THE 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: THEIR ANTICIPATED IMPACT ON EMPLOYMENT LITIGATION

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I. INTRODUCTION

On December 1, 1993, the rules of the “litigation game” changed significantly in our federal court system. On that date, a number of amendments to the Federal Rules of Civil Procedure became effective in those districts which chose to adopt all or a portion of the amendments. The District of Nebraska adopted the revised rules, as did neighboring states in the Eighth Circuit, such as Iowa, South Dakota, Minnesota, and Kansas.¹

The 1993 Amendments to the Federal Rules of Civil Procedure have had a major impact upon civil practice in our federal courts in general. However, that impact will be especially pronounced in employment litigation. The reason is simple. Employment litigation has been experiencing explosive growth over the past several decades.² Much of that litigation takes place in federal court because many of the legal claims arise under federal law³ and employers traditionally

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¹ The district courts were given the option to adopt or reject amended Rule 26. Those states that adopted it are as follows: Alabama, Alaska, Arizona, Arkansas, District of Columbia, Florida, Georgia, District of Guam, Hawaii, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, District of Puerto Rico, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.
² Indeed, in 1990, the congressionally-mandated Federal Courts Study Commission found that during the period 1970 through 1989, the number of employment discrimination cases filed in federal court increased by 2,166%, compared to all other civil litigation, which rose by 125% during the same time period. Daily Lab. Rep. (BNA) No. 5, at A-3 (Jan. 8, 1990).
have preferred to defend lawsuits in federal court. Consequently, employers generally have sought to remove cases filed in state court to the federal forum.  

On balance, it is the belief of the authors of this Article that the 1993 Amendments have converted what used to be a "home field" advantage for employers in federal court to one for the employee/plaintiff. While employers have suffered setbacks as a result of the 1993 Amendments, they have been the recipient of several benefits as well. This Article focuses on the 1993 Amendments and their impact on employment litigation — both good and bad — for employers.


The 1993 Amendments did not result in a wholesale change of every procedural rule, but they did alter a number of them. This article addresses each of the more significant changes by rule, followed by an analysis of the anticipated impact the 1993 Amendments will have on employment litigation.

A. RULE 4: THE RULES OF SERVICE

The goal of the amendment to Rule 4 is to make it easier for plaintiffs to accomplish service of the complaint and to reduce the cost of service. Rule 4(d) allows the plaintiff to obtain a waiver of service of the summons. The plaintiff may send two copies of the complaint to the defendant, along with a special form which notifies the defendant of the lawsuit, its location, and the consequences of compliance or non-compliance with the waiver request.

4. Claims arising under federal statutes normally may be filed in either state or federal court. See, e.g., Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990) (holding that concurrent jurisdiction is present for actions under Title VII); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (holding that in the absence of evidence to the contrary, concurrent jurisdiction should be presumed). However, under 28 U.S.C. § 1441(b) (Supp. IV 1992), the defendant may remove such claims filed in state court to federal court within thirty (30) days after service of the complaint. See 28 U.S.C. § 1446(a) (Supp. IV 1992); see also Fed. R. Civ. P. 81(c) (providing that federal rules apply to removed actions).

5. In the experience of the authors of this Article, federal courts have been preferred by defense counsel for several reasons. First, federal courts follow rigid progression standards which force plaintiffs to advance their claims and meet tight discovery timetables. Second, the potential for sanctions under old Rule 11 of the Federal Rules of Civil Procedure provided a much greater deterrent to the filing of frivolous suits than did its counterpart in the various state courts. Third, less experienced plaintiffs employment attorneys were less comfortable with the procedures in federal court because they were not as familiar with the rules and perceived federal court to be more expensive than state court.


7. See Appendix A.
If the defendant agrees to waive service, he will have sixty (60) days in which to answer the complaint. Normally, the defendant must file an answer or other responsive pleading within twenty (20) days.\textsuperscript{8} If the defendant refuses to waive service, the plaintiff is entitled to recover all of her costs incurred in obtaining service by an alternative method, including her attorneys’ fees incurred in the pursuit of a motion to obtain costs.\textsuperscript{9} This provision does not apply if the defendant can show good cause for refusing to waive service.\textsuperscript{10} Moreover, the cost-shifting procedures do not apply unless both parties reside in the United States.\textsuperscript{11} For purposes of the statute of limitations, Rule 4(d) expressly provides that the summons and complaint are considered served at the time the plaintiff files the defendant’s waiver.\textsuperscript{12}

The amendment broadens the mechanisms for service. The plaintiff may now serve a defendant under any means authorized by the law of the state in which the defendant is served, as well as the law of the state in which the district court is located.\textsuperscript{13}

The amendment also makes it easier to serve persons in foreign countries. The methods of service include those authorized by international agreement, personal service of a copy of the summons and complaint (if not prohibited by the law of the country in which the service is effected), and any other means not prohibited by international agreement and authorized by court order.\textsuperscript{14}

Significantly, Rule 4 now facilitates the exercise of personal jurisdiction over defendants. If a waiver is filed or service obtained, that is adequate to establish personal jurisdiction over any person with respect to claims arising under federal law.\textsuperscript{15} Nevertheless, the exercise of such jurisdiction must be consistent with the Constitution.\textsuperscript{16} Rule 4(k) specifies other conditions that will establish personal jurisdiction.\textsuperscript{17}

The amendment to Rule 4 has removed some of the strictures for filing suit against the federal government and its agencies.\textsuperscript{18} Finally, while Rule 4 still specifies that the case can be dismissed if the plain-

\textsuperscript{8} FED. R. CIV. P. 4(d)(3); id. Rule 12(a)(1)(A).
\textsuperscript{9} FED. R. CIV. P. 4(d)(2), (5).
\textsuperscript{10} FED. R. CIV. P. 4(d)(2). The advisory committee notes warn that a defendant’s belief that the claim is unjust or invalid does not constitute good cause for refusing to waive service. Id. Rule 4 advisory committee notes.
\textsuperscript{11} Id. Rule 4(d)(4).
\textsuperscript{12} Id.
\textsuperscript{13} Id. Rule 4(e)(1).
\textsuperscript{14} Id. Rule 4(f).
\textsuperscript{15} Id. Rule 4(k)(2).
\textsuperscript{16} Id.; See also International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\textsuperscript{17} FED. R. CIV. P. 4(k)(1).
\textsuperscript{18} See id. Rule 4(i), (j) (specifying that a plaintiff can now serve the federal government by certified mail. Previously, service had to be accomplished by personal service).
If the plaintiff fails to serve the complaint or file the waiver within 120 days of filing, the plaintiff may now obtain an extension for good cause.\textsuperscript{19} This requirement does not apply to service outside of the country.\textsuperscript{20}

\textit{Impact on Employment Litigation:}

(1) \textit{The Waiver.}

The waiver provisions should have no meaningful impact on employment litigation. The reason, in our opinion, is simple. Employers are easily served by certified mail addressed to their registered agents. Consequently, plaintiffs have no real incentive to request a waiver because the burdens of asking for a waiver or, alternatively, seeking service by certified mail, are the same.\textsuperscript{21} In fact, there is a disincentive to requesting a waiver, because the employer then will have sixty (60) days to answer the complaint, rather than the twenty (20) days specified by Rule 12.\textsuperscript{22}

Although there generally is no advantage to seeking a waiver from corporate employers, it could be useful for claims against individual defendants, such as supervisors sued for sexual harassment and Americans with Disabilities Act ("ADA") violations.\textsuperscript{23} Likewise, the waiver provisions could be effective against sole proprietors and partnerships having no registered agents. If an employer receives a request for a waiver, in general, it should agree to waive the service because it can easily be served by alternative methods and the employer will bear the cost.\textsuperscript{24}

One exception to this general rule may relate to those cases where the statute of limitations is potentially an issue. In a few jurisdictions, the statute may not be tolled until the complaint is served.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} Rule 4(m).
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.} Rule 4(b)(1).
\item \textsuperscript{22} \textit{Id.} Rules 12(a)(1)(A), 4(d)(3).
\item \textsuperscript{23} Individual liability of supervisors for Title VII and ADA violations is an unsettled issue in the Eighth Circuit. Lower courts within the Eighth Circuit have ruled that supervisors cannot be held individually liable under Title VII. See Henry v. E.G. & G. Missouri Metals Shaping Co., 837 F. Supp. 312 (E.D. Mo. 1993); Stafford v. State, 835 F. Supp. 1135 (W.D. Mo. 1993). As far as individual liability under the ADA is concerned, only one lower court in the Eighth Circuit has ruled on the issue. It held that supervisors cannot be liable in their individual capacity. See Dunham v. City of O'Fallon, No. 4:93CV02677, 1994 WL 228598 (E.D. Mo. 1994). Courts from other jurisdictions have held that individual supervisors can be liable under the ADA and Title VII. See, e.g., Bishop v. Okidata, Inc., 864 F. Supp. 416 (D. N.J. 1994) (addressing the ADA); Jones v. Metropolitan Denver Sewage Disposal Dist. No. 1, 537 F. Supp. 966 (D. Colo. 1982) (addressing Title VII); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802 (C.D. Ill. July 22, 1994) (addressing the ADA).
\item \textsuperscript{24} \textit{Fed. R. Civ. P.} 4(d)(2), (5).
\end{itemize}
Because Rule 4(d)(4) provides that the complaint is not deemed served until the waiver is filed or service is effected, the employer may be able to enforce the statute of limitations on common law theories such as contract, estoppel, fraud, or intentional infliction of emotional distress. The employer can hold the complaint for thirty (30) days to determine whether to waive service. Consequently, employers may have some unintended flexibility. However, equitable considerations may prevent an employer from enforcing the statute of limitations by refusing to waive service.

Refusing to waive service would not help the employer enforce the statute of limitations for claims brought under Title VII of the Civil Rights Act of 1964, the ADA, or the Age Discrimination in Employment Act (“ADEA”). The plaintiff can meet the “limitations period” for those actions simply by filing the complaint within ninety (90) days after receipt of a right to sue letter.

(2) Service In Foreign Countries.

The provisions of Rule 4(f) will make it easier for plaintiffs to pursue litigation against foreign defendants. The 1991 Civil Rights Act expanded the reach of Title VII and the ADA to cover discriminatory actions against American citizens working for American-owned or controlled companies overseas.

(3) Personal Jurisdiction.

The changes embodied in Rule 4(k) are significant. Defendants now will be amenable to personal jurisdiction in virtually any federal district when the plaintiff sues under Title VII, the ADA, the ADEA, the Family and Medical Leave Act, or the Fair Labor Standards Act.30

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26. Fed. R. Civ. P. 4(d)(2)(X)(F) (providing that the time to return waiver is thirty (30) days). The time limits for bringing common law actions are governed by the statute of limitations for each state.

In Nebraska, contract actions based on written contracts are governed by a five year statute of limitations. Neb. Rev. Stat. § 25-205 (1989). Actions based on oral contracts must be brought within four years. Id. § 25-206. Tort actions are generally governed by a four year statute of limitations. Id. § 25-207. Claims not otherwise specified are covered by a four year statute of limitations. Id. § 25-211. They are further covered by a three year statute of limitations for federal actions which have no specified limitations period. Id. § 25-219.


This means an employee could be fired in North Carolina, move to Oregon, and sue the former employer in the federal courts of Oregon.

Although the Rule provides that the exercise of jurisdiction must be constitutional, it is unlikely that a court would find personal jurisdiction wanting. The constitutional analysis is largely a test of foreseeability. The analysis asks whether the defendant had sufficient contacts with the forum such that he availed himself of the benefits of the forum and could foresee being sued for violation of the forum's employment law.31

For large employers with business nationwide, the courts have generally concluded that it should have been foreseeable to the employers that they could be sued in any forum.32 It is easy to envision the courts adopting the same analysis in the area of employment litigation as is currently applied to violations of the securities laws. Under the federal securities laws, Congress has authorized nationwide service of process.33 Courts interpreting these laws generally have concluded that it is foreseeable that a plaintiff could be sued in any forum in the country because Congress has authorized nationwide service of process. All that is necessary is that the defendant have some minimum contacts with the United States, regardless of whether those contacts are with the specific district.34

In effect, congressional adoption of Rule 4(k) enacted nationwide service of process under any federal law. Accordingly, courts likely will treat claims brought under federal employment laws the same way as service under any other statute with nationwide service of process.35

The implications of this change are significant. Plaintiffs could force defendants to litigate in distant forums as a vehicle to extort a settlement. Small employers will be particularly vulnerable. Litigating in a distant forum could prompt employers to settle claims simply to avoid the higher defense costs. Conversely, plaintiffs also may be reluctant to pursue litigation from a distant forum, simply because it will be expensive for them to depose all of the witnesses who likely will be located in the defendant's state.

(4) Time For Service.

32. Jack H. Friedenthal et al., Civil Procedure § 3.10 (2d ed. 1993).
Amended Rule 4(m) is essentially a continuation of the old Rule 4(j). The amendment requires the plaintiff to serve the employer within 120 days after filing the complaint, or the case can be dismissed without prejudice. However, Rule 4(m) also allows the plaintiff to obtain an extension of this time period upon a showing of good cause for failure to serve.36

For cases filed under the ADA, Title VII, and the ADEA, a dismissal under Rule 4(m) can have the effect of a dismissal with prejudice.37 This is so because those statutes require plaintiffs to file suit within ninety (90) days after they receive the right to sue letter.38 If the claim is dismissed without prejudice, but after the ninety (90) days have elapsed, the plaintiff cannot then refile the lawsuit.39 Under old Rule 4(j), there was no provision for extending the service period for good cause. Consequently, if a plaintiff's attorney was negligent and simply failed to serve the complaint on time, the action could be dismissed without prejudice even though the court was well aware that its action amounted to a dismissal with prejudice under Title VII.40 It will now be more difficult to exploit the service rule under amended Rule 4.

B. RULE 11: SANCTIONS

One of the most significant changes wrought by the 1993 Amendments concerns the revisions to Rule 11.41 The last time Rule 11 had

36. See Appendix A.
38. See supra note 28 and accompanying text.
40. Id.; see 2A A. LARSON AND L. LARSON, EMPLOYMENT DISCRIMINATION § 48.32(a) (1994 Supp.). In practice, this did not always occur.

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
been modified was in 1983. At that time, Congress sought to put more "teeth" into Rule 11 in order to deter frivolous pleadings and discourage abusive litigation tactics.42 However, virtually from its inception,

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

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

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

(1) How Initiated.

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

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

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

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

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

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

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

Id.

Rule 11 has sparked enormous controversy. The position of those who favor a strong Rule 11 was best summarized by Justice Scalia who dissented in the Supreme Court's approval of the 1993 Amendments. He asserted that a strong Rule 11 was necessary to deter rampant frivolous litigation, and that the 1993 Amendments to Rule 11 would detract from its effectiveness. The opponents of the 1980 Amendment to Rule 11 complained that Rule 11 drastically curtailed the development of creative and novel theories of the law and penalized plaintiffs with fewer resources than their relatively well-funded corporate counterparts.

While the amendments to Rule 11, without question, favor plaintiffs, there are some advantages for defendants. The most significant revisions contained in the amendment are outlined below.

The amended Rule 11 now applies to any "presentation" made to the court, "whether by signing, filing, submitting or later advocating" a pleading. The old Rule 11 applied only to papers that were signed and filed with the court.

The amended Rule 11 now only requires that the signature certify that the pleading is warranted by existing law or a nonfrivolous argument for the extension or reversal of existing law. This removes the old subjective "good faith" requirement. The purpose for substituting the "nonfrivolous" standard for the old "good faith" standard was to ensure that courts had a more objective standard to use in applying Rule 11. Under the old Rule 11, the plaintiff would not be found in violation of Rule 11 by asserting a frivolous argument as long as it was brought in good faith. Now, the argument must be nonfrivolous.

Factual statements in pleadings, as before, must have evidentiary support. However, a complaint or defense may be based upon an expectation of evidentiary support likely after discovery, or "reasonably based on a lack of information or belief" — as long as specifically so identified. In essence, this provision allows a plaintiff to plead facts for which she has no evidence, as long as she is capable of certifying that she reasonably believes she will "unearth" those facts after dis-

43. Id.
44. Id.
covery — as long as she indicates within the complaint that she presently is not capable of establishing those facts.

One of the most controversial changes in Rule 11 is the discretionary nature of sanctions. Under the old Rule 11, sanctions were mandatory.\(^5\) Now they are purely within the discretion of the court.\(^5\) Sanctions must be requested by a separate motion, and they cannot simply be requested in an offhand manner at the conclusion of a pleading.\(^5\) Also, amended Rule 11 now allows for sanctions against the entire law firm and not simply the offending attorney.\(^5\)

Rule 11 also provides an “escape hatch” for plaintiffs. The defendant must serve a Rule 11 motion twenty-one (21) days before it is filed with the court.\(^5\) If the plaintiff corrects the offending pleading within that time period, the defendant may not file its request for sanctions.\(^5\) The purpose behind this provision is very similar to the intent behind Federal Rule of Evidence 407 concerning subsequent remedial measures. Drafters of the 1993 Amendments were concerned that many persons refused to withdraw offending pleadings out of a concern that to do so would admit liability, much the same way correcting a defective condition would be an admission of liability in a personal injury action.\(^5\)

Amended Rule 11 also prohibits the court from granting monetary sanctions after a voluntary dismissal or settlement of a claim.\(^5\) This is directly contrary to a Supreme Court decision which held that, under the old Rule 11, the court retained jurisdiction to award sanctions even after a case had been dismissed with prejudice.\(^6\)

Finally, under the new Rule 11, monetary sanctions very rarely will be awarded. The advisory committee notes indicate that only when litigation is truly harassing in nature should a court award monetary penalties.\(^6\) Moreover, no monetary sanctions may be awarded against a represented party for bringing a frivolous legal claim, because that is considered the responsibility of the attorney.\(^6\)

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52. Fed. R. Civ. P. 11 (codified in 28 U.S.C.) (stating that “the court... shall impose upon the person that signed it an appropriate sanction”).
53. Id. Fed. R. Civ. P. 11 (stating that “the court may, subject to the conditions stated below, impose an appropriate sanction”).
56. Id. Fed. R. Civ. P. 11(c)(1)(A) (stating that “a motion for sanctions under this rule shall be made separately from other motions or requests”).
58. Id. Rule 11 advisory committee’s note.
Amended Rule 11 expressly provides that it does not apply to discovery sanctions. Consequently, monetary sanctions may be freely awarded in discovery matters.

**Impact on Employment Litigation:**

(1) **Impact in General.**

The amendments to Rule 11 come at an unfortunate time in the history of employment litigation. As stated above, employment litigation has grown at a rapid pace within the federal courts. Many plaintiffs' attorneys are discovering employment litigation for the first time. Consequently, they have advanced substantially defective pleadings, frivolous claims, and other pleadings which betray the attorneys' ignorance of the law and its substantive requirements. The specter of Rule 11 sanctions, in many cases, has kept plaintiffs' lawyers away from federal court. Moreover, defense attorneys could successfully refine employment litigation down to legitimate issues simply by invoking Rule 11. That will no longer be the case, given that a plaintiff can...

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63. *Id.* Rule 11(d).
64. *Id.* Rule 37(b)(2). Rule 37(b)(2) provides:

(2) **Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

*Id.*
so easily escape the strictures of the Rule. Moveover, even if they are sanctioned, the amended Rule 11 makes monetary sanctions, the most punitive measure, relatively unlikely.

For example, the first case to review the new Rule 11 makes it clear that the courts will do little to deter frivolous employment litigation. In *Thomas v. Treasury Management Assoc.*, the plaintiff filed a Title VII suit without first filing a charge with the Equal Employment Opportunity Commission. The defendant filed a motion for summary judgment, won, and then requested attorneys’ fees as a Rule 11 sanction. The court rejected the request both because the defendant had failed to give the plaintiff an opportunity to withdraw a count from her suit which allegedly violated Rule 11 before seeking sanctions, and because attorneys’ fees are rarely appropriate under Rule 11.

Although Rule 11 enacts a more objective standard requiring plaintiffs to submit a “nonfrivolous” argument rather than a “good faith” argument, it is difficult to see how this standard will be different in practice. Advisory opinions give no real guidance.

(2) Expectation Evidence Will Be Discovered.

The revision to Rule 11 which allows plaintiffs to merely plead facts they expect to obtain in the course of discovery will undoubtedly lead to more speculative litigation by plaintiffs. In many cases, employment discrimination plaintiffs do not have access to those facts necessary to support their claim. Rule 11 gives them no incentive to verify these facts before filing a lawsuit. Consequently, employers should expect more tentative lawsuits.

Despite its shortcomings, Rule 11 may, in fact, provide employers with an advantage at the point of summary judgment under Title VII, the ADA, and the ADEA. If a plaintiff does not have adequate facts to support allegations made in her complaint, she is obligated to specify within her complaint those allegations for which she does not have factual support. This will give defense lawyers a hint as to those facts the plaintiff might be unable to prove at the time of trial. There appears to be no reason why defense attorneys cannot use this portion of Rule 11 to support summary judgment following the conclusion of discovery.

A recent spate of cases interpreting *St. Mary's Honor Center v. Hicks*, have determined that a plaintiff cannot defeat summary

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67. *Id.* at 366, 369.
69. See *Fed. R. Civ. P.* 11(b)(3); see supra note 41.
70. 113 S. Ct. 2742 (1993).
judgment simply by stating a *prima facie* case. Increasingly, courts have concluded that, if a plaintiff can produce no evidence beyond a bare *prima facie* case and a subjective belief that she was the victim of discrimination, summary judgment is appropriate.

At the conclusion of discovery, the defendant may point to such allegations within the plaintiff’s complaint as an admission that the plaintiff has no evidence to support the contention in issue. This could be highly effective if the plaintiff, in fact, is not able to produce any evidence in the course of discovery.

C. RULE 26: DISCOVERY

In addition to Rule 11, one of the most significant changes brought by the 1993 Amendments includes the revisions to Rule 26, which governs discovery. Under new Rule 26, the parties must now engage in early disclosure of relevant information governing documents, witnesses with likely knowledge and expert witnesses, damages, and insurance.

Many critics of the new Rule 26 contend that it invades the attorney-client privilege because it obligates attorneys to disclose facts opposing counsel would not otherwise be entitled to learn. Nevertheless, there are limits to what must be disclosed. The Rule specifies that disclosures must only be made as to “relevant disputed facts alleged with particularity in the pleadings.” This means defendants must only disclose information concerning those facts specifically alleged within the complaint.

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71. See Wallis v. J. R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1087 (5th Cir. 1994) (noting that failure to do more than merely refute an employer’s reasons for not hiring is not sufficient); Durham v. Xerox Corp., 18 F.3d 836, 840 (10th Cir. 1994) (finding that the plaintiff failed to offer sufficient evidence showing pretext), cert. denied, 115 S. Ct. 80 (1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994) (noting that the plaintiff must put forth evidence showing that the employers lied); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (reasoning that the plaintiff must show a factual dispute with regard to the nondiscriminatory reason); Geary v. Visitation of Blessed Virgin Mary Parish Sch., 7 F.3d 324, 332 (3d Cir. 1993) (finding that the plaintiffs failed to show genuine issue of fact); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993) (reasoning that the plaintiff must show evidence from which fact finder could infer discriminatory motive), cert. denied, 114 S. Ct. 1398 (1994).

72. See supra note 71.

73. FED. R. CIV. P. 26(a)(1)-(3). See Appendix B.


75. FED. R. CIV. P. 26(a)(1)(A), (B).
The parties must also disclose the identity of any experts they plan to use at the time of trial, along with a signed report with the expert's opinion and a recitation of those facts forming the basis for the opinion. The parties waive any claim of privilege pertaining to materials given to the expert, even if the expert does not actually rely upon the information. If the parties fail to provide this information within the court-imposed deadlines, they will be forbidden from calling their expert witness.

Amended Rule 26(e) provides that the parties have a duty to supplement their responses to requests for admissions, as well as to document requests. Under the old rule, a controversy existed as to

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76. Id. Rule 26(a)(2)(B).
77. Id. This rule provides that the expert must identify "the data or other information considered by the witness in forming the opinions." Id. Comments to paragraph (2)(B) of Rule 26(a) suggest there should be no expectation of privilege for anything sent to a testifying expert. Id. Rule 26 cmt.
78. Fed. R. Civ. P. 37(c)(1). Rule 37(C)(1) provides:
   (c) FAILURE TO DISCLOSE; FALSE OR MISLEADING DISCLOSURE; REFUSAL TO ADMIT.
   (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

79. Fed. R. Civ. P. 26(e)(2). Rule 26(e) provides:
   (e) SUPPLEMENTATION OF DISCLOSURES AND RESPONSES. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
   (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.
   (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Id. Rule 26(e).
whether supplementation was required for interrogatories. In addition, the new Rule 26 forbids any formal discovery until after disclosures have been made.

Impact on Employment Litigation:

(1) Limitations on Disclosure.

Rule 26 obviously will force defendants to tip much of their hand earlier than they have had to under traditional forms of discovery. However, defendants should be able to use the limitation upon disclosures to relevant facts which are alleged with particularity to their advantage in employment litigation.

In many cases, plaintiffs' lawyers simply do not have enough factual information to adequately plead those facts within the complaint. Defense counsel should narrowly construe the pleadings to limit that which is disclosed.

Employers could also use the provision governing disclosure as a defense to broad based formal discovery which follows. For example, plaintiffs frequently request information regarding other discrimination claims for unrelated facilities of a defendant employer, or even unrelated divisions. Defense lawyers can argue that unless a pattern or practice is alleged within the complaint, the plaintiff has not established the requisite particularity that would justify discovery on the issue under the mandatory disclosures or other discovery.

In fact, defense attorneys may be able to use the particularity provision as a vehicle for limiting the scope of discovery in general. The argument would be that the provision states a congressional preference for tying discovery only to issues apparent in the pleadings.

One of the negative aspects of the automatic disclosures is the obligation that employers disclose information concerning the facts alleged within the affirmative defenses. This could force employers to forego the element of surprise because of the need to effectively lay the foundation for many of these defenses. For example, one of the most

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81. Fed. R. Civ. P. 26(d). Rule 26(d) provides:

(x) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Id.

82. Fed. R. Civ. P. 26(a)(1)(A), (B) (providing that facts be alleged with particularity in "pleadings").
promising defenses for employers to use on summary judgment is the "after-acquired evidence" or "resume fraud" defense. The employer has a better chance of "catching" the employee on this issue by surprising her at the time of deposition with questions concerning the fraudulent information. If the employee has notice of the defense prior to the deposition, her attorney may be able to coach her on responses which would be adequate to defeat summary judgment.

As a result, employers must be careful to determine what defenses must be plead affirmatively. To the extent it can avoid pleading defenses affirmatively, the employer should not have to disclose the information prior to the plaintiff's deposition. Early deposition testimony in employment litigation is usually critical to "freeze" the employee's story and prepare the defense before the plaintiff can be coached in providing her response.

(2) Disclosure of Damages and Experts.

One benefit of the disclosure provisions for employers is the obligation for the plaintiff to identify the nature of damages claimed, as well as the documentation and witnesses which support those damages. This allows the employer to determine early on in the litigation what is truly at stake in the case, and what the plaintiff has in the way of evidence to support the claim.

Likewise, plaintiffs have much more stringent requirements for identifying the opinions and the factual basis for any expert testimony they wish to introduce at trial. In the case of employment litigation, expert testimony frequently will be in the area of damages for emotional distress. Although there is some debate on the issue, most commentators have concluded that Rule 26(a)(2) obligates plaintiffs to provide the requisite disclosure concerning experts for emotional distress claims. This will force the plaintiff to find an adequate expert early in the case. If the plaintiff is unable to do so, the case may resolve itself early.

83. Under this theory, the employer argues that because the plaintiff has lied on the application, a fact which the employer learned during the discovery process, he would have fired the employee had he known about her lie on the application. See Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994). The Supreme Court of the United States recently ruled that after-acquired evidence does not defeat a plaintiff's entire claim. Rather, it can only cut off front pay, back pay from the date of discovery of the evidence and reinstatement. See McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885-87 (1995).

84. Fed. R. Civ. P. 26(2)(C); see supra note 73. Under old Rule 26(b)(4)(A)(i), parties only had to disclose the expert opinion by interrogatory. Fed. R. Civ. P. 26(b)(4)(A)(i) (codified in 28 U.S.C.). Parties were only entitled to obtain other discovery from the expert upon motion. Now the parties must produce the report, a list of all publications, fees, previous testimony during the last four years, as well as exhibits to be used at trial. Fed. R. Civ. 26(2)(C).
(3) **No Formal Discovery Until After Disclosures.**

One troubling aspect of Rule 26 is the requirement that parties may not begin formal discovery until after the disclosures have been provided. This means that employers cannot force plaintiffs into a deposition until after they have "shown some of their cards" upon making the mandatory disclosures. Employers, consequently, must make every effort to construe the Rule as narrowly as possible to limit the amount of information the plaintiff has prior to that deposition.

**D. Rule 30: Depositions**

Under amended Rule 30, each party is limited to ten (10) depositions unless leave of court is granted. Rule 30(c) now provides that the depositions need not comply with Federal Rule of Evidence 615, which allows the court to exclude witnesses so that they cannot hear another witness' testimony prior to testifying. Parties are also now forbidden to instruct a witness not to answer a question unless the answer is protected by privilege, to "enforce a limitation on evidence directed by the court," or to present a motion upon its "showing that the examination is being conducted in bad faith or in a manner as unreasonably to annoy, embarrass, or oppress the deponent or party."

Rule 30(b)(2) now permits a party to take a deposition by nonstenographic means, including sound and visual. Any party may arrange for a transcript to be made from the recording of a deposition taken by nonstenographic means. The party must specify the method within the notice of deposition. Other parties may, with prior notice to the deponent and other parties, designate another method to record the deponent's testimony in addition to the method specified by the party taking the deposition. The party requesting the additional method of recording must pay the expense of that recording.

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85. See Fed. R. Civ. P. 26(d); see supra note 81.
86. Fed. R. Civ. P. 30(a)(2)(A) (limiting depositions to ten per side without court order). See Appendix C.
87. Fed. R. Civ. P. 30(c); Fed. R. Evid. 615.
89. Id. Rule 30(b)(2).
90. Id. The party which is to take the deposition must state the method of deposition within the notice. Id. The parties are permitted to record "by sound, sound-and-visual, or stenographic means e.g." Id.
92. Id. Rule 30(b)(3).
93. Id. Rule 30(b)(2).
Rule 30(d)(1) prohibits objections which are made in a suggestive or argumentative manner.\textsuperscript{94} The Rule also provides that a party may obtain his or her costs and attorneys' fees for anyone who conducts a deposition in a manner to impede, delay, or otherwise frustrate the fair examination of the deponent.\textsuperscript{95}

E. RULE 32: USE OF DEPOSITION AT TRIAL

Rule 32 governs the use of depositions at trial. The modifications permit the use of nonstenographically recorded depositions. However, Rule 32(c) obligates the party using nonstenographic depositions to provide a written transcription of the portions of the deposition which will be used at trial.\textsuperscript{96} The Rule further provides that a deposition may not be used against a party that did not have at least eleven (11) days notice and promptly filed a motion for protective order.\textsuperscript{97} However, the notes of the advisory committee specifically state that Rule 32(c) does not create an absolute requirement that each deposition provide eleven (11) days advance notice.\textsuperscript{98}

Impact on Employment Litigation:

Rule 32 will have no special impact on employment litigation over any other civil litigation. However, the provision does make it much easier to use a videotaped deposition, which previously required court approval under the old rules.\textsuperscript{99} In cases such as sexual harassment, the Rule probably will help plaintiffs obtain trial testimony of other victims of sex discrimination. These persons may be reluctant to face the alleged sex harasser at the time of trial. However, a videotaped deposition removes some of that concern.

F. RULE 33: INTERROGATORIES

There is now a twenty-five (25) interrogatory limit on interrogatories without leave of court.\textsuperscript{100} If the defendant removes the case, and

\textsuperscript{94} Id. Rule 30(d)(1).  
\textsuperscript{95} Id. Rule 30(d)(3).  
\textsuperscript{96} Id. Rule 32(c). Rule 32(c) provides:  
\textsuperscript{(c) Form of Presentation.} Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.  
\textsuperscript{Id.}  
\textsuperscript{97} Fed. R. Civ. P. 32(c).  
\textsuperscript{98} Id. Rule 32(c) advisory committee's note.  
\textsuperscript{99} Id. Rule 32(c).  
\textsuperscript{100} Id. Rule 33(a).
the plaintiff is served interrogatories with the complaint, the plaintiff must get leave of court before the defendant is obligated to answer interrogatories in excess of twenty-five (25). Parties must answer to the extent the interrogatories are not objectionable. Moreover, a party may not refuse to serve answers or objections to an interrogatory based only on objection. The party must have first filed a motion for a protective order.102

Impact on Employment Litigation:

In litigation, defendants frequently remove employment claims filed in state court to federal court. Defendants should be aware that they are not obligated to answer those interrogatories after removal prior to the time that disclosures are made. Moreover, they should not answer interrogatories beyond the twenty-five (25) limit. This is one of the advantages defendants enjoy, because plaintiffs frequently have used an excessive number of interrogatories as a less expensive form of discovery.

G. RULE 37: DISCOVERY SANCTIONS

The amended Rule 37 expands the scope of sanctions for discovery abuses. All of the previous sanctions remain intact. However, there have been some new and significant ones added. The most significant is the penalty for failure to disclose information when obligated to do so under Rule 26(a) (initial disclosures) or (e)(1) (pretrial).103 The court may refuse to allow the plaintiff to introduce the disclosed information at the time of trial.104 The court also may instruct the jury that the plaintiff or defendant failed to disclose the information.105

Impact on Employment Litigation:

The new sanctions provisions could have tremendous impact on employment litigation. After the Supreme Court's recent ruling in Hicks, the plaintiff now arguably has a heavier burden in establishing pretext in order to prove a claim of discrimination.106 If an employer fails to provide critical information in a disclosure, and the jury is instructed that the employer failed to do so despite its obligation to produce that information, this certainly could be viewed as evidence that

101. Id.
102. Id. Rule 37(d). Rule 37(d) provides that "[f]ailure to . . . [answer] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)." Id.
103. See Fed. R. Civ. P. 37(c)(1); see supra note 78.
105. Id.
the employer's asserted nondiscriminatory reason is a pretext. Indeed, it may even be adequate to supply that additional evidence necessary to prove that discrimination was the motivating factor in the termination or other adverse employment decision, or an instruction that the plaintiff is entitled to a presumption that the defendant's stated reason for termination is a pretext for discrimination.

III. CONCLUSION

It has been over a year now since the 1993 Amendments to the Federal Rules of Civil Procedure became effective. In that time, many of the observations presented in this Article and many of the predictions made by other commentators about the impact of the 1993 Amendments on litigation have come true.

Without question, the new discovery rules and sanction provisions of Rule 26 and Rule 11 have affected the practice of employment law in federal court. Litigants rarely resort to Rule 11 anymore. It simply does not afford the "club" it once provided as shown by the Maryland District Court's decision in Thomas v. Treasury Management Assoc. Rule 26 has also forced litigants to disclose more information at an earlier stage than they normally would within the constraints of the ethical rules.

Nevertheless, Rule 26 has worked to the defendant's advantage as well by allowing the defendant to exclude expert testimony of emotional distress that the plaintiff did not timely or appropriately disclose. Another benefit is the new deposition rules which have worked well to facilitate the use of video depositions while limiting the number of depositions that plaintiffs have requested.

While several of the observations presented in this Article have come to pass, others have not. Maybe these observations are incorrect or too technical to ever arise in practice. On the other hand, it simply may be too early to tell whether they are correct. The authors of this Article will let you and the courts be the judges.

107. This is somewhat akin to the "adverse inference" rule applied by the EEOC during the administrative handling of discrimination charges. Under this rule, the EEOC will infer that, under certain circumstances, missing documents, if produced, would have been adverse to the employer's position. See Favors v. Fisher, 13 F.3d 1235, 1238-39 (8th Cir. 1994) (stating that the plaintiff was entitled to the presumption that the defendant's legitimate, nondiscriminatory reason for termination was a pretext where the defendant employer had destroyed tests used to evaluate the plaintiff and the applicants, since the applicable EEOC regulations required that it retain the tests).

108. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 n.4 (1993) (indicating that the plaintiff must show that discrimination was the reason behind the employer's actions).

APPENDIX A

RULE 4

(A) 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.

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

(C) Service with Complaint; by Whom Made.

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.

(D) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

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

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request
(A) shall be in writing and shall be addressed directly to the
defendant, if an individual, or else to an officer or manag-
ing or general agent (or other agent authorized by appoint-
ment or law to receive service of process) of a defendant
subject to service under subdivision (h);

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

(C) shall be accompanied by a copy of the complaint and shall
identify the court in which it has been filed;

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

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

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

(G) shall provide the defendant with an extra copy of the no-
tice and request, as well as a prepaid means of compliance
in writing.

If 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 ef-
fecting service on the defendant unless good cause for the failure be
shown.

(3) A defendant that, before being served with process, timely re-
turns a waiver so requested is not required to serve an answer
to the complaint until 60 days after the date on which the re-
quest for waiver of service was sent, or 90 days after that date
if the defendant was addressed outside any judicial district of the
United States.

(4) When the plaintiff files a waiver of service with the court, the
action shall proceed, except as provided in paragraph (3), as if
a summons and complaint had been served at the time of filing
the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for
failure to comply with a request to waive service of a summons
shall include the costs subsequently incurred in effecting ser-
vice under subdivision (e), (f), or (h), together with the costs,
including a reasonable attorney's fee, of any motion required to
collect the costs of service.
(e) **Service upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

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

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) **Service upon Individuals in a Foreign Country.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

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

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

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

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

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

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

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

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

(g) **Service upon Infants and Incompetent Persons.** Service upon an infant or an incompetent person in a judicial district of the
United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

**Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

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

2. (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

**Service Upon the United States, and Its Agencies, Corporations, or Officers.**

1. (1) Service upon the United States shall be effected

   A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

   B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

   C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.
(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

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

(j) Service upon Foreign, State, or Local Governments.

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

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

(k) Territorial Limits of Effective Service.

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

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

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

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

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

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

(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United
States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to the amended.

(M) **TIME LIMIT FOR SERVICE.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, 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. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(N) **SEIZURE OF PROPERTY; SERVICE OF SUMMONS NOT FEASIBLE.**

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

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.
CIVIL PROCEDURE AMENDMENTS

APPENDIX B

RULE 26(A)(1)-(3)

(A) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

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

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

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

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

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

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

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

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

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

1. A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

2. A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,
   (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;
   (B) the person to be examined already has been deposed in the case; or
   (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(B) **NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

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

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

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

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.
The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

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

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

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.
(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.