among the circuit courts of appeal as to whether a finding of bad faith is required by § 1927. Compare *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 23 (2d Cir. 1990) (bad faith required) with *Cruz v. Savage*, 896 F.2d 626, 632 (1st Cir. 1990) (bad faith not required).

366. 501 U.S. 32 (1991).

367. *Id.* at 50 (noting that where applicable, a court should rely on Rule 11 first).

368. See, e.g., *Mahfood v. Post*, No. 93-CV-2977(SJ), 1994 WL 675086, at *6 (E.D.N.Y. 1994) (stating that the court would not accept any papers on behalf of the plaintiff unless they were first reviewed by an assigned magistrate), *aff'd sub nom.* *Mahfood v. I.R.S.*, 50 F.3d 3 (2d Cir. 1995); *Meadows v. Gibson*, 855 F. Supp. 223, 227 (W.D. Tenn. 1994) (requiring the plaintiff to file a motion requesting permission from the court to file an affidavit certifying that his attempts to file the papers were in good faith before it would entertain his complaint).

2. Sanctions Imposed on Court's Initiative

As mentioned above, the court retains the power, under Rule 11(c)(1)(B),³⁶⁹ to impose sanctions *sua sponte*, and when the court has initiated a hearing to determine whether there has been a Rule 11 violation, the safe harbor provision of Rule 11(c)(1)(A) does not apply. The Committee Notes explain that the safe harbor is not provided in such cases because the court will normally issue an order to show cause on its own initiative only in situations that are similar to contempt of court.³⁷⁰ The Committee also notes that the court should take any corrective action, such as withdrawal of the offending paper, into account in determining what, if any, sanctions to impose.³⁷¹

Rule 11 is explicit in stating that a court can impose sanctions on its own initiative only upon issuance of an order to show cause, so that the party has notice and an opportunity to be heard.³⁷² This due process requirement had been recognized by many, although not all, circuit courts of appeal under the 1983 rule.³⁷³ In addition, any order imposing sanctions, whether on motion or *sua sponte*, must describe the sanctionable conduct and explain the basis for the sanctions which are imposed.³⁷⁴ Again, to emphasize that Rule 11 is designed to deter and not to compensate, the rule now provides that when a sanction is awarded *sua sponte*, the court can order a penalty be paid to the court, but cannot order that monetary sanctions be paid to the opposing party.³⁷⁵ This change also underscores Rule 11's goal of preventing abuse of the court system, and its attendant cost to society.³⁷⁶

369. FED. R. CIV. P. 11(c)(1)(B).

370. 1993 Committee Notes, 146 F.R.D. at 592.

371. *Id.*

372. FED. R. CIV. P. 11(c).

373. Many circuits have held that due process requires notice and an opportunity to be heard before the imposition of sanctions. *See, e.g.,* G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 830 (10th Cir. 1990); Securities Indus. Ass'n v. Clarke, 898 F.2d 318, 322 (2d Cir. 1990); Jensen v. Federal Land Bank of Omaha, 882 F.2d 340, 341-42 (8th Cir. 1989); Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833, 836 (9th Cir. 1987). Other circuits, however, have held that, at least for violation of the obligation to conduct a reasonable pre-filing factual inquiry, Rule 11 itself provides all of the notice and opportunity required. *See, e.g.,* Spiller v. Ella Smithers Geriatric Center, 919 F.2d 339, 347 (5th Cir. 1990); Davis v. Carl, 906 F.2d 533, 535-36 (11th Cir. 1990). *See generally* SANCTIONS: RULE 11 AND OTHER POWERS, *supra* note 306, at 4.

374. FED. R. CIV. P. 11(c)(3). There is no similar obligation on the court to explain a denial of a motion for sanctions. 1993 Committee Notes, 146 F.R.D. at 590.

375. FED. R. CIV. P. 11(c)(2)(B).

376. *See* Arthur W. Andrews, *Rule 11 and the Nondeductibility of Monetary Sanctions Imposed upon Attorneys*, 32 ARIZ. L. REV. 279, 291-92 (1990); A. Leo Levin &

Rule 11 also has been revised to reverse the result reached in *Cooter & Gell*, where the Supreme Court held that the 1983 Rule 11 mandated imposition of sanctions on a finding of a violation, even if the case was subsequently dismissed or settled.³⁷⁷ Thus, the court cannot impose monetary sanctions after a case has been dismissed or settled,³⁷⁸ in order to prevent sanctions from interfering with a negotiated settlement agreement.³⁷⁹

3. Nature of Sanctions Imposed

The increased emphasis on the deterrent nature of the rule, as well as the concern that the cost-shifting use of the rule has provided an incentive for the filing of many nonessential Rule 11 motions,³⁸⁰ is reflected in the restrictions placed on the sanctions that may be imposed for a violation.³⁸¹ The rule has been revised to emphasize the point made by the Supreme Court in *Pavelic & LeFlore v. Marvel Entertainment Group*³⁸² that an "appropriate sanction,"³⁸³ monetary or non-monetary, should not be harsher than what is "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."³⁸⁴ As under the former rule, the court has great discretion in determining what is an appropriate sanction, and the Committee Notes mention a wide variety of non-monetary sanctions which are available.³⁸⁵ Non-monetary

Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 (1985) (calculating the cost of a federal court's time in the fiscal year of 1982 to be approximately \$600 per hour); see also *Advo System, Inc. v. Walters*, 110 F.R.D. 426, 433 (E.D. Mich. 1986) (adopting Levin's calculation in the assessment of sanctions); *Dominguez v. Figel*, 626 F. Supp 368, 374 (N.D. Ind. 1986) (same).

377. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990).

378. FED. R. CIV. P. 11(c)(1)(A).

379. See 1993 Committee Notes, 146 F.R.D. at 592.

380. See Attachment B to Keeton letter, *supra* note 31, at 524.

381. See generally Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule*, 1993 B.Y.U. L. REV. 879 (1993).

382. 493 U.S. 120, 127 (1989) ("Moreover, psychological effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him . . .").

383. FED. R. CIV. P. 11(c).

384. FED. R. CIV. P. 11(c)(2). See also 1993 Committee Notes, 146 F.R.D. at 587.

385. 1993 Committee Notes, 146 F.R.D. at 587 ("[t]he court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs . . . [and] referring the matter to disciplinary authorities . . ."). See also Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 43-44 (1993).

sanctions are preferred, as evidenced by the mandate that the least severe sanction sufficient for deterrence be imposed, as well as by several limitations placed on the imposition of monetary sanctions. For example, under the former rule, one of the most common sanctions was the imposition of attorney's fees. Now, however, attorney's fees are to be awarded only in "unusual circumstances . . ."³⁸⁶ Where monetary sanctions are awarded, they are ordinarily paid to the court, and may be awarded to an opposing party only if "warranted for effective deterrence . . ."³⁸⁷ Even when monetary sanctions are awarded to an opposing party, the party may be compensated only for the attorney's fees and "other expenses incurred as a direct result of the violation" of Rule 11.³⁸⁸ An award for consequential damages is not authorized.³⁸⁹ Furthermore, monetary sanctions may not be imposed on a represented party for a frivolous legal argument.³⁹⁰ If sanctions are imposed by the court *sua sponte*, no monetary sanctions can be awarded unless an order to show cause was issued before the claims were settled or dismissed.³⁹¹ This provision was inserted in order to prevent litigants who have settled their cases from being hit with monetary sanctions that were not taken into account in the settlement agreement.³⁹² Any monetary sanctions imposed *sua sponte* must be paid to the court, not to an opposing party.³⁹³

Several other changes have been made to the sanction provisions of Rule 11. Sanctions may be awarded against attorneys, their law firms, or the parties who have violated Rule 11 themselves, or are responsible for the violation.³⁹⁴ Under the former rule, only the individual attorney who

386. 1993 Committee Notes, 146 F.R.D. at 587-88.

387. FED. R. CIV. P. 11(c)(2).

388. *Id.*

389. *Id.* "[T]he purpose of Rule 11 sanctions is to deter rather than to compensate . . ." 1993 Committee Notes, 146 F.R.D. at 587.

390. FED. R. CIV. P. 11(c)(2)(A). This limitation on the award of sanctions apparently was included in response to concerns that monetary awards against represented parties could affect substantive rights, and this could run afoul of the Rules Enabling Act. This view was adopted by Justice Kennedy in a dissenting opinion in *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 498 U.S. 533, 565-69 (1991). However, this position was rejected by the majority, who found that any effect on substantive rights was incidental. *Id.* at 553. See 1993 Committee Notes, 146 F.R.D. at 589. ("Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act.")

391. FED. R. CIV. P. 11(c)(2)(B).

392. FED. R. CIV. P. 11 advisory committee's note.

393. FED. R. CIV. P. 11(c)(2).

394. FED. R. CIV. P. 11(c).

signed the offending papers could be sanctioned.³⁹⁵ There is now a presumption that a law firm is “jointly responsible for violations [of the rule] committed by its partners, associates, and employees.”³⁹⁶ The rule, however, does not define “law firm,” leaving open the question of whether organizations such as legal aid offices, public defenders offices, or law departments of corporations would be considered law firms. A broad interpretation of the term would cover them.³⁹⁷

Under the former rule, sanctions were mandatory upon the finding of a violation, even if the case had been dismissed or settled.³⁹⁸ Now, however, the imposition of Rule 11 sanctions are completely discretionary,³⁹⁹ and sanctions cannot be imposed after a case has been voluntarily dismissed or settled.⁴⁰⁰ As pointed out by Justice Scalia, even when sanctions were mandatory under the former rule, the courts were reluctant to impose them.⁴⁰¹ Now that they no longer are required to do so, it seems inevitable that courts will impose sanctions even less often, which, some argue, may diminish the deterrent effect of the rule.⁴⁰² However, a district court that is inclined to impose sanctions still has power to do so, and its decision will continue to be reviewed on an abuse of discretion standard.⁴⁰³

395. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 122, 127 (1989).

396. FED. R. CIV. P. 11(c)(1)(A).

397. *See, e.g., Babb v. Edwards*, 412 So. 2d 859, 861 (Fla. 1982) (considering the issue of whether assistant public defenders from the same circuit are considered part of the same “law firm” for conflict of interest purposes); *Commonwealth v. Westbrook*, 400 A.2d 160, 162 (Pa. 1979) (stating that the rule in Pennsylvania holds that “members of the public defender’s office would be considered members of the ‘same firm’ for purposes of presenting a claim of ineffective assistance of trial counsel [as well as claims of] conflict of interest . . .”). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. 1 (1983) (defining law firm to include corporate legal departments); Jeffrey A. Parness, *Sanctioning Legal Organizations Under the New Federal Civil Rule 11: Radical Changes Loosen More Unforeseeable Forces*, 14 REV. LITIG. 63, 70-72 (1994) (discussing the applicability of Rule 11 to legal organizations including in-house law offices and law offices of governmental organizations).

398. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990).

399. FED. R. CIV. P. 11(c).

400. FED. R. CIV. P. 11(c)(2)(B).

401. Order of April 22, 1993, 146 F.R.D. at 508 (Scalia, J., dissenting).

402. *Id.* at 507-08 (Scalia, J., dissenting).

403. *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

4. Inapplicability to Discovery

In a special note to the preliminary proposal, the Advisory Committee invited comments concerning whether Rule 11 should continue to apply to discovery motions and other discovery documents filed with the court.⁴⁰⁴ Comments received by the Advisory Committee supported the change, and the rule was revised so that it no longer applied to discovery practice under Rules 26 through 37.⁴⁰⁵ The rule, however, will continue to apply to motions made concerning Rule 45,⁴⁰⁶ which governs third party subpoenas. Sanctions for abusive discovery practices are now covered exclusively by Rules 26(g) and 37.⁴⁰⁷ Those rules have also been revised, but the revisions do not parallel the revisions to Rule 11. For example, as discussed in greater detail below, sanctions for discovery abuse under Rule 37 are still mandatory, and an award of attorney's fees will be the normal sanction.⁴⁰⁸

III. RULE 16 - PRE-TRIAL CONFERENCES

The amendments to Rule 16 have been canvassed elsewhere,⁴⁰⁹ and will not be examined in detail here. For purposes of this article, the most significant amendments are those which effect the discovery and disclosure rules, including amendments regarding the timing of Rule 16 conferences and orders. Rule 16 has been amended to require the issuance of a scheduling order within ninety days of the first appearance by a defendant in the action, or, in any event, no later than 120 days after service (rather than filing) of the complaint.⁴¹⁰ The court retains discretion to issue the order earlier.⁴¹¹ The timing of the Rule 16(b) order or conference is important because the dates for the new mandatory disclosure

404. Fed. R. Civ. P. 11 (Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, Advisory Committee's Note), reprinted in 137 F.R.D. 53, 82 (1991).

405. FED. R. CIV. P. 11(d).

406. FED. R. CIV. P. 45.

407. See *infra* notes 690-731 and accompanying text.

408. See *infra* notes 714, 723, 730 and accompanying text. In comparison, sanctions under Rule 11 are discretionary. The rule states that "the court may, subject to the conditions stated below, impose an appropriate sanction . . ." FED. R. CIV. P. 11(c). In addition, Rule 11 places limits on the imposition of monetary sanctions. FED. R. CIV. P. 11(c)(2)(A), (B).

409. See, e.g., Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar*, 157 F.R.D. 69 (1994).

410. FED. R. CIV. P. 16(b).

411. *Id.* The rule states that "[t]he order shall issue as soon as practicable . . ." *Id.*

process are governed by it.⁴¹² For example, under the new Rule 26(f), discussed below, parties are to meet to discuss discovery at least fourteen days before a scheduling order issues or a scheduling conference is conducted.⁴¹³

The list of matters that may be considered at a pretrial conference, and in a pretrial order, has been expanded to include restrictions and limitations on expert testimony,⁴¹⁴ the timing and appropriateness of summary judgment motions,⁴¹⁵ scheduling and control of discovery,⁴¹⁶ separate trials of issues or claims,⁴¹⁷ early presentation of evidence to facilitate early disposition under Rules 50(a) or 52(c),⁴¹⁸ and limits on the time allowed for presentation of evidence at trial.⁴¹⁹

Moreover, the reference in Rule 16 to alternate dispute resolution mechanisms has been expanded.⁴²⁰ Finally, in addition to being explicitly authorized to compel a represented party to be present at the pre-trial conference,⁴²¹ the court may now require a party or the representative of a party to be available by telephone to discuss a possible settlement.⁴²²

412. See FED. R. CIV. P. 26(a), (f).

413. FED. R. CIV. P. 26(f).

414. FED. R. CIV. P. 16(c)(4).

415. FED. R. CIV. P. 16(c)(5).

416. FED. R. CIV. P. 16(c)(6).

417. FED. R. CIV. P. 16(c)(13).

418. FED. R. CIV. P. 16(c)(14).

419. FED. R. CIV. P. 16(c)(15).

420. FED. R. CIV. P. 16(c)(9). Under the old rule, the pretrial conference could be used to discuss "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . ." FED. R. CIV. P. 16(c)(7), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). The new rule now states that "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule" can be considered at the conference. FED. R. CIV. P. 16(c)(9). The Committee Notes state that "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." 1993 Committee Notes, 146 F.R.D. at 604.

421. FED. R. CIV. P. 16(c)(16); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (stating that although the former Rule 16 did not expressly authorize a court to command a party represented by counsel to appear at a settlement conference before trial, the court had inherent power to do so in order to maintain the integrity and efficiency of the judicial system).

422. FED. R. CIV. P. 16(c)(16).

IV. CHANGES TO THE DISCOVERY RULES

The most controversial of the 1993 amendments were the changes made to the discovery rules, particularly the amendments to Rule 26, which now provide for informal discovery or "disclosure" of certain information,⁴²³ and the corresponding amendments of Rules 30, 31, and 33, which now provide presumptive limits on the amount of discovery taken by the conventional methods of depositions and interrogatories.⁴²⁴ No presumptive limit, however, has been placed on the number of formal requests for the production of documents that may be made pursuant to Rule 34.⁴²⁵ The new system embodied in these provisions was intended to simplify and expedite discovery by accelerating the exchange of essential information and eliminating paperwork.⁴²⁶

The 1993 amendments fundamentally altered the basic scheme of the discovery process. The new rules envision discovery proceeding essentially as follows:

- Fourteen days before the Rule 16(b) scheduling conference with the court, or the issuance of a scheduling order if no conference is held⁴²⁷ (i.e., at the latest 106 days after service of the complaint), the parties must meet, pursuant to Rule 26(f), to discuss the case, consider the possibility of settlement, and to set out a discovery plan.⁴²⁸ Failure to participate in the Rule 26(f) meeting is sanctionable under Rule 37(g).⁴²⁹

423. FED. R. CIV. P. 26(a)(1).

424. FED. R. CIV. P. 30(a)(2), 31(a)(2), 33(a).

425. FED. R. CIV. P. 34.

426. 1993 Committee Notes, 146 F.R.D. at 628. For an interesting discussion of the origin and aims of amended Rule 26(a)(1), as well as the rules-making process in general, as seen by the former reporter to the Advisory Committee on Civil Rules (1985-1992), see Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

427. FED. R. CIV. P. 16(b). Under Rule 16(b), the court is to hold a scheduling conference with the parties and issue a scheduling order "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." *Id.* The district court may opt out of the requirement to hold a scheduling conference or issue a scheduling order by local rule. *Id.* However, if it does so, and does not opt out of the requirements of Rule 26(f), the local rules would also have to specify when the Rule 26(f) meeting of the parties must be held as its timing is, under the rule, determined by the timing of the Rule 16 conference. *Id.*

428. FED. R. CIV. P. 26(f).

429. FED. R. CIV. P. 37(g). Rule 37(g) provides:

[i]f 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

- Within ten days of the parties' Rule 26(f) meeting, each party must disclose to the other parties, without any formal request, certain relevant information, which is set out in Rule 26(a)(1).⁴³⁰
- Under Rule 26(d), no formal discovery can be sought before the Rule 26(f) conference between the parties.⁴³¹ Because it is presumed that most of the relevant material will be disclosed without formal requests, Rules 30(a)(2)(A)⁴³² and 33(a)⁴³³ place presumptive limits on the number of depositions and interrogatories that may be sought from the parties in formal discovery. There is no such presumptive limit placed on the number of formal document requests that may be made under Rule 34.⁴³⁴ This is because the automatic disclosure provisions allow parties to provide descriptions of relevant documents rather than actually producing copies,⁴³⁵ so that other parties are expected to formally request only those documents that they want.
- In addition to the automatic disclosure of relevant information under Rule 26(a)(1), Rule 26(a)(2) requires each party to automatically disclose, within ninety days of trial, the identity of their expert witnesses, the expected testimony of the experts at trial, and materials upon which their opinions are based.⁴³⁶
- Rule 26(a)(3) also requires disclosure, thirty days before trial, of witnesses that will or may be called at trial or presented by deposition, as well as exhibits that will be used.⁴³⁷
- Under Rule 26(e), parties are required to supplement or correct disclosures and discovery responses on an ongoing basis as new information is discovered.⁴³⁸
- If a producing party withholds any material on the grounds of an asserted privilege, Rule 26(b)(5) requires that party to provide a list and description of those materials to the other parties.⁴³⁹
- Sanctions for failure to comply with the disclosure and discovery rules are provided in Rule 26(g) and Rule 37; Rule 11 no longer applies to

any other party the reasonable expenses, including attorney's fees, caused by the failure.

Id.

430. FED. R. CIV. P. 26(a)(1).

431. FED. R. CIV. P. 26(d).

432. FED. R. CIV. P. 30(a)(2)(A).

433. FED. R. CIV. P. 33(a).

434. *See* FED. R. CIV. P. 34.

435. *See* FED. R. CIV. P. 26(a)(1)(B).

436. FED. R. CIV. P. 26(a)(2).

437. FED. R. CIV. P. 26(a)(3).

438. FED. R. CIV. P. 26(e).

439. FED. R. CIV. P. 26(b)(5).

discovery.⁴⁴⁰ Rule 37(a)(2)(A) contains a new requirement that a person moving to compel discovery or disclosure confer, or attempt to confer, in good faith, with the party against whom the motion is brought.⁴⁴¹ In addition, Rule 37(c)(1) provides that the normal sanction for failure to make a timely disclosure or supplementation is that the offending party will not be able to use the evidence at a trial or hearing, or on a motion.⁴⁴²

The new discovery regime was adopted in response to the widely-held perception that discovery practice had become too adversarial and burdened with motion practice, too costly, wasteful, and prone to the kind of gamesmanship that the Federal Rules were intended to prevent.⁴⁴³ The new rules were an attempt to change the entire climate in which discovery takes place.⁴⁴⁴ Although the amendments certainly had their supporters, they drew vigorous opposition from members of each sector of the bar, as well as academics and members of the bench.⁴⁴⁵ This includes Justice Scalia, who, joined by Justices Souter and Thomas, wrote a rare dissent from the Supreme Court's order transmitting the rules to Congress, in which he characterized the amendments as "potentially dis-

440. FED. R. CIV. P. 11(d).

441. FED. R. CIV. P. 37(a)(2)(A).

442. FED. R. CIV. P. 37(c)(1).

443. See generally William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 704-05 (1989) (discussing how abuse of the discovery process in recent years has led to a feeling among many attorneys that the rules are unworkable and should be altered), cited in 1993 Committee Notes, 146 F.R.D. at 628. For an argument that the perception of rampant discovery abuse is false, and that such abuse actually is quite uncommon, see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN L. REV. 1393 (1994).

444. See Paul W. Greene, *Reassessment of the Lawyers' Discovery Responsibilities*, 53 ALA. LAW. 278, 278 (1992) ("The non-adversarial approach to discovery is intended to simplify and expedite the resolution of litigation.").

445. See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery - The Rush to Reform*, 27 GA. L. REV. 1, 3 (1992) (stating that many trial judges, litigants and lawyers opposed the 1990 proposal of the Advisory Committee to include provisions for automatic disclosure in the Federal Rules and suggested the proposal be modified or withdrawn); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 822-28 (1991) (outlining criticisms made by public interest lawyers of an earlier draft of the amendments); *Administration Opposes New Disclosure Rule*, NAT'L L.J., July 26, 1993, at 5 (indicating that the ABA Board of Governors was opposed to the Rule 26(a)(1) automatic disclosure provision); *Federal Courts, ABA Denounces New Discovery Rule; Urges Congress to Reject Amendments*, Daily Report for Executives; Regulation, Economics and Law (BNA) Section A, at 156 (Aug. 16, 1993).

astrous,” and stated that they were likely to increase, rather than diminish, the discovery burdens of the district courts.⁴⁴⁶

One of the major objections Justice Scalia and others had to the promulgation of the new discovery rules was that there was no empirical evidence demonstrating their likely efficacy at remedying the perceived evils of the old system.⁴⁴⁷ Under the Civil Justice Reform Act of 1990 [CJRA],⁴⁴⁸ the federal district courts were required to create plans to

446. Order of April 22, 1993, 146 F.R.D. at 510 (Scalia, J., dissenting).

447. *Id.* at 511 (Scalia, J., dissenting). Arizona has had similar rules in place since 1992, and while empirical evidence of their efficacy is scant, several judges there who have overseen cases governed by the new rules believe that the new system has had the desired effect of reducing the number of discovery disputes, and forcing attorneys to get on top of their cases earlier. See Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 21 (1993). On the experience in Arizona, see generally Symposium, *Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993).

Several federal district courts also have had mandatory disclosure rules in place for a few years, pursuant to the Civil Justice Reform Act. For a discussion of the experience in those district courts, which was based on a survey conducted by the American Bar Association, and which concludes generally that they have had little actual impact on practice, see Melinda Thaler and Ettie Ward, *Mandatory Prediscovery Disclosure Rules: How They Have Worked So Far*, 8 INSIDE LITIG., Sept. 1994, at 23, 29.

More than a year after the new federal discovery rules came into effect, there still is very little evidence, other than anecdotal evidence, as to whether they have generated any improvement. One author has tentatively concluded, not surprisingly, that the new discovery regime works best in routine cases, like automobile accident cases, and is less effective in more complex cases. Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D. 229, 231 (1994). See also Bryan J. Holzberg, *Federal Rules Require Front-End Loading*, 20 LITIG. NEWS 9, 9 (Dec. 1994/Jan. 1995) (citing members of panel at ABA Section on Litigation, including some district judges who stated they found pleadings more specific and particularized, and found “more co-operation among attorneys and more credible trial dates being set as a result of the new rules”).

One reason for the lack of evidence so far, of course, is that very few cases in which the new disclosure and discovery procedures have been employed have gone to trial. As noted below, because the main sanction under Rule 37 for failure to disclose evidence is exclusion of that evidence at trial, we should expect that many disclosure squabbles will not surface until trial. The ABA Section on Litigation and Pepper, Hamilton & Scheetz of Washington, D.C., have conducted a survey of practitioners to obtain opinions concerning the new mandatory disclosure requirement under Rule 26(a)(1) and assess any personal litigation experiences with the rule. Results of that survey are to be available from the ABA early in 1996. Survey, *Experience With FRCP 26(a)(1), Mandatory Prediscovery Disclosure*, (ABA Subcommittee on Mandatory Disclosure of the Committee on Pretrial Practice & Discovery of the Section of Litigation and Pepper, Hamilton & Scheetz) (copy of survey form on file with the law review).

448. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1990).

reduce expenses in civil cases by December 1993.⁴⁴⁹ Thirty four district courts implemented plans two years early, and were designated Early Implementation District Courts.⁴⁵⁰ Most of those courts included in their plan some sort of mandatory disclosure procedures similar, although not identical to, the procedures outlined in the new Federal Rules.⁴⁵¹ Under the CJRA, several of the district courts are called upon to report on their experience in 1995.⁴⁵² Many opponents of the amendments to the discovery rules urged that such a radical alteration in the rules should not be made until the results of local experimentation under the CJRA could be studied.⁴⁵³ The Advisory Committee responded that “[t]o delay consideration of rules changes until completion of [the CJRA] studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise.”⁴⁵⁴ As a compromise, the rules were drafted with an “opt-out” provision to allow district courts to continue the experimentation with discovery procedures that had begun under the CJRA.⁴⁵⁵

449. 28 U.S.C. § 471 note (Supp. II 1991) (Implementation of Plans). For a discussion of the Civil Justice Reform Act, see generally Edwin J. Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83 - What Trumps What?*, 154 F.R.D. 563 (1994); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

450. Tobias, *supra* note 449, at 1402-03, 1413.

451. Tobias, *supra* note 449, at 1424.

452. 28 U.S.C. § 471 note (Supp. II 1991) (Pilot Program). The RAND corporation study of the pilot and comparison districts that was prescribed by § 105(c) of the Judicial Amendments Act of 1994 has been delayed by one year, pursuant to that Act, as one-fifth of the cases in the study would not have been completed by the original deadline. See 28 U.S.C.A. § 471 note (Pilot Program) (West Supp. 1995); see also Margaret L. Sanner and Carl Tobias, *The Judicial Amendments Act of 1994*, 159 F.R.D. 649, 650-51 (1995).

453. Order of April 22, 1993, 146 F.R.D. at 512 (Scalia, J., dissenting).

454. Attachment B to Keeton letter, *supra* note 31, at 527. See 1993 Committee Notes, 146 F.R.D. at 629.

455. For the perspective of the former reporter for the Advisory Committee on the evolution of the mandatory disclosure rules, and the politicization of the rules amending process, see Paul D. Carrington, *Aim of Mandatory Disclosure was to Save Judicial Rulemaking*, 4 INSIDE LITIG., May 1994, at 10. For a thorough discussion of the background of Rule 26(a)(1) and an analysis of the rule, see Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) - "Much Ado About Nothing?"*, 46 HASTINGS L.J. 679 (1995).

A. The "Opt-out" Provision

The first sentence of Rule 26(a)(1), which is the provision requiring automatic disclosure, contains an "opt-out" clause, authorizing the district courts, by local rule or by court order, to exempt all or particular types of cases from the disclosure requirements, or to modify the type of information that is to be disclosed.⁴⁵⁶ Similar opt-out clauses are contained in several of the new discovery provisions, including Rule 26(f), which requires the parties to meet to establish a discovery plan;⁴⁵⁷ Rule 26(d), which provides that formal discovery shall not take place until after the parties have met pursuant to Rule 26(f);⁴⁵⁸ and Rules 30,⁴⁵⁹ 31,⁴⁶⁰ and 33,⁴⁶¹ which limit the number of depositions and interrogatories allowed in discovery. Several district courts have issued local rules declaring that many of the new provisions, including Rule 26(a)(1), will not apply to cases in their courts, and several district courts have adopted their own procedures.⁴⁶² In courts that have their own disclo-

456. FED. R. CIV. P. 26(a)(1).

457. FED. R. CIV. P. 26(f).

458. FED. R. CIV. P. 26(d).

459. FED. R. CIV. P. 30(a)(2). This subsection provides that "[a] party must obtain leave of court . . . if . . . a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants . . ." *Id.*

460. FED. R. CIV. P. 31(a)(2). This subsection provides that "[a] party must obtain leave of court . . . if . . . a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants . . ." *Id.*

461. FED. R. CIV. P. 33(a). This subsection provides that "[w]ithout leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number . . ." *Id.*

462. According to a survey conducted by the Alfred W. Cortese, Jr. and Kathleen L. Blaner of Pepper, Hamilton & Scheetz, Washington, D.C., as of October 1994, only 19 of the 94 district courts, which had handled 19% of the civil caseload in 1993, had fully implemented the new rule; 18 other districts (handling 13% of the civil caseload in 1993) had adopted Rule 26(a)(1), while exempting certain classes of cases (typically social security cases, government forfeiture actions, prisoner petitions, bankruptcy and administrative appeals); 28 districts (handling 37% of the civil caseload in 1993) had their own rules for mandatory disclosure; and 29 districts (handling 30% of the civil caseload in 1993) had no form of mandatory disclosure. Alfred W. Cortese, Jr. and Kathleen L. Blaner, *Mandatory Disclosure Rule 26(a)(1): Not the Rule of Choice*, (Pepper, Hamilton & Scheetz, Wash. D.C.), Oct. 1, 1994. See also Memorandum from Kathleen L. Blaner to Alfred W. Cortese, Jr., *Implementation Status of Federal Rule of Civil Procedure 26(a)(1): Mandatory Prediscovery Disclosure*, (Pepper, Hamilton & Scheetz, Wash. D.C.), Oct. 1, 1994 (copies on file with the law review).

Somewhat different results are reported by Donna Stienstra of the Research Division of the Federal Judicial Center. See Donna Stienstra, *Implementation of Disclosure in*

sure procedures, the procedures are different from those under the Federal Rules. Indeed, in several districts, the procedures are based on an earlier superseded draft of the amendments to the Federal Rules, in which the standard for disclosure was quite different.⁴⁶³ At least with respect to discovery, uniformity is no longer to be expected among federal courts, a result which has been heavily criticized.⁴⁶⁴ Rather, local rules are becoming the primary source of law. Because of the possibility that a court has opted out of the new discovery regime, or has its own procedures in place, counsel must study the local rules for any district court in which they appear, as well as any standing order of the district court judges before whom they are appearing, in order to determine the applicable discovery procedures.

In addition to the possibility of variation by local rule or court order, the parties may stipulate to "modify . . . procedures governing or limita-

United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, reprinted in 159 F.R.D. LXXI (Mar. 25, 1995). Ms. Stienstra summarizes her findings on the implementation of Rule 26(a)(1) as follows:

Rule 26(a)(1) . . . has been more frequently rejected than have the other subdivisions of Rule 26. Altogether, just under half the districts have implemented 26(a)(1), and just over half have not. Of the 49 districts that have not implemented the rule, five require initial disclosure through local rules, orders, or the CJRA plan, and fifteen specifically give individual judges authority to require initial disclosure. . . . [In addition] six courts have implemented Rule 26(a)(1) with a significant revision. Typically the revision excludes either the requirement to disclose adverse material or the requirement to submit a computation of damages.

Id. at LXXV. Her report also includes a district by district table detailing the courts' responses to each part of Rule 26. *See also Districts Make Further Changes in Procedure Since Amendments to Federal Rules*, 8 *INSIDE LITIG.*, Sept. 1994, at 32 (providing a district by district review of changes made to the Federal Rules of Civil Procedure).

463. In 1991, the Advisory Committee proposed that Rule 26 be amended to provide that parties automatically disclose, among other things, the identity of individuals who are "likely to have information that bears significantly on any claim or defense," as well as copies or descriptions of documents and other tangible things that are "likely to bear significantly on any claim or defense." Fed. R. Civ. P. 26, (Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence), *reprinted in* 137 F.R.D. 53, 87-88 (1991). This proposal had been published for public comment when several district courts were formulating their own mandatory disclosure requirements for their civil justice plans, but was superseded by the language of the adopted amendment. Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 144-45 (1993).

464. *See, e.g.,* Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 *REV. LITIG.* 49 (1994); Thomas Earl Patton, *This is Uniformity? New Federal Discovery Rules Promote Divergent Procedures*, *WASH. LAW.*, March/April 1995, at 22.

tions placed upon discovery” under Rule 29.⁴⁶⁵ The last paragraph of Rule 26(a)(1) states that the disclosure shall take place within ten days of the Rule 26(f) meeting “[u]nless otherwise stipulated or directed by the court”⁴⁶⁶ Similar provisions appear in Rules 30(a)(2),⁴⁶⁷ 31(a)(2)⁴⁶⁸ and 33(a).⁴⁶⁹ Normally, court approval of such stipulations will be unnecessary, unless a stipulation extending the time for responses provided in Rules 33, 34, and 36 would interfere with deadlines in scheduling orders.⁴⁷⁰ This article does not attempt to cover the variations in discovery provided for by local rules, but deals only with the Federal Rules, which will govern in the absence of a local rule or court order.

B. Rule 26 - General Provisions Governing Discovery; Duty of Disclosure

1. Meeting of the Parties and Discovery Plan

Rule 26(f) was initially promulgated in 1980 in response to widespread criticism of discovery abuse.⁴⁷¹ The rule allowed the district court to plan a conference to schedule and set limitations on discovery, but did not require that such a conference be held unless the parties were

465. FED. R. CIV. P. 29.

466. FED. R. CIV. P. 26(a)(1).

467. FED. R. CIV. P. 30(a)(2). This provision states that “[a] party must obtain leave of court . . . if . . . a party seeks to take a deposition before the time specified in Rule 26(d)” *Id.*

468. FED. R. CIV. P. 31(a)(2). This provision states that “[a] party must obtain leave of court . . . if . . . a party seeks to take a deposition before the time specified in Rule 26(d).” *Id.*

469. FED. R. CIV. P. 33(a). This provision states that “[w]ithout leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).” *Id.*

470. FED. R. CIV. P. 29. This rule states that:

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

Id.

471. 1980 Advisory Committee’s Note to Fed. R. Civ. P. 26, *reprinted in* 85 F.R.D. 521, 526.

unable to reach an agreement as to a discovery plan, and one of the parties made a motion.⁴⁷² Indeed, it was contemplated that Rule 26(f) meetings would not be the norm, but would be necessary only in large, complex cases.⁴⁷³ As expected, this version of Rule 26(f) was rarely invoked, and if it was, the Rule 26(f) meeting was often combined with a Rule 16 conference.⁴⁷⁴ Under the 1993 amendments, a Rule 26(f) discovery meeting of the parties is now mandatory in all cases, unless a local rule or order of the court provides otherwise.⁴⁷⁵ Only the parties attend the conference, which is to be held at least fourteen days before the scheduling conference with the court under Rule 16, or, if no conference is held, fourteen days before a scheduling order is issued by the court.⁴⁷⁶ As noted above, the scheduling order must issue no later than ninety days after an appearance by a defendant, or no later than 120 days after service on a defendant.⁴⁷⁷ Any scheduling conference, of course, would be held even earlier. Thus, the parties must be prepared to meet and discuss the case no later than 106 days after service of the complaint, and often sooner.

The mandatory Rule 26(f) meeting is designed to force the parties' attorneys to become fully acquainted with the case quickly. Experience with analogous provisions in Arizona state court indicates that it should be successful in this regard.⁴⁷⁸ The parties are to discuss the nature and basis of the claims and defenses, and the possibility of settlement.⁴⁷⁹ They also are to make or arrange for the initial disclosures required by Rule 26(a)(1), and to develop a discovery plan, which must indicate the parties' views and proposals on when and how disclosures will be made, what discovery is needed and when it should be completed, limitations on discovery, and any discovery orders and the scheduling orders to be made by the court.⁴⁸⁰ Other subjects, such as the time for filing dispositive motions and the time for trial may also be considered,⁴⁸¹ as those issues will also be discussed with the court at the Rule 16 conference

472. Fed. R. Civ. P. 26(f), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

473. See 1993 Committee Notes, 146 F.R.D. at 641.

474. See 1993 Committee Notes, 146 F.R.D. at 641-42.

475. FED. R. CIV. P. 26(f).

476. *Id.*

477. See *supra* note 410 and accompanying text.

478. Myers, *supra* note 447, at 21. See also Tobias, *supra* note 447, at 231 (stating that attorneys are now engaging in discovery activities, such as document retrieval, much earlier as a result of the application of automatic disclosure rules).

479. FED. R. CIV. P. 26(f).

480. See generally FED. R. CIV. P. 26(f)(1)-(4).

481. FED. R. CIV. P. 26 advisory committee's note.

which is to be held a few weeks later. A discovery plan formed pursuant to this rule should not be overly complex, but should act as a framework, with sufficient flexibility to allow the parties to resolve unanticipated problems as they arise without court intervention.⁴⁸²

All counsel and unrepresented parties are jointly responsible for arranging and participating in the meeting in good faith.⁴⁸³ Any party that fails to do so may be sanctioned under Rule 37(g) and ordered to pay the attorney's fees incurred by the other parties and other expenses caused by the neglect.⁴⁸⁴ Within ten days of the meeting, the parties must submit a written report to the court outlining a plan as to issues on which the parties agree, and stating the positions of the parties on disputed issues.⁴⁸⁵ A new Form 35 provides an example of a report, and can serve as a checklist for the meeting. The report will be the basis for discussions at the Rule 16 conference to be held fourteen days after the meeting. In addition to submitting the written report to the court, the parties must make the initial disclosures required by Rule 26(a)(1) within ten days of the Rule 26(f) meeting, or just four days before the Rule 16(b) conference with the court.⁴⁸⁶

As noted above, Rule 26(f) contains a clause allowing variation or exemption by local rule or court order, and several district courts have passed local rules providing that the provision is not in effect in their districts.⁴⁸⁷ Unlike some of the other discovery provisions, however, Rule 26(f) does not appear to be subject to modification by agreement of the parties under Rule 29. Although Rule 29 provides that parties may stipulate to "modify . . . procedures governing . . . discovery,"⁴⁸⁸ which could be interpreted as authorizing an agreement to forego the conference, the better view is that Rule 29 does not allow parties to opt out of

482. For an example of a discovery plan fashioned by a court after a review of plans suggested by the parties, pursuant to a court order analogous to Rule 26(f), see *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, Nos. 93 Civ. 5298 (LLM) (RLE), 93 Civ. 8270 (LLM) (RLE), 1994 WL 419934 (S.D.N.Y. Aug. 10, 1994).

483. FED. R. CIV. P. 26(f)(5).

484. FED. R. CIV. P. 37(g).

485. FED. R. CIV. P. 26(f)(5).

486. FED. R. CIV. P. 26(a)(1).

487. See, e.g., Eastern District of Virginia, Local Rules of Practice, Rule 11.1(A)(2) (Jan. 1, 1994).

According to a study by the Federal Judicial Center, as of March 24, 1995, Rule 26(f) was not in effect in one third (31) of the district courts. Of those courts, six allow judges to order the parties to meet and confer to prepare a discovery plan in specific cases. Only slightly more than half of the district courts oblige parties to delay discovery until after they have held the 26(f) meeting. Stienstra, *supra* note 462, at LXXV.

488. FED. R. CIV. P. 29.

the Rule 26(f) meeting and report. This interpretation is more precise in light of the mandatory language of Rule 26(f), and the fact that the parties are required to confer on more than just discovery procedures at a Rule 26(f) conference.

2. Required Initial Disclosure - Rule 26(a)(1)

Under Rule 26(a)(1), the parties are required to disclose four types of information without awaiting formal requests:

(A) "the name[,] . . . address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings,"⁴⁸⁹ and the subject of the information each person has;⁴⁹⁰

(B) copies of "or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;"⁴⁹¹

(C) computations of damages claimed, and any non-privileged documents or evidentiary material on which the computations are based;⁴⁹² and

(D) any insurance agreements that may cover all or part of a judgment in the action.⁴⁹³

The Committee Notes characterize these initial disclosures as the "functional equivalent of court-ordered interrogatories,"⁴⁹⁴ although it seems to be much broader than the scope of permissible interrogatories under the old rule.

These disclosures must be made within ten days of the Rule 26(f) meeting.⁴⁹⁵ Again, the Rule 26(f) meeting must be held at least fourteen days before the Rule 16 conference, the timing of which is to be determined by the court.⁴⁹⁶ If no pretrial conference with the court is held pursuant to Rule 16(b), the Rule 26(f) meeting must be held at least fourteen days before a scheduling order is issued under Rule 16(b), which must be entered within ninety days of the appearance of the de-

489. FED. R. CIV. P. 26(a)(1)(A).

490. *Id.*

491. FED. R. CIV. P. 26(a)(1)(B).

492. FED. R. CIV. P. 26(a)(1)(C).

493. FED. R. CIV. P. 26(a)(1)(D).

494. 1993 Committee Notes, 146 F.R.D. at 629.

495. FED. R. CIV. P. 26(a)(1).

496. FED. R. CIV. P. 26(f).

fendant and within 120 days of the service of the defendant.⁴⁹⁷ Thus, the latest that the disclosures can be made is 116 days after service of the complaint on a defendant. Conceivably, a named defendant may not have been served when initial disclosures are required, as Rule 4(m) allows 120 days for service of the complaint on the defendant after it is filed.⁴⁹⁸ In such a case, another Rule 26(f) meeting might be necessary, followed by another round of disclosures.⁴⁹⁹

A disclosing party is required under Rule 26(g)(1) to make a reasonable inquiry into the facts of the case, and to certify that to the best of its “knowledge, information, and belief . . . the disclosure is complete and correct” when made.⁵⁰⁰ In addition to being served on the opposing parties, the disclosures must be signed and filed with the court.⁵⁰¹ This requirement can be modified by local rule or court order.⁵⁰² It is likely that many courts will order that disclosures are not to be filed with the court as a matter of course, to avoid the extra burden on the clerk of the court, and because of scarce filing space. A party is not excused from the disclosure requirement on the ground that its investigation is incomplete.⁵⁰³ Rather, as the investigation progresses, the party must supplement its disclosure as required by subdivision 26(e)(1), discussed below.⁵⁰⁴ The disclosures are to be made simultaneously, and a party cannot refuse to make a disclosure because it is dissatisfied with the sufficiency of the opposing party’s disclosure, or because the other party has failed to make its disclosure.⁵⁰⁵ In an appropriate case, such as where a defendant recently appeared, the court may extend extra time to that defendant for disclosure.⁵⁰⁶

Rule 26(a)(1)(A) requires disclosure of names and addresses of any person who could possess information that is discoverable as well as pertinent to disputed facts which have been plead with particularity.⁵⁰⁷ All such individuals must be disclosed, regardless of whether their testimony would support the position of the disclosing party.

497. FED. R. CIV. P. 16(b).

498. FED. R. CIV. P. 4(m).

499. *Cf.* 1993 Committee Notes, 146 F.R.D. at 643.

500. FED. R. CIV. P. 26(g)(1).

501. FED. R. CIV. P. 26(a)(4).

502. *Id.*

503. FED. R. CIV. P. 26(a)(1).

504. *See infra* notes 614-18 and accompanying text.

505. FED. R. CIV. P. 26(a)(1). *See* 1993 Committee Notes, 146 F.R.D. at 633.

506. FED. R. CIV. P. 26 advisory committee’s note.

507. FED. R. CIV. P. 26(a)(1)(A).

Rule 26(a)(1)(B) requires disclosure of "all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings . . ."⁵⁰⁸ The provision allows the disclosing party to choose either to produce copies of the relevant documents, or to describe them by their nature and location; an itemized listing is not required.⁵⁰⁹ Opposing parties may then request the documents they want informally, or by formal document requests under Rule 34.⁵¹⁰ For that reason, apparently, Rule 34 does not limit the number of document production requests that can be served. Formal discovery requests will also be necessary where facts have not been plead with sufficient particularity to trigger disclosure obligations. In all likelihood, and particularly in large litigations, a request for disclosure in the form of descriptions of documents will be made with only one document production request for all of the documents described in the disclosure. Thus, one could argue, the mandatory disclosure provision simply delays the time in which document productions will be made.

However, discovery might in some cases actually be accelerated because the amount of motion practice over document requests should be reduced. Under the old system, parties were required to produce only those documents that were specifically requested.⁵¹¹ Thus, parties would often interpret a request as narrowly as possible in an attempt to avoid producing a document harmful to their case. This tendency for the producing party to narrowly construe a document request, coupled with the fact that the requesting party typically did not have sufficient information about what documents opposing parties had in their files, meant that a requesting party often felt compelled to phrase its requests as broadly as possible.⁵¹² Often, such a broadly phrased request would be met with

508. FED. R. CIV. P. 26(a)(1)(B).

509. *Id.* This procedure is analogous to that allowed under Rule 33(d), which provides that a party responding to an interrogatory may specify records from which the answer to the interrogatory may be obtained and allow the party making the interrogatory to examine the records. FED. R. CIV. P. 33(d).

510. FED. R. CIV. P. 34. This rule states in pertinent part that "[a]ny party may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, any designated documents . . ." *Id.*

511. *See* Fed. R. Civ. P. 26(a), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). This rule provided that "[p]arties may obtain discovery by . . . production of documents . . ." *Id.*

512. *See* Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation (Draft, Sept. 18, 1978) (hereinafter Second Circuit Commission), *cited in* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 746 (5th ed. 1989).

a motion for a protective order under Rule 26(c),⁵¹³ on the grounds that it was overbroad and burdensome. As a result, both parties would incur the expense of briefing the issue at least once for a hearing before the magistrate, and often twice, if the magistrate's order was appealed to the court under Rule 72(a).⁵¹⁴

The Committee Notes state that the new procedure is intended to reduce the number of such "squabbles" over the wording of document requests.⁵¹⁵ Still, attorneys have a talent for disagreeing, and, as discussed below, it seems likely that squabbles over the phrasing of document requests will be replaced by squabbles over whether parties disclosed all information required under Rule 26(a)(1) in a timely fashion. As the sanction for failure to disclose relevant material is the exclusion of the material at trial,⁵¹⁶ there is a great incentive to make such a motion. Thus, while discovery initially may be expedited by the new procedure, the total amount of motion practice may not actually be reduced, at least in cases that make it to the trial stage.

By describing a document in a Rule 26(a)(1)(B) list, a party does not waive its right to claim that the document is not sufficiently relevant to the action to justify the expense or burden of production.⁵¹⁷ The objection under the old standard used to state that the request was "unduly burdensome or expensive."⁵¹⁸ The new objection, made pursuant to Rule 26(b)(2)(iii), states that "the burden or expense of the proposed discovery outweighs its likely benefit . . ."⁵¹⁹ The Committee Notes state that the new standard is intended to "enable the court to keep tighter rein on the extent of discovery."⁵²⁰ But, in the context of disclosure, when the disclosing party has already incurred the burden of determining the existence of and identifying the document, it seems unlikely that an assertion that production of the document would be burdensome will prevail, because any additional expense, which at that point will usually be merely the cost of photocopying, can be placed upon the party requesting production. The argument could be made that taking the document from its normal file for photocopying is disruptive.

513. Fed. R. Civ. P. 26(c), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

514. Fed. R. Civ. P. 72(a), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). See Second Circuit Commission, *supra* note 512.

515. 1993 Committee Notes, 146 F.R.D. at 630.

516. Fed. R. Civ. P. 37(c)(1).

517. 1993 Committee Notes, 146 F.R.D. at 631.

518. Fed. R. Civ. P. 26(b)(1)(iii), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

519. Fed. R. Civ. P. 26(b)(2)(iii).

520. 1993 Committee Notes, 146 F.R.D. at 638.

However, the very identification of the document by the disclosing party is an admission that it is relevant to a fact in dispute, and, particularly in a close case, courts are inclined to allow more discovery rather than less.

a. Disclosure of the Existence of a Document is not a Waiver of Privilege

The identification of a document will not constitute a waiver of an objection to production of the document on the basis of work-product protection or privilege.⁵²¹ It could be argued that, because privilege and work product protection are provided for in Rule 26(b)(5), which appears to apply only to "discovery,"⁵²² those protections are not extended to materials which must be "disclosed" pursuant to Rule 26(a).⁵²³ Of course, if a disclosing party were to produce an otherwise privileged document as part of its disclosure, it would likely waive any claim of privilege or work-product protection, unless the court were to accept an argument that the disclosure was inadvertent and did not constitute a waiver. But the rules contemplate that initial disclosures may be made by simply identifying, rather than producing, the documents.⁵²⁴ The opposing party then may serve a Rule 34 request for production,⁵²⁵ which is part of discovery, rather than disclosure, and the Rule 26 privilege and work product protections should apply. Under Rule 26(b)'s definition of the scope of discovery, parties may not obtain discovery of privileged material, and the document with respect to which a privilege is claimed may be withheld from production on that basis.⁵²⁶

An argument that the initial identification of the document is a waiver of the privilege is frivolous; the document has not been produced, but only identified. Indeed, an identification of the document is necessary on order to assert a claim of privilege pursuant to Rule 26(b)(5).⁵²⁷ Under this subdivision, parties withholding "otherwise discoverable" documents on the grounds of privilege or work-product immunity are required to "make the claim expressly," and must provide information sufficient to enable other parties to assess the validity of the claim of privi-

521. 1993 Committee Notes, 146 F.R.D. at 631.

522. FED. R. CIV. P. 26(b)(5).

523. This issue was first pointed out to me by Jack E. McClard, Esq., of Hunton & Williams, Richmond, Va.

524. FED. R. CIV. P. 26(a)(1)(B).

525. FED. R. CIV. P. 34(a).

526. FED. R. CIV. P. 26(b)(1).

527. FED. R. CIV. P. 26(b)(5).

lege.⁵²⁸ Indeed, failure to provide such an identification will subject a party to Rule 37(b)(2) sanctions,⁵²⁹ and, the Committee states, may itself constitute “a waiver of the privilege or protection.”⁵³⁰

b. The Particularity Standard

Disclosure of witnesses, documents and tangible things required by Rule 26(a)(1)(A) and (B) is necessary when the evidence is “relevant to disputed facts alleged with particularity in the pleadings”⁵³¹ Only witnesses likely to have information regarding disputed facts, and documents that are relevant to disputed facts, need be disclosed. If a fact is admitted, disclosure is not necessary. As has already been noted, however, disclosure may take place before a defendant has responded to the complaint,⁵³² as in the situation where a defendant has moved to dismiss the action under Rule 12(b).⁵³³ In that case, the parties may not have established which facts are in dispute. However, absent a court order or stipulation, the parties must make Rule 26(a)(1) disclosures within 116 days of service of the complaint, regardless of whether the defendant has filed a response.⁵³⁴ One of the purposes of the Rule 26(f) meeting is to deal with this problem. The Committee has stated that if the defendant has not answered the complaint before the parties meet, the meeting will allow the parties to “refine the factual disputes . . . or . . . afford the parties an opportunity to modify by stipulation the timing or scope of these [Rule 26(a)(1)(A) and (B)] obligations.”⁵³⁵

The Committee’s rather sanguine view of the willingness and ability of litigants to work out discovery disputes without court intervention is ironic, given that the amendments were, in large part, a response to the increasing litigiousness and incivility of discovery. However, this optimism may be justified. Some anecdotal evidence suggests that the new regime has encouraged more cooperation among parties during discov-

528. *Id.*

529. FED. R. CIV. P. 37(b)(2). Examples of sanctions available under this rule are establishing matters and facts for the party making the order, not allowing a disobedient party to oppose or support defenses or claims, prohibiting introduction of evidence, striking pleadings, staying proceedings, dismissing an action, or granting a default judgment. *Id.*

530. 1993 Committee Notes, 146 F.R.D. at 639.

531. FED. R. CIV. P. 26(a)(1)(A), (B).

532. *See supra* text accompanying note 498.

533. FED. R. CIV. P. 12(b).

534. *See supra* notes 497-98 and accompanying text.

535. 1993 Committee Notes, 146 F.R.D. at 632.

ery.⁵³⁶ Still, it is likely under the new discovery regime for it to become standard for a defendant who responds to a complaint by filing a Rule 12(b) motion to dismiss the complaint to simultaneously move for an order exempting the action from disclosure under Rule 26(a)(1), pending determination of the dispositive motion. In those cases, the district court can, and should, exercise its discretion to allow a limited amount of formal discovery pertinent to the motion to take place before the Rule 26(f) meeting. Otherwise, in order to avoid the harsh penalties associated with a failure to make timely disclosure,⁵³⁷ including exclusion of evidence,⁵³⁸ the defendant would have to state its position on the allegations of the complaint, as it must set out which facts it disputes.⁵³⁹ Thus, the defendant effectively would be forced to respond to the complaint earlier than is required by Rule 12.⁵⁴⁰

The standard "alleged with particularity in the pleadings"⁵⁴¹ replaced an earlier proposed - and looser - standard of "likely to bear significantly on any claim or defense,"⁵⁴² which was rejected as unworkable, given the relaxed pleading requirements under the Federal Rules.⁵⁴³ Under the new version of Rule 26, parties do not have to identify potential evidence with regard to matters that are plead in a broad, vague or conclusory manner,⁵⁴⁴ although such a manner of pleading is permitted by Rule 8. The Committee Notes cite an example, which makes it clear that the change in the standard was a victory for the products liability defense bar. "[T]he assertion that a product with many component parts is defective in some unspecified manner — should not impose upon re-

536. See Holzberg, *supra* note 447.

537. FED. R. CIV. P. 37(c)(1). This subsection provides that a court has the option of awarding payment of expenses and attorney's fees, ordering that facts be taken as established, exclusion of evidence, preventing a party from opposing or supporting a claim or defense, striking pleadings, staying proceedings, granting a default judgment or granting a dismissal if disclosure is not made. *Id.*

538. *Id.*

539. FED. R. CIV. P. 8(b).

540. A related issue arises with respect to pleadings to which no responsive pleading is required or permitted, such as an answer in which no counterclaim is asserted. Any averments in such a pleading are deemed denied or avoided. FED. R. CIV. P. 8(d). Now, the parties effectively will be forced to respond to such pleadings.

541. FED. R. CIV. P. 26(a)(1)(A), (B).

542. Fed. R. Civ. P. 26 (Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence), *reprinted in* 137 F.R.D. 53, 88 (1991).

543. It has been inferred that the use of this standard has been rejected because while it appeared in the 1991 version of the Proposed Amendments to the Federal Rules of Civil Procedure, it was omitted from the 1993 amendments to the rules.

544. 1993 Committee Notes, 146 F.R.D. at 631.

sponding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product.”⁵⁴⁵

Thus, there is an incentive for the plaintiff to allege all facts in the complaint with “particularity” in order to trigger the automatic disclosure provisions. What constitutes sufficient particularity to do so, however, is not at all clear.

The “particularity” standard is borrowed from Rule 9(b),⁵⁴⁶ which requires that fraud and mistake be alleged with particularity.⁵⁴⁷ That rule, however, has spawned a significant amount of motion practice, with inconsistent decisions resulting in an uncertain standard,⁵⁴⁸ so that Rule 9(b) decisions will provide little guidance in the interpretation of Rule 26(a)(1). The context in which the issue of what constitutes sufficient “particularity” is presented under Rule 9(b) is quite different than the context in which it is presented when disclosure requirements are at issue. Whether fraud or mistake has been alleged with sufficient particularity to satisfy Rule 9(b) is an issue that is raised as the basis for a motion to dismiss the complaint for failure to state a claim, pursuant to Rule 12(b)(6).⁵⁴⁹ If the court finds the requisite particularity lacking, the complaint may be dismissed.⁵⁵⁰ By contrast, the particularity standard of Rule 26(a)(1), applied in the disclosure context, was not intended to produce such a harsh result. Rather, the Committee envisioned more of a continuum approach, in which different degrees of particularity in the pleadings would lead to different disclosure obligations: “[t]he greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence.”⁵⁵¹

545. *Id.*

546. FED. R. CIV. P. 9(b).

547. *Id.*

548. The Second Circuit, for example, has tended to apply the particularity requirement of Rule 9(b) with greater rigor than other circuits, especially regarding the particularity required for an allegation of the requisite scienter for fraud. *Compare* *Denny v. Barber*, 576 F.2d 465, 469 (2d Cir. 1978) (stating that a complaint characterizing loans as risky and speculative was merely stating a conclusion and was not sufficiently particular to establish fraud) *with* *Denny v. Carey*, 72 F.R.D. 574, 580 (E.D. Pa. 1976) (stating that an allegation that a defendant “‘knew or should have known’ and ‘knew, were reckless in failing to know or ascertain, or should have known’” was sufficient to establish fraud under Rule 9(b) in a case with the same plaintiff and substantially the same facts as *Denny v. Barber*).

549. FED. R. CIV. P. 12(b)(6).

550. *Id.*

551. 1993 Committee Notes, 146 F.R.D. at 631.

Still, it is not clear just what degree of particularity is sufficient to trigger disclosure obligations with respect to various documents or other evidence. As discussed below, because a party who fails to fulfill its duty of automatic disclosure under Rule 26(a) “*shall not . . . be permitted* to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed,”⁵⁵² we should expect to see a significant amount of litigation over whether the facts have been plead with sufficient particularity to trigger the automatic disclosure with respect to specific evidence. We should also expect to see a lot of irrelevant material disclosed, especially through a general description of documents, by defendants who want to ensure they will not be met with such a sanction.

Another issue that arises is whether allegations plead on information and belief can trigger disclosure obligations.⁵⁵³ If the allegation is sufficiently particular, and is disputed, it seems nonsensical to suggest that disclosure is required only if the plaintiff already has evidence to support the allegation. It is when evidence is peculiarly within the knowledge and control of the defendants, such as in class action suits, securities fraud suits, and civil rights suits, that plaintiffs need disclosure the most. A plaintiff can obtain evidence through traditional methods of discovery but, as noted above, discovery cannot take place until after the parties’ Rule 26(f) meeting.⁵⁵⁴ This can be too late because the Rule 16(b) conference with the court will take place within two weeks of that meeting, and one of the subjects to be discussed of which is the formulation and simplification of the issues, including the elimination of frivolous claims or defenses.⁵⁵⁵ A party who has not had adequate time for discovery on a claim would be at a clear disadvantage at the conference.

The parties are expected to work out issues of this sort during their Rule 26(f) meeting, and if they are unable to do so, any party may make a motion to compel disclosure.⁵⁵⁶ In addition, a party may make a motion to have the court clarify its disclosure or discovery obligations.⁵⁵⁷ Under Rule 26(c), a party may move for a protective order, including an

552. FED. R. CIV. P. 37(c)(1) (emphasis added).

553. FED. R. CIV. P. 11(b)(3). This rule requires an attorney or unrepresented party to certify that “the allegations . . . have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .” *Id.*

554. *See supra* text accompanying note 431.

555. FED. R. CIV. P. 16(c)(1).

556. FED. R. CIV. P. 37(a).

557. FED. R. CIV. P. 26(c).

order that certain disclosure or discovery not take place at all.⁵⁵⁸ However, a party making a motion under Rule 26(c) is now required to certify that it has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.⁵⁵⁹

c. Inconsistency with Notice Pleading

A more fundamental concern with the standard for disclosure set out in Rule 26(a)(1) is that the encouragement of more particularized pleadings in the new Rule 26(a)(1) is a poor fit with the liberal system of notice pleading contemplated by the Federal Rules. Rule 8(a)(2) requires only that a complaint include “a short and plain statement of the claim showing that the pleader is entitled to relief”⁵⁶⁰ This liberality in pleading was one of the major reforms achieved by the 1938 Federal Rules. The attempt to set out each party’s view of the facts was shifted from the pleading stage to the discovery stage, so that parties were not forced to take positions on the facts before they had access to witnesses and documents, some of which might be within the control of the opposing party. Now, to trigger the duties of automatic disclosure, a complaint must more closely resemble code or “fact pleading,” or even a common law bill of particulars, rather than the kind of “notice pleading” envisaged by the Federal Rules.⁵⁶¹ The problem may be exacerbated by the fact that required disclosure is determined by what disputed facts are plead with particularity, with no requirement that those facts have any

558. FED. R. CIV. P. 26(c)(1).

559. FED. R. CIV. P. 26(c)

560. FED. R. CIV. P. 8(a)(2). The only exceptions are those set out in Rule 9, which requires that certain matters be plead with more particularity or specificity. FED. R. CIV. P. 9. Arguments that certain types of cases, such as civil rights actions, should be treated differently have been rejected by the Supreme Court. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (“We think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit [to civil rights cases under 42 U.S.C. § 1983] with the liberal system of ‘notice pleading’ set up by the Federal Rules.”).

561. *Cf. Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (describing the Federal Rules as requiring “notice pleading”); *see also* Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958) (stating that the rules require only a general explanation of the case) (Judge Clark was the principal drafter of the 1938 Federal Rules and served on the Second Circuit Court of Appeals).

The Advisory Committee was aware of this apparent inconsistency between the disclosure provisions and the provisions for notice pleading, and suggested that the issue should be studied and considered in the future. *See* Attachment B to Keeton letter, *supra* note 31, at 528.

relevance to the issues in the lawsuit. Given that plaintiffs are encouraged by the automatic disclosure provisions to be more verbose in their complaints, and that some may choose to use a long detailed complaint for its *in terrorem* effect in disclosure and discovery,⁵⁶² we should also expect to see an increase in the number of motions to strike under Rule 12(f),⁵⁶³ because parties will not want to be subject to mandatory disclosure respecting alleged facts that have been plead with the requisite particularity, the veracity of which they dispute, but which are irrelevant to the claims in the action.

Of course, notice pleading is still sufficient under the Federal Rules.⁵⁶⁴ In particular, Rule 26(a)(1) does not require that the plaintiff plead with particularity to avoid dismissal of the action; it only requires the plaintiff to plead with particularity in order to take advantage of automatic disclosure.⁵⁶⁵ Nor are the disclosure provisions of subdivision (a) exclusive; parties still are free to request additional discovery using traditional methods,⁵⁶⁶ provided such requests are not made prior to the Rule 26(f) conference.⁵⁶⁷ However, while requests for documents are not limited by the new rules,⁵⁶⁸ the number of interrogatories and depositions that can be requested is limited,⁵⁶⁹ as it is expected that most of the relevant evidence will have been disclosed. Where the pleadings do not sufficiently define the factual disputes, the parties may use the Rule 26(f) conference to do so informally.⁵⁷⁰ In that situation, the parties could stipulate what disclosure is required, or formally amend their pleadings to state facts with the requisite particularity.

562. Cf. *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 114-15 (2d Cir. 1982) (describing the complaint in that case as an "‘everything but the kitchen sink’ type of pleading which would give plaintiff’s attorneys carte blanche in the area of liberal federal discovery.”).

563. FED. R. CIV. P. 12(f).

564. See FED. R. CIV. P. 8(a).

565. FED. R. CIV. P. 26(a)(1).

566. FED. R. CIV. P. 26(a)(5). See 1993 Committee Notes, 146 F.R.D. at 628.

567. FED. R. CIV. P. 26(d). Rule 30(a)(2)(C) provides an exception for an earlier deposition of a witness about to leave the country. FED. R. CIV. P. 30(a)(2)(C). However, under Rule 32(a)(3), such a deposition taken without leave of court cannot be used at trial against a party that was unable, even with due diligence, to obtain counsel to represent it at the deposition. FED. R. CIV. P. 32(a)(3).

568. FED. R. CIV. P. 34.

569. See FED. R. CIV. P. 30(a)(2)(A), 31(a)(2)(A), 33(a).

570. See 1993 Committee Notes, 146 F.R.D. at 631.

d. Automatic Disclosure and the Adversary System

Perhaps the most widely expressed concern with the mandatory disclosure provision is the potential encroachment on the protection afforded attorney work-product,⁵⁷¹ and the inconsistency with the adversarial system. The materials that must be disclosed under Rule 26(a)(1) were discoverable under the former rules,⁵⁷² but now must be disclosed without a request,⁵⁷³ based on the assessment of counsel for the disclosing party as to what evidence is relevant to the issues in the action. That assessment necessarily will reflect counsel's impressions and theories about the case, or communications from the client to counsel about what documents exist and their significance.⁵⁷⁴ Many attorneys fear that mandatory disclosure will provide opposing counsel with the access to factual information as well as an insight into their theory of the case. Indeed, many argue, the better the counsel, the better the disclosure that will be afforded to opposing counsel. Thus, a party's adversary will benefit from that party's choice of quality counsel. Critics contend that this result cannot be squared with the adversarial system. As Justice Jackson pointed out in *Hickman v. Taylor*,⁵⁷⁵ "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."⁵⁷⁶ Many attorneys also fear that the relationship between the attorney and the client will be jeopardized; rather than reviewing the relevant facts and materials with her client in order to equip herself with enough information to enable her to do the best job possible, the attorney now will be making such a review in order to disclose the information to the opposition, without any formal request being made. Justice Scalia stated the objection forcefully:

571. FED. R. CIV. P. 26(b)(3). Rule 26(b)(3), which was not altered by the 1993 amendments, and the Supreme Court's decisions in *Hickman v. Taylor*, 329 U.S. 495 (1947) and *Upjohn Co. v. United States*, 449 U.S. 383 (1981), protect against disclosure of an attorney's mental impressions, conclusions, opinions or legal theories, or the legal theories of a party concerning the litigation. In *Upjohn*, the Court emphasized the extraordinary protection afforded mental impressions of an attorney, and stressed that "such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without due hardship." *Upjohn*, 449 U.S. at 401.

572. Fed. R. Civ. P. 26(a), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

573. FED. R. CIV. P. 26(a)(1).

574. For a discussion of this problem, see James Holmes, Note, *The Disruption of Mandatory Disclosure with the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution*, 73 TEX. L. REV. 177 (1994).

575. 329 U.S. 495 (1947).

576. *Id.* at 516 (Jackson, J., concurring).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients - on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment - the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary.⁵⁷⁷

The Committee Notes do not respond directly to these concerns, but simply point out that similar automatic disclosure provisions have been in place for several years in Canada and Great Britain,⁵⁷⁸ both of which retain the adversarial system, as well as attorney-client privilege and work-product immunity. In a thorough analysis of the mandatory disclosure provisions,⁵⁷⁹ Professor Sorenson has canvassed the arguments against automatic disclosure, and has rejected the argument that it is contrary to the adversarial system. He points out that the adversarial system is a means to an end; a way to seek truth, and not an end in itself.⁵⁸⁰ He then points out that, to the extent that there is any agreement about what makes up the adversarial system, the system remains intact with the implementation of automatic disclosure because there still is a neutral judge, the parties are responsible for gathering and presenting the evidence, and there is a system of formal rules.⁵⁸¹ In response to arguments that mandatory disclosure infringes upon work-product immunity and attorney-client privilege, he points out that both claims are still available under the rules.⁵⁸² Neither privilege was ever intended to insulate facts from discovery; they were only meant to protect communications between the attorney and client, and the mental impressions of an attorney, neither of which is required to be disclosed any more than if formal discovery requests were made.⁵⁸³

577. Order of April 22, 1993, 146 F.R.D. at 511 (Scalia, J., dissenting).

578. 1993 Committee Notes, 146 F.R.D. at 629.

579. Charles W. Sorenson, *Disclosure Under Federal Rule of Civil Procedure 26(a)* - "Much Ado About Nothing?," 46 HASTINGS L.J. 679, 760-92 (1995).

580. *Id.* at 763.

581. *Id.* at 763-64.

582. *Id.* at 772, 779. See *supra* text accompanying notes 521-30.

583. *Id.* at 778.

3. Required Expert Disclosure and Expert Depositions - Rule 26(a)(2) and (b)(4)

In addition to the disclosure required by Rule 26(a)(1), Rule 26(a)(2)(A) requires parties to disclose the identity of any person who may be used to present expert evidence at trial.⁵⁸⁴ Subject to stipulation or court order, the expert disclosure must include a report prepared and signed by any witness specifically employed to give expert testimony, or whose duties as a party's employee include giving expert testimony.⁵⁸⁵ A report is not required from other experts who may testify, such as a treating physician.⁵⁸⁶ The report must state the opinion to be expressed by the expert, the basis of the opinion, and any exhibits that will be used.⁵⁸⁷ A party may not refuse to divulge these materials on the grounds of attorney-client privilege or work-product immunity.⁵⁸⁸ This does not mean, however, that every document shown to a testifying expert must be disclosed. The rule requires that the report contain "the basis and reasons" for the expert's opinion and "the data or other information considered by the witness in forming the opinions . . .".⁵⁸⁹ This language can easily be interpreted as excluding information that was considered by the expert, but ignored while he formed his opinions. Thus, it can be argued that the new rule has failed to resolve the problem of when information provided to testifying experts is discoverable, and it seems as though parties will continue to litigate that issue.⁵⁹⁰

The Rule 26(a)(2) expert report also must provide details about the qualifications of the expert, including publications, other matters in which the expert has testified in the past four years, and the compensation paid to the expert in the pending case.⁵⁹¹ Under Rule 26(a)(4), this disclosure, too, must be filed with the court.⁵⁹² This disclosure is not exclusive; parties who want additional information, such as testimony the expert has given more than four years ago, are free to request it with

584. FED. R. CIV. P. 26(a)(2)(A). Although the rule does not provide for an opt-out from this provision, about one-fourth of the federal district courts have interpreted the rule as allowing such an opt-out. Stienstra, *supra* note 462, at LXXV.

585. FED. R. CIV. P. 26(a)(2)(B).

586. FED. R. CIV. P. 26(a)(2)(B).

587. *Id.*

588. See 1993 Committee Notes, 146 F.R.D. at 634.

589. FED. R. CIV. P. 26(a)(2)(B).

590. For a discussion of the issue under the old and new rule, see Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773 (1994).

591. FED. R. CIV. P. 26(a)(2)(B).

592. FED. R. CIV. P. 26(a)(4).

traditional discovery methods.⁵⁹³ However, under Rule 26(d), parties may not make formal discovery requests until after the parties have met pursuant to Rule 26(f).⁵⁹⁴ The ongoing duty to supplement, discussed below, extends to expert disclosures.⁵⁹⁵

Unless the court orders otherwise, expert disclosure should take place ninety days before trial, with an additional thirty days allowed for disclosure of expert testimony used to rebut the testimony of another party.⁵⁹⁶ The Committee expects that the court typically will specify the timing and sequence of expert disclosure in a Rule 16(b) scheduling order, with the party having the burden of proving an issue normally making disclosures first.⁵⁹⁷

Rule 26(b)(4) has been amended specifically to allow depositions of experts after disclosure of an expert's report.⁵⁹⁸ Under the former rule, such a deposition could take place only by consent, or on application to the court,⁵⁹⁹ which was granted routinely by many courts. These depositions are not counted toward the ten depositions allowed for each party under Rules 30 and 31.⁶⁰⁰ However, given the degree of specificity required in the expert's report under Rule 26(a)(4), the Committee Notes state that it is expected that expert depositions will be brief, and often unnecessary.⁶⁰¹ As a tactical matter, counsel dissatisfied with an expert's disclosure may prefer not to request the expert's deposition, and

593. FED. R. CIV. P. 26(a)(5).

594. FED. R. CIV. P. 26(d). *See* 1993 Committee Notes, 146 F.R.D. at 628; *see also* FED. R. CIV. P. 30(a)(2)(C) (oral depositions); FED. R. CIV. P. 31(a)(2)(C) (depositions by written questions); FED. R. CIV. P. 33(a) (interrogatories); FED. R. CIV. P. 34(b) (requests for production); FED. R. CIV. P. 36(a) (requests for admission). All of these rules invoke the time constraint set forth in Rule 26(d). FED. R. CIV. P. 26(d).

595. FED. R. CIV. P. 26(a)(2)(C), (e)(1).

596. FED. R. CIV. P. 26(a)(2)(C).

597. 1993 Committee Notes, 146 F.R.D. at 633.

598. FED. R. CIV. P. 26(b)(4)(A).

599. FED. R. CIV. P. 26(b)(4)(A)(ii), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). The 1970 version of Rule 26 stated that only interrogatories were available to obtain information about expert witnesses. Fed. R. Civ. P. 26(b)(4)(A)(i), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). In addition, it provided that the court could order additional discovery through other methods in regards to fees. Fed. R. Civ. P. 26(b)(4)(A)(ii), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). The new rule now explicitly provides for deposition of expert witnesses. FED. R. CIV. P. 26(b)(4)(A), (B).

600. We know this because Rules 30 and 31 only limit the number of depositions to be taken pursuant to *these two rules*. *See* FED. R. CIV. P. 30(a)(2)(A), 31(a)(2)(A). Rules 30 and 31 do not mention depositions to be taken pursuant to Rule 26. *See* FED. R. CIV. P. 30(a)(2)(A), 31(a)(2)(A). Therefore, since depositions of experts are taken pursuant to Rule 26(b)(4)(A), they are not included in the ten deposition limit imposed by Rules 30 and 31.

601. 1993 Committee Notes, 146 F.R.D. at 635.

instead move for preclusion of the expert's testimony based on inadequate disclosure.⁶⁰²

Rule 26(b)(4)(B) provides protection against discovery of information held by experts retained in anticipation of litigation who are not expected to testify.⁶⁰³ Depositions or interrogatories may be used to seek this type of information only in the exceptional case - when the party trying to obtain discovery shows that it is "impracticable . . . to obtain facts or opinions on the same subject by other means."⁶⁰⁴ In this respect, the rule resembles Rule 26(b)(3), which provides protection against discovery to "work-product" or materials prepared in anticipation of litigation.⁶⁰⁵ The rule is not clear as to whether the protection afforded to information and opinions held by non-testifying experts is simply an extension of, or is in addition to, the work-product protection of 26(b)(3). The Committee Notes, however, indicate that the rationale for the protection given to the opinions of non-testifying experts is not that they are work-product, but is instead premised on the notion that it is unfair to allow one party to hire and pay for an expert and then be required to turn over information from that expert to his opponent.⁶⁰⁶ Thus, at least one court has held that the disclosure of information by a non-testifying expert is not a waiver of the Rule 26(b)(4)(B) protection, as it would be were that protection merely work-product protection, and that a party seeking discovery still must show exceptional circumstances to justify discovery.⁶⁰⁷

602. See *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir.) (ordering preclusion of expert testimony under Rule 37(c)(1), on the grounds that the expert disclosure was inadequate, and stating that the purpose of the required disclosure is to eliminate unfair surprise and conserve resources by obviating the need for depositions), *cert. denied*, 116 S. Ct. 84 (1995).

603. FED. R. CIV. P. 26(b)(4)(B).

604. *Id.*

605. FED. R. CIV. P. 26(b)(3). This subsection states:

a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial . . . 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.

Id.

606. See 1993 Committee Notes, 146 F.R.D. at 638-39.

607. See *Vanguard Savings and Loan Ass'n v. Banks*, No. CIV. A. 93-4627, 1995 WL 71293, at *3 (E.D. Pa. Feb. 17, 1995) ("[D]efendant cannot discover the facts known, or opinions held by [the expert] if: (1) plaintiff retained [the expert] in anticipation of litigation; (2) plaintiff does not intend to call [an expert] representative as a trial witness; and (3) defendant cannot prove that exceptional circumstances compel discov-

4. Pre-Trial Disclosure - Rule 26(a)(3)

At least thirty days before trial, or as directed by the court in a pretrial order, parties must disclose information regarding evidence that will possibly be used at trial "other than solely for impeachment purposes" ⁶⁰⁸ The information is of the nature normally covered by pretrial order: (A) names, addresses and telephone numbers of witnesses must be listed, with witnesses who are expected to be called listed separately from those that may be called. Listing a witness does not create an obligation to secure the witness's attendance at trial; (B) testimony to be presented by deposition is to be designated, and transcripts of any depositions not taken stenographically must be provided; and (C) exhibits must be identified, with those that are expected to be used listed separately from those that may be used if needed. ⁶⁰⁹

Unless the court directs otherwise, a list of objections to the use of depositions and exhibits may be filed within fourteen days of the disclosure. ⁶¹⁰ Listing an objection at this time does not constitute an objection at trial, but the court may rule on the objections before trial by treating it as a motion in limine. ⁶¹¹ Any objections not made at that time, other than objections under Federal Rules of Evidence 402 and 403 (relevance, prejudice, cumulative etc.) are waived, if not excused for good cause. ⁶¹² Under the amended rules, the normal sanction under Rule 37(c)(1) for failure to disclose will be exclusion of the evidence. ⁶¹³

ery."). This conclusion is also buttressed by the statement in Rule 26(b)(3) that the provision is subject to 26(b)(4).

608. FED. R. CIV. P. 26(a)(3). Evidence to be used for impeachment purposes may, of course, be discovered by opposing parties using conventional methods of discovery. See *Corrigan v. Methodist Hospital*, 158 F.R.D. 54, 58 (E.D. Pa. 1994).

609. FED. R. CIV. P. 26(a)(3). As with expert disclosures under Rule 26(a)(2), there is no provision in the rule allowing the district courts to opt out of its application, but about one fourth of the districts have interpreted the rule to provide for an opt-out. Stienstra, *supra* note 462, at LXXV.

610. FED. R. CIV. P. 26(a)(3).

611. 1993 Committee Notes, 146 F.R.D. at 637.

612. FED. R. CIV. P. 26(a)(3).

613. FED. R. CIV. P. 37(c).

5. Duty to Supplement Disclosure and Discovery Responses - Rule 26(e)

The duty to supplement discovery responses, which was quite limited under former Rule 26(e),⁶¹⁴ has been expanded, and has been extended to the disclosures required by subdivision 26(a).⁶¹⁵ A party must supplement disclosures or discovery at “appropriate intervals” if the party learns that the information disclosed is in some material regard incomplete or incorrect.⁶¹⁶ The information need not have been incomplete or incorrect at the time it was provided to the other parties; the duty to supplement extends to information acquired after the original disclosure or discovery response was made.⁶¹⁷ There is no need to formally supplement disclosures or discovery responses if the information otherwise has been “made known to the other parties during the discovery process or in writing.”⁶¹⁸

The duty to supplement discovery responses is limited to interrogatories, requests for admission and requests for production;⁶¹⁹ there is no duty to supplement deposition testimony, other than expert deposition testimony.⁶²⁰ Where an expert has provided a report under Rule 26(a)(2)(B), the duty of supplementation extends both to the information in the report as well as to information provided by deposition testimony.⁶²¹ Any such supplementation of expert disclosure must be made when pre-trial disclosures under Rule 26(a)(3) are due;⁶²² that is, normally thirty days before trial.⁶²³ If a party wishes to add to the expert’s

614. Fed. R. Civ. P. 26(e), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). The old rule required a party to supplement a discovery request only if:

any question [is] directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person’s testimony.

... [Or] the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Id.

615. FED. R. CIV. P. 26(e).

616. FED. R. CIV. P. 26(e)(1).

617. *Id.*

618. FED. R. CIV. P. 26(e)(1), (2).

619. FED. R. CIV. P. 26(e)(2).

620. FED. R. CIV. P. 26(e)(1).

621. *Id.*

622. FED. R. CIV. P. 26(c)(1).

623. FED. R. CIV. P. 26(a)(3).

report or testimony beyond that time, an agreement of the parties or order of the court will be required. Under the rule, the parties are also under a duty to supplement their pre-trial disclosures,⁶²⁴ but any attempt at supplementation fewer than thirty days before trial will likely be met with a Rule 37 motion to exclude the evidence as not having been disclosed in a timely fashion. The requirement that the pretrial disclosure be made at least thirty days before trial is, of course, intended to allow the parties sufficient time to prepare for trial,⁶²⁵ and to prevent prejudice caused by surprise. If evidence is not disclosed in a timely fashion, the presumptive sanction is exclusion of the evidence under Rule 37(c)(1).⁶²⁶ However, if the information is of a nature that is helpful to the aggrieved party, a more appropriate sanction would be a continuance of the trial, and, perhaps, an award of attorney's fees and expenses occasioned by the failure to disclose the evidence or information earlier.⁶²⁷

C. Depositions

1. General Provisions Governing Depositions - Rules 30 and 31

Rule 30, which covers oral depositions⁶²⁸ has been revised in several respects. The most significant revision is to subdivision (a)(2)(A), which now sets forth a presumptive limit on the number of depositions that can be taken.⁶²⁹ This provision may be varied by local rule, court order or agreement of the parties.⁶³⁰ The limits on depositions, and the limitation on interrogatories in Rule 33, are intended to complement the wide-ranging disclosure provisions of Rule 26(a), which the Committee believes will result in the production of the bulk of discoverable material, and reduce the necessity for formal discovery.⁶³¹ The limits are also

624. FED. R. CIV. P. 26(e).

625. FED. R. CIV. P. 26 advisory committee's note.

626. See FED. R. CIV. P. 37(c)(1).

627. See *id.*

628. FED. R. CIV. P. 30.

629. FED. R. CIV. P. 30(a)(2)(A).

630. FED. R. CIV. P. 30(a)(2). We know that this rule can be varied by local rule or court order by the reference to Rule 26(b)(2) contained in Rule 30(a)(2). *Id.* In addition, the parties can agree to alter discovery procedures pursuant to Rule 29. FED. R. CIV. P. 29.

631. See 1993 Committee Notes, 146 F.R.D. at 675. It was because of this link between automatic disclosure and limits on discovery that HR 2814, the bill to eliminate Rule 26(a)(1) mandatory disclosure, did not get past the Senate. Opponents of the bill agreed that Rule 26(a)(1) should not be implemented, but could not agree on whether the

intended to emphasize counsel's responsibilities under Rule 26(f) to develop a cost-effective plan for discovery.⁶³²

Under Rules 30(a)(2)(A)⁶³³ and 31(a)(2)(A),⁶³⁴ leave of the court or an agreement of the parties is required before all plaintiffs, all defendants, or all third-party defendants together can take more than ten depositions under Rule 30 or 31.⁶³⁵ Depositions of experts are taken pursuant to Rule 26 and not pursuant to Rule 30 or 31 and therefore are not included in the limits.⁶³⁶ Depositions of non-parties, however, are included.⁶³⁷ This is because even though a non-party witness' attendance at a deposition is compelled by a subpoena issued under Rule 45,⁶³⁸ the deposition still is conducted pursuant to Rule 30 or Rule 31.⁶³⁹ A Rule 30(b)(6) deposition, in which a corporation or other organization must designate knowledgeable persons to testify on specified matters,⁶⁴⁰ should be treated as a single deposition, even if two or more people are designated to testify.⁶⁴¹ This type of deposition, therefore, may become more attractive than it has been in the past, and we may see some creative use of this procedure.

Because the limits apply to each side as a whole, multiple parties on either side must agree on how to allocate the depositions among themselves, or seek court intervention to resolve the disputes.⁶⁴² The rules do not specify how long a deposition on oral examination may be but, under Rule 30(d)(2), a time limit may be imposed by court order or local rule.⁶⁴³ That provision also requires the court to allow additional time if

caps on the number of depositions and interrogatories should be deleted or simply increased. *New Discovery Rules Are Here, But Future Remains Uncertain*, 9 Civ. Trial Manual (BNA) 501-02 (Dec. 8, 1993).

632. 1993 Committee Notes, 146 F.R.D. at 662.

633. FED. R. CIV. P. 30(a)(2)(A).

634. FED. R. CIV. P. 31(a)(2)(A).

635. *See* FED. R. CIV. P. 30(a)(2)(A), 31(a)(2)(A). The parties can agree to change discovery limitations pursuant to Rule 29. FED. R. CIV. P. 29.

636. *See supra* note 600.

637. We know this because depositions of non-parties are taken pursuant to Rules 30 and 31, and therefore are included in the ten deposition limit. FED. R. CIV. P. 30(a), 31(a).

638. FED. R. CIV. P. 45.

639. *See* FED. R. CIV. P. 30(a), 31(a).

640. FED. R. CIV. P. 30(b)(6).

641. 1993 Committee Notes, 146 F.R.D. at 662.

642. *Id.*

643. FED. R. CIV. P. 30(d)(2). The preliminary draft of the rule included a presumptive time limit of six hours for each deposition. Fed. R. Civ. P. 30(d)(1) (Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence), reprinted in 137 F.R.D. 53, 111 (1991).

necessary "for a fair examination of the deponent or if the deponent or another party impedes or delays the examination."⁶⁴⁴ At the same time, subdivision (d)(1) attempts to limit obstreperous conduct during the deposition by requiring that objections "be stated concisely and in a non-argumentative and non-suggestive manner."⁶⁴⁵ In addition, a witness may be instructed not to answer "only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for a protective order]."⁶⁴⁶ Sanctions may be imposed on a person whose conduct "frustrate[s] the fair examination of the deponent"⁶⁴⁷

Leave of court is required to depose a person confined in prison.⁶⁴⁸ Court order or agreement of the parties is also necessary to take the deposition of a person who has already been deposed in the case,⁶⁴⁹ or to take a deposition before the parties have met pursuant to Rule 26(f),⁶⁵⁰ unless the party seeking a deposition upon oral examination certifies that the person to be examined is expected to leave the United States and will be unavailable for examination.⁶⁵¹ Still, it may be wise to seek leave of court to conduct an early deposition in those circumstances as well because, as noted above, if such a deposition is taken without leave of court, it cannot be used at trial against a party that was unable to obtain counsel to represent it at the deposition, even though due diligence was used.⁶⁵²

Rule 30(b)(2) allows the party noticing the deposition to specify a non-stenographic means of recording, such as audio tape or videotape, without prior court approval.⁶⁵³ Another party may record a deposition by another method as well, at its own expense.⁶⁵⁴ If a party intends to offer at trial deposition testimony that was recorded by non-stenographic means, Rules 26(a)(3)(B) and 32(c) require that party to provide the court and opposing parties with transcripts of the pertinent parts of the testimony.⁶⁵⁵ In another nod to modern technology, subdivision (b)(7)

644. FED. R. CIV. P. 30(d)(2).

645. FED. R. CIV. P. 30(d)(1).

646. *Id.*

647. FED. R. CIV. P. 30(d)(2).

648. FED. R. CIV. P. 30(a)(2), 31(a)(2).

649. FED. R. CIV. P. 30(a)(2)(B), 31(a)(2)(B). The parties can agree to alter discovery procedures pursuant to Rule 29. FED. R. CIV. P. 29.

650. FED. R. CIV. P. 30(a)(2)(C), 31(a)(2)(C).

651. FED. R. CIV. P. 30(a)(2)(C).

652. FED. R. CIV. P. 32(a)(3).

653. FED. R. CIV. P. 30(b)(2).

654. FED. R. CIV. P. 30(b)(3).

655. FED. R. CIV. P. 26(a)(3)(B), 32(c).

allows depositions to be taken “by telephone or other remote electronic means,” if the parties agree or it is ordered by the court.⁶⁵⁶

Rule 30(b)(4) now specifies the statement to be made at the beginning of the deposition by the officer before whom the deposition is being conducted.⁶⁵⁷ Under Rule 30(e), the deponent is no longer required to review the transcript unless such a review is requested by a party or the deponent before the deposition is complete, and it must be signed only if changes are made.⁶⁵⁸

Rule 30 still does not specify how much notice must be given to parties of the taking of a deposition, other than the requirement in Rule 30(b)(1) that notice must be “reasonable.”⁶⁵⁹ However, if a party was given notice of less than eleven days, and promptly made a motion for a protective order, Rule 32(a)(3) provides that the deposition may not be used against that party.⁶⁶⁰

Rule 30(c) has been amended to resolve a recurring dispute as to whether other potential deponents may be excluded from a deposition, through the invocation of Federal Rule of Evidence 615.⁶⁶¹ Rule 30(c) now provides that Rule 615 does not apply to depositions,⁶⁶² so that other witnesses will not automatically be excluded at the request of a party.⁶⁶³ Exclusion still can be ordered by the court on motion for a protective order under Rule 26(c)(5).⁶⁶⁴ This revision, however, does not “resolve issues concerning attendance by others, such as members of the public or press.”⁶⁶⁵

Finally, the time set out in Rule 31(a)(4) for serving cross, redirect and recross questions in depositions on written questions has been shortened.⁶⁶⁶

656. FED. R. CIV. P. 30(b)(7).

657. FED. R. CIV. P. 30(b)(4).

658. FED. R. CIV. P. 30(e).

659. FED. R. CIV. P. 30(b)(1).

660. FED. R. CIV. P. 32(a)(3).

661. FED. R. EVID. 615. This rule provides that witnesses may be excluded from hearing the testimony of other witnesses simply by a party making such a request. *Id.*

662. FED. R. CIV. P. 30(c).

663. *Id.*

664. FED. R. CIV. P. 26(c)(5).

665. 1993 Committee Notes, 146 F.R.D. at 664.

666. FED. R. CIV. P. 31(a)(4). Under the old rule, parties had thirty days to serve cross questions and ten days to serve redirect and recross questions. FED. R. CIV. P. 31(a), 28 U.S.C.A. Federal Rules of Civil Procedure (1992). Under the new rule, however, parties have only fourteen days to serve cross questions and seven days to serve redirect and recross questions. FED. R. CIV. P. 31(a)(4).

2. Depositions in Foreign Countries - Rule 28

Rule 28(b) has been amended to incorporate language of the Hague Convention, and provides that depositions may be taken in a foreign country pursuant to any applicable convention or treaty.⁶⁶⁷ This provision "is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad" and any future treaties.⁶⁶⁸

3. Use of Depositions in Court Proceedings - Rule 32

As noted above, a deposition of a person about to leave the United States that is taken under Rule 30(a)(2)(C) (deposition of a party about to leave the country, taken before the Rule 26(f) meeting) without leave of court cannot be used against a party who, despite diligent effort, was unable to obtain counsel to represent it at the deposition.⁶⁶⁹ The provision does not specifically provide for an opt-out by local rule,⁶⁷⁰ but, given that Rule 30(a)(2)(C) is dependent on Rule 26(f),⁶⁷¹ which does allow an opt-out,⁶⁷² it would make no sense to leave this restriction in place in districts where Rule 26(f) is not in force.

Rule 32(a)(3) also provides that a deposition cannot be used against a party who was given notice of less than eleven days that the deposition was to be taken, if that party promptly made "a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place . . ."⁶⁷³ While it seems that parties may agree to a shorter time, and that the protections of the rule may be waived by an affected party, the rule does not authorize the court to vary this provision by local rule or court order.⁶⁷⁴

Subject to order of the court, if deposition testimony is offered at trial or on a dispositive motion in non-stenographic form, the party offering the testimony must provide a transcript of the offered portions.⁶⁷⁵ In a case tried before a jury, a party has a right to require that deposition testimony not used for purposes of impeachment be presented in non-

667. FED. R. CIV. P. 28(b)(1).

668. 1993 Committee Notes, 146 F.R.D. at 646.

669. See *supra* text accompanying notes 651-52; FED. R. CIV. P. 30(a)(3).

670. FED. R. CIV. P. 32(a)(3).

671. See FED. R. CIV. P. 30(a)(2)(C).

672. FED. R. CIV. P. 26(c).

673. FED. R. CIV. P. 32(a)(3).

674. *Id.*

675. FED. R. CIV. P. 32(c).

stenographic form, if it is available.⁶⁷⁶ The court may direct otherwise only if good cause exists.⁶⁷⁷

D. Interrogatories

Under Rule 33(a), there is now a presumptive limit of twenty-five on the number of interrogatories allowed to be served by each party.⁶⁷⁸ Multiple parties do not have to cooperate in this situation; any party can serve any other party with twenty-five interrogatories including subparts.⁶⁷⁹ The limitation may prove to be troublesome. Under Rule 33(d), parties still are allowed to respond to interrogatories by producing business records from which the response to the interrogatory can be ascertained.⁶⁸⁰ Often, a party met with such a response finds it necessary to use further interrogatories to cull through the records provided. The limitation on interrogatories makes that process impossible without leave of court, and places a real premium on the artfulness with which interrogatories are framed.

The Committee Notes state that the limits on interrogatories apply to cases removed to federal court from state court in which more than twenty-five interrogatories are outstanding.⁶⁸¹ The party requesting the interrogatories must either seek leave of court to allow the additional interrogatories, state which ones are to be responded to, or serve new interrogatories in compliance with Rule 33(a).⁶⁸² The time for responding to such outstanding interrogatories, or to outstanding requests for production of documents and things, will be measured from the date of the parties' Rule 26(f) meeting.⁶⁸³ The amended rule also makes it clear that objections to interrogatories must be specifically justified,⁶⁸⁴ and that an interrogatory to which an objection is raised should be answered to the extent it is not objectionable.⁶⁸⁵

As with the limits on depositions, the number of interrogatories may

676. *Id.*

677. *Id.*

678. FED. R. CIV. P. 33(a).

679. *Id.*

680. FED. R. CIV. P. 33(d).

681. FED. R. CIV. P. 33 advisory committee's note.

682. *Id.*

683. 1993 Committee Notes, 146 F.R.D. at 676, 679.

684. FED. R. CIV. P. 33(b)(4).

685. FED. R. CIV. P. 33(b)(1). See FED. R. CIV. P. 33(b)(1) advisory committee's note.

be varied by court order or stipulation of the parties.⁶⁸⁶ Several districts, including some that have opted out of the automatic disclosure provisions, have their own limits on interrogatories by local rule.⁶⁸⁷ Under the Federal Rules, interrogatories cannot be served before the parties' Rule 26(f) meeting, absent a court order or agreement of the parties.⁶⁸⁸

E. Sanctions for Discovery Abuse

Rule 11 no longer applies to discovery requests, motions, objections or responses (other than those that are subject to the provisions of Rule 45).⁶⁸⁹ Sanctions for abuse of the discovery process are governed by Rules 26(g)⁶⁹⁰ and 37,⁶⁹¹ which are now a self-contained system. In a curious twist, however, the amendments to these rules do not parallel the amendments to Rule 11, and they more closely resemble the 1983 version of Rule 11.

1. Certification - Rule 26(g)

The certification provision of Rule 26(g) has been amended to apply to initial disclosures made pursuant to Rule 26(a)(1) and pretrial disclosures made under Rule 26(a)(3).⁶⁹² It does not apply to expert disclosures made under Rule 26(a)(2).⁶⁹³ The signature of an attorney or pro se party on a disclosure is 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."⁶⁹⁴ As noted above, Rule 26(e) imposes on parties a continuing duty to supple-

686. FED. R. CIV. P. 33(a). The parties can agree to change discovery limitations pursuant to Rule 29. FED. R. CIV. P. 29.

687. *See, e.g.*, Eastern District of Virginia, Local Rules of Practice, Rule 11.1(A.1) (Jan. 1, 1994) (limiting interrogatories to 30). This limit cannot be waived by counsel, and can be increased by the court only if good cause is shown. *Id.*

688. FED. R. CIV. P. 33(a). The parties can agree to alter discovery procedures pursuant to Rule 29. FED. R. CIV. P. 29.

689. FED. R. CIV. P. 11(d). Rule 11(d) provides that "[s]ubdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." *Id.*

690. FED. R. CIV. P. 26(g).

691. FED. R. CIV. P. 37.

692. FED. R. CIV. P. 26(g)(1).

693. *Id.* Subsection (a)(2) of Rule 26 is not mentioned in subsection (g)(1). *Id.* Sanctions are available under Rule 37(c) for failure to make timely and complete expert disclosure as required by Rule 26(a)(2). FED. R. CIV. P. 37(c).

694. FED. R. CIV. P. 26(g)(1).

ment disclosures at appropriate intervals,⁶⁹⁵ and any such supplementation also must be certified.⁶⁹⁶

The former Rule 26(g) is essentially unchanged, and has been renumbered 26(g)(2). Under that provision, an attorney or unrepresented party must sign discovery requests, objections, and responses certifying

that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case⁶⁹⁷

This certification was modeled on the 1983 version of Rule 11,⁶⁹⁸ and courts often look to Rule 11 precedents in Rule 26(g) cases. Because the changes to Rule 26(g) are so modest, precedents under the former Rule 11 will continue to be a source of reference in interpreting Rule 26(g). For example, under the 1983 version of Rule 11, there was no vicarious liability of law firms for violations of a partner or associate.⁶⁹⁹ While this result under Rule 11 has been changed by the 1993 amendments,⁷⁰⁰ it appears that it is still good law for Rule 26(g). In addition, although Rule 11 has been amended to require that an argument for a change in existing law be "nonfrivolous,"⁷⁰¹ Rule 26(g) retains the "good faith" standard.⁷⁰² Thus, it appears that one could still urge an "empty-head pure-heart" defense to a motion for discovery sanctions.⁷⁰³ However, as noted above in the discussion of Rule 11, even under the "good faith" standard, courts generally applied a "reasonably competent attorney" standard, requiring reasonable investigation.⁷⁰⁴

695. See *supra* notes 614-16 and accompanying text.

696. See FED. R. CIV. P. 26(g)(1).

697. FED. R. CIV. P. 26(g)(2).

698. See Fed. R. Civ. P. 11 (1983), 28 U.S.C.A. Federal Rules of Civil Procedure (1992).

699. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126-27 (1989).

700. FED. R. CIV. P. 11(c). The rule states in pertinent part that a court has the power to "impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." *Id.*

701. FED. R. CIV. P. 11(b)(2).

702. FED. R. CIV. P. 26(g)(2)(A).

703. Cf. 1993 Committee Notes, 146 F.R.D. at 586-87.

704. See *supra* note 289 and accompanying text.

2. Sanctions - Rule 37

Rule 37 provides for sanctions for failure to make initial disclosures as required under Rule 26(a), failure to supplement those disclosures, as required by Rule 26(e), and failure to comply with discovery requests.⁷⁰⁵ Generally, Rule 37(a) provides the mechanism for making a motion to compel disclosure or discovery from an opposing party;⁷⁰⁶ 37(b) provides that the court may impose sanctions if an order made under Rule 37(a) is not obeyed;⁷⁰⁷ and Rule 37(c) provides that, even absent a motion or order of the court, there will be an automatic sanction of preclusion of evidence for failure to make a required disclosure.⁷⁰⁸

a. Motion to Compel Disclosure or Discovery

Under Rule 37(a), a party may move for an order to compel disclosure or discovery,⁷⁰⁹ including an order that a party produce documents or respond to an interrogatory, or that a deponent respond to a question posed to him.⁷¹⁰ Regardless of where the discovery is taking place, all motions against parties are to be made in the district court where the action has been filed.⁷¹¹ Motions against other persons are to be made in the district where the discovery is going to be taken or is taking place.⁷¹² Any motion under the rule must include a certification that the moving party has attempted to confer or has conferred in good faith with the party against whom sanctions are sought in an effort to resolve the dispute without court intervention.⁷¹³

Under subdivision (a)(4), if a motion to compel is granted, or if the offending party provides the required disclosure or discovery after the motion is filed, the court must order the offending party to pay the movant's reasonable expenses and attorney's fees incurred in making the motion.⁷¹⁴ The only defenses to the imposition of this sanction are that the failure to disclose was substantially justified, the moving party did

705. FED. R. CIV. P. 37. For a discussion on sanctions concerning failure to comply with mandatory disclosure under the amendments generally, see Sorenson, *supra* note 579, at 752-58.

706. FED. R. CIV. P. 37(a).

707. FED. R. CIV. P. 37(b).

708. FED. R. CIV. P. 37(c).

709. FED. R. CIV. P. 37(a).

710. FED. R. CIV. P. 37(a)(2)(B).

711. FED. R. CIV. P. 37(a)(1).

712. *Id.*

713. FED. R. CIV. P. 37(a)(2)(A).

714. FED. R. CIV. P. 37(a)(4)(A).

not make a good faith effort to confer with the respondent, “or that other circumstances make an award of expenses unjust.”⁷¹⁵ Conversely, if a motion which was not substantially justified is denied, the court must order the moving party to pay the respondent’s expenses and attorney’s fees.⁷¹⁶ Where the motion is partly successful, the court may apportion the parties’ expenses “in a just manner.”⁷¹⁷

b. Sanctions for Failure to Comply with Order

If the court makes an order compelling disclosure or discovery and the order is not obeyed, additional sanctions may be imposed under Rule 37(b).⁷¹⁸ This provision provides a non-exhaustive list of appropriate sanctions, including a ruling that certain matters have been established,⁷¹⁹ prohibiting the offending party from presenting evidence on certain matters,⁷²⁰ dismissal of all or part of a party’s claim,⁷²¹ and a finding that the offending party is in contempt of court.⁷²² Again, the offending party is required to pay the aggrieved party’s expenses and attorney’s fees resulting from the failure to obey the court’s order, unless it would be unjust to award fees or the failure was significantly justified.⁷²³

c. Automatic Exclusion for Failure to Disclose

Finally, Rule 37(c) provides for automatic sanctions, without the need for a formal motion, for failure to make disclosures or to supplement them in a timely manner.⁷²⁴ If the information is of a nature that would aid the non-complying party, Rule 37(c) provides that the evidence shall not be used by that party at a trial, on a motion, or at a hearing.⁷²⁵ The exclusion of evidence does not require a motion, but is automatic and self-executing, and the evidence shall not be used absent a showing of substantial justification for the failure to disclose, or a showing that the

715. *Id.*

716. FED. R. CIV. P. 37(a)(4)(B).

717. FED. R. CIV. P. 37(a)(4)(C).

718. FED. R. CIV. P. 37(b).

719. FED. R. CIV. P. 37(b)(2)(A).

720. FED. R. CIV. P. 37(b)(2)(B).

721. FED. R. CIV. P. 37(b)(2)(C).

722. FED. R. CIV. P. 37(b)(2)(D).

723. FED. R. CIV. P. 37(b)(2).

724. FED. R. CIV. P. 37(c)(1).

725. *Id.*

failure is harmless⁷²⁶ (e.g. an inadvertent failure to identify a potential witness who already was known to all parties). The mandatory language of the provision requiring exclusion seems to be tempered somewhat by the next sentence of subdivision (c)(1), which provides that “[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.”⁷²⁷ The Committee Notes observe, however, that the court is given this discretion so that certain types of information that is helpful to the aggrieved party will not be excluded.⁷²⁸ Where the offending party wishes to use the evidence, the presumption that its exclusion is the appropriate sanction will be hard to overcome. This preference for the sanction of exclusion may result in some gamesmanship. As all documents relevant to disputed facts plead with particularity must be disclosed, no discovery request for documents should be necessary. Thus, an attorney may withhold a discovery demand as a strategic move, in the hope that the other side will fail to make a disclosure, and be barred from presenting the non-disclosed evidence at trial.⁷²⁹ However, in a motion for exclusion, the parties will be certain to disagree as to what documents were relevant, and whether facts were plead with sufficient particularity. The stakes will be much higher in this context than they have been in the past on discovery motions, when all that normally turned on the issue was whether the requested discovery would be required.

It is interesting to note that if an aggrieved party does move to compel disclosure under Rule 37(a), and the motion is granted, the court is required to order the offender to pay the movant’s reasonable expenses and attorney’s fees for making the motion.⁷³⁰ By contrast, if the aggrieved party moves under 37(c) for sanctions in addition to exclusion of the non-disclosed evidence, an award of attorney’s fees and expenses is within the court’s discretion, as are any other additional sanctions.⁷³¹

726. *Id.* See 1993 Committee Notes, 146 F.R.D. at 691.

727. FED. R. CIV. P. 37(c)(1).

728. 1993 Committee Notes, 146 F.R.D. at 691. The Committee stated:

[I]miting the automatic sanction . . . 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.

Id.

729. David D. Siegel, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, and a Word About Mandatory Disclosure*, 151 F.R.D. 147, 151 (1993).

730. FED. R. CIV. P. 37(a)(4)(A).

731. FED. R. CIV. P. 37(c)(1).

Still, the structure of Rule 37 stands in stark contrast to the revised Rule 11; indeed, it closely mirrors the 1983 version of Rule 11. In contrast to the 1993 Rule 11, Rule 37 sanctions are generally mandatory, with little discretion left to the court; monetary awards to the moving party are preferred and, in some circumstances, mandatory; and there is no safe harbor provision.⁷³² This inconsistency should be reexamined by the Advisory Committee in the future. It has already been examined by the House of Representatives, which has come down in favor of the structure of Rule 37, and passed a bill that would, if enacted by Congress, repeal most of the amendments to Rule 11, making sanctions mandatory, and making it apply to discovery matters.

CONCLUSION

The 1993 revisions to the Federal Rules of Civil Procedure are extensive. Almost thirty rules were revised, some dramatically, and the revisions have tremendous implications for practice in federal courts. The wisdom of the amendments, particularly those affecting discovery, remains to be seen. Several courts are not willing to wait, and have opted out of some of the new provisions on disclosure and discovery, with the result that the discovery process will vary greatly among the districts. Counsel must become familiar not only with the revisions to the Federal Rules, but also with any revisions to local rules, or orders of individual courts. We must wait and see what, if anything, Congress will do with the changes.

732. See Fed. R. Civ. P. 37.

