To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May 21, 2003, as revised July 31, 2003**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on May 1 and 2 at the Administrative Office of the United States Courts in Washington, D.C.

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Part I of this report describes recommendations to publish for comment in two parts. Part IA recommends four proposals for immediate publication along with the amendments to Admiralty Rules B and C approved for publication at the January meeting.

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***I ACTION ITEMS: NEW RULE 5.1 AND AMENDED RULES 6(e), 24 (c), 27(a), AND 45(a) FOR PUBLICATION; * * ***

Part IA recommends immediate publication for comment of a new Rule 5.1 and amended Rules 6(e), 24(c), 27(a), and 45(a). * * *

A. Rules For Immediate Publication

The Advisory Committee recommends publication for comment of new Civil Rule 5.1 and amendments to Rules 6(e), 24(c), 27(a), and 45(a).

Rule 5.1

The project that led to development of proposed Rule 5.1 arose from a suggestion stimulated by the publication of Appellate Rule 44(b) for comment. Rule 44(b) expanded Rule 44 to address the procedure for notifying a court of appeals that a party questions the constitutionality of a state statute. Judge Barbara B. Crabb responded to publication of the proposed amendment by suggesting that the Civil Rules should emulate Appellate Rule 44, implying that the provisions in present Civil Rule 24(c) are inadequate. The Department of Justice has taken up the proposal.

Appellate Rule 44 and present Civil Rule 24(c) implement the provisions of 28 U.S.C.A. § 2403:

> (a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *
>
> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee

> thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) that took effect on December 1, 2002, provides:

> **(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> **(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28,

> U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. Rule 24 is likely to be consulted by a party who knows of a lawsuit and wants to join it, but may not be consulted by a party who has joined an action and may not remember the duty to call the court's attention to a constitutional question and § 2403. Relocation as a new Rule 5.1, sandwiched between rules that deal with service and notice, may make the rule more effective.

Apart from the question of location, the Department of Justice reports that too often it fails to receive notice that the constitutionality of an Act of Congress has been drawn in question in a district-court action. It believes that it is particularly important to have notice while the action is in the district court, because that is where the record is made, and to have notice as soon as the constitutional question is drawn. For this reason, it believes that just as Appellate Rule 44 was drafted in terms quite different from Civil Rule 24(c), a new Civil Rule 5.1 should do more than Appellate Rule 44 to assure notice to the Attorney General.

The relationship between proposed Rule 5.1 and Appellate Rule 44 is important. Cognate provisions in the Civil and Appellate Rules should differ only when the differences are justified by the need to respond to the distinctive needs of trial-court procedure and appellate procedure. The relationship between the rules and the statute they implement, § 2403, also is important. The description of proposed Rule 5.1 thus begins by describing the ways in which it

departs from § 2403 and then carries on to describe the ways in which it departs from Appellate Rule 44.

Both the Rule 5.1 draft and Appellate Rule 44 depart from § 2403 in at least three ways.

First, each imposes an obligation on a party, while § 2403 imposes an obligation only on the court.

Second, § 2403 applies only to a statute "affecting the public interest." Both draft Rule 5.1 and Appellate Rule 44 delete this restriction, requiring notice and certification when a challenge addresses any Act of Congress or state statute. This expansion of the statutory certification requirement flows from the belief that the Attorney General should be the first to determine whether an act affects the public interest and to argue for intervention on that view. The court retains control at the stage of determining whether § 2403 establishes a right to intervene.

Third, § 2403 does not require notice to the Attorney General if a United States officer or employee is a party. Both Appellate Rule 44 and draft Rule 5.1 require notice when an officer or employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the United States Attorney General often will have notice under Civil Rule 4(i) of an action against a United States officer or employee in an individual capacity, but not always.

Draft Rule 5.1 departs from Appellate Rule 44 in six ways, one of them drawing from the provisions of Civil Rule 24(c).

First, Appellate Rule 44 addresses a party who "questions" the constitutionality of an Act of Congress or a state statute. Draft Rule 5.1, drawing directly from § 2403, applies to a party who "draws in question" the constitutionality of an Act of Congress or state statute. This direct incorporation of statutory language avoids any dispute whether an argument that a challenged interpretation should be rejected to avoid a constitutional question, "questions" the constitutionality of the statute.

Second, draft Rule 5.1 provides greater detail than Rule 44 in addressing the notice that a party must file. The notice must state the question and identify the pleading, written motion, or other paper that raises the question.

Third, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the court. It also requires that the notice be served promptly on the Attorney General. Service would be accomplished in the manner provided by Civil Rule 4(i)(1)(B), which calls for certified or registered mail. The draft does not substitute this requirement for the court's § 2403 duty to certify the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus may get notice twice, once from the party who raises the question and once from the court. This dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion. The dual notice is less burdensome than might appear on first blush. The party must file a notice with the court; it is little additional burden to serve the notice by mail on the Attorney General. Similarly, the court must set a time for intervention by the Attorney General; it is little additional effort to include a certification. The major benefit of the dual notice may be that the party notice will be served early in the litigation, often well before any activity by the court concerning the action.

Fourth, adhering to the statute, draft Rule 5.1 provides that the court certifies the question to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft Rule 5.1, dispenses with the need to determine whether the challenged statute affects the public interest. Substitution of the clerk may be complicated, however, by the need under Rule 44 to determine whether a United States officer or employee who is a party has been made a party in an official capacity.)

Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate Rule 44 has no similar provision. This difference reflects the great variability of time to disposition in a trial court as compared to the more predictable schedule on appeal.

Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure to file the required notice, or a court's failure to make a required certification, "does not forfeit a constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

Rule 6(e)

Moved by comments on the Appellate Rules amendments that conformed appellate time-counting conventions to the Civil Rules conventions, the Appellate Rules Committee referred to the Civil Rules Committee a nice question arising from the relationship between Civil Rules 6(a) and 6(e). Rule 6(e), set out below, adds 3 days to some prescribed time periods. Unfortunately, it does not do so in a way that is as clear as time-counting rules should be. The proposed amendment aims to increase clarity in a way that will support, not disrupt, the general present understanding.

As recently amended, Rule 6(e) says:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

(Rule 5(b)(2)(B) governs service by mail. (C) governs service by leaving a copy with the court clerk. (D) governs service by "any other means, including electronic means, consented to in writing.")

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days."

Four possible methods of integrating Rules 6(a) and 6(e) have been recognized. Two can be rejected without regret. One would "add" the 3 days "to the prescribed period" directly — a 10-day period becomes a 13-day period, Rule 6(a) is ousted because the

period is no longer less than 11 days, and the time to respond is shorter than it would be if Rule 6(e) did not exist. That is not the intent. The other would treat the three Rule 6(e) days as an independent time period, so that intervening Saturdays, Sundays, and legal holidays are excluded, often lengthening the time to respond by many more than three days.

The two plausible alternatives are to "add" the three Rule 6(e) days before beginning to count the ten days or after completing the ten-day count. Perhaps surprisingly, the choice makes a difference. It is easier to illustrate the difference than to articulate the explanation.

One illustration: The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the three days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

The reason for this difference is that adding three days at the beginning of the period means that if service is made on a Wednesday, Thursday, or Friday, the first Saturday and often Sunday are double-counted. Saturday is omitted both because it is one of three added days and also because it is Saturday. (An intervening legal holiday may trigger the same phenomenon.) If the three days are added at the end, there is no opportunity for double counting. The extension may be greater.

So there is a difference. How should it be resolved? In the abstract, there is much to be said for adding the three days before beginning to count the ten-day period. Using mail service as an illustration, the three additional days are provided to allow for the time that may be required to deliver the mail. That happens at the beginning. Apart from the abstract, this approach would move things along a bit more quickly than if the three days are added at the end.

Adding three days at the end has proved more attractive despite these arguments. Perhaps it is desirable to allow more time. However that may be, informal surveys of practicing lawyers show two things. One is substantial uncertainty and a strong desire to achieve greater clarity. The second is an overwhelmingly common practice. Lawyers add the three days at the end, perhaps because it may allow more time, perhaps because that is the natural reading of the present language.

If clarity is the overriding goal, smooth implementation also is important. Conforming to general present practice will mean that the clarified rule does not trap many lawyers during the learning period that follows any rule change. Indeed no lawyer should be trapped, since the time never will be shorter than if the three days were added at the beginning.

The proposal recommended for publication adds three days after the prescribed period. It is based on the Style version of Rule 6(e) that is presented below for approval for publication at a later time. If publication of Rule 6(e) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 6(e) for the present Style version.

One final note. Every discussion of this proposal has prompted the anguished protest made during every other discussion of time-counting rules. It is said that the rules are too complicated, and by more than half. Instead of excluding intervening days, we should set realistic time periods and adhere to them without further complication. The only rules needed would address the problems that would arise if a time period terminates on a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. (These problems arise also when an order sets a time measured by an interval before another event — a brief must be filed ten days before trial. If ten days before trial is a Sunday, must the brief be filed on Friday, or will Monday do?)

The Advisory Committee suggested that when competing demands allow, it may be desirable to establish an ad hoc committee

cutting across all the advisory committees to consider a general approach to counting short time periods.

Rule 27(a)(2)

Rule 27(a) sets the procedure for a petition to perpetuate testimony before an action is filed. Paragraph (a)(2) provides for notice to expected adverse parties and directs that the notice be served "in the manner provided in Rule 4(d)." This cross-reference to Rule 4(d) has been outdated since the 1993 Rule 4 amendments. Rule 4(d) now governs waiver of service. The cross-reference must be fixed.

Fixing the cross-reference is not entirely easy. The service provisions of former Rule 4(d) have been dispersed among present Rules 4(e), (g), (h), (i), and (j)(2). Even as to these provisions, new methods of service have been added to those provided by former Rule 4(d). Former Rule 4(d), moreover, did not provide for service on an individual in a foreign country — that matter was covered by former Rule 4(i), now found in Rule 4(f). And present Rule 4(j)(1) provides for service on a foreign state or political subdivision. Recreation of the precise circumstances of former Rule 4(d) would be difficult.

It is not only that recreation of former Rule 4(d) would be difficult. More importantly, recreation would be pointless. The purpose of Rule 27(a)(2) is to provide a reliable means of notice to expected adverse parties so that the pre-action discovery will function as well as can be. Duplication later would be wasteful, and — given the very purpose of allowing discovery before an action is filed — often would be impossible. The sensible approach is to invoke Rule 4 methods of service as to all categories of expected adverse parties. Although service may seem a cumbersome means of notice to parties in foreign countries, notice by other means may be offensive to foreign law.

The substantive change in Rule 27(a)(2), then, is to correct the superseded cross-reference to former Rule 4(d) by cross-referring to all means of Rule 4 service. The proposal is presented in the Style version of Rule 27(a)(2) that is under consideration by the Style Subcommittee. If publication of Rule 27(a)(2) is approved now, it

may become appropriate in the cycle of the Style Project to substitute amended Rule 27(a)(2) for the present Style version.

Rule 45(a)(2)

Rules 30 and 45 interplay in a way that may not notify a deponent of the means of recording a deposition. Rule 30(b)(2) directs that a notice of deposition state the manner for recording the testimony, but the notice need not be served on the deponent. The deponent will get notice of the first-designated recording medium only if the deponent is a party or is informed by a party. Rule 30(b)(3) provides that any party may designate another method to record "[w]ith prior notice to the deponent and other parties." If two or more methods of recording are used, the deponent does have notice of the recording media. The proposed amendment completes the circle by directing that the subpoena served on the deponent state the method for recording the testimony.

Notice of the method for recording may be important to the deponent simply for psychological reasons — video recording may work better if the deponent anticipates it in advance in matters as simple as dressing for the occasion. Notice also may be important for other reasons. A deponent may have valid reasons to object to the means of recording, or — perhaps more commonly — to seek a protective order to guard against misuse of the recording. Raising these issues after the deponent has appeared for the deposition can be disruptive and inefficient. Advance notice will ensure an orderly opportunity to raise these issues and, if need be, to seek a protective order.

As with Rules 6(e) and 27(a)(2), the proposal is presented in the Style version of Rule 45(a)(2) that is under consideration by the Style Subcommittee. If publication of Rule 45(a)(2) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 45(a)(2) for the present Style version.

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To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **December 3, 2002**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 3 and 4 in Santa Fe, New Mexico.

Part I of this report describes the recommendation to publish for comment proposed amendments of Admiralty Rules B and C.
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I ACTION ITEMS: ADMIRALTY RULES B AND C FOR PUBLICATION
Rule B(1)(a)

The Advisory Committee recommends publication in August 2003 of this amendment of Admiralty Rule B(1) and the accompanying Committee Note:

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process. * * *

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Discussion: This change was first proposed by a member of the Standing Committee during discussion of the Admiralty Rules changes that took effect on December 1, 2000, and has been endorsed by the Maritime Law Association.

Rule B(1) provides for attachment in a maritime in personam action. It applies when "a defendant is not found within the district." The "found" concept is old-fashioned; a defendant who is not physically present in the district and who has no agent there for the service of process is not "found" there, even though subject to personal jurisdiction on some other basis. Rule B(1) thus serves two purposes: it establishes a form of quasi-in-rem jurisdiction to substitute for personal jurisdiction, but it also provides a pre-judgment security device in some cases in which the court has personal jurisdiction. The ploy attempted in the Heidmar case reflects the use of Rule B(1) as a security device. The complaint was filed at 3:45 p.m. with a motion to arrest a vessel; at 4:00 the owner faxed notification that it had appointed an agent for service of process. After straightening out various confusions, the case came to be treated as presenting the question whether the application of Rule B(1) is determined at the time the complaint is filed or instead at the time the attachment issues. The court ruled that the time of filing controls. It relied in part on inference from the requirement that the complaint be accompanied by an affidavit that the defendant cannot be found, and that the court review these materials before ordering attachment — "not found" relates to the time of filing, not the time of attachment. More importantly, it relied on the theory that Rule B(1) serves the purpose of "assuring satisfaction in case the plaintiff's suit is successful," pointing out that an attachment, once issued, is not vacated when the defendant appears. The court also thought it unfair and inefficient to allow a defendant to defeat attachment by waiting to appoint an agent for service until a complaint had been filed.

Amendment is recommended to give direct notice to lawyers and courts, protecting against the need to identify the question and search for an answer in circumstances that often require prompt action. Maritime actions frequently involve defendants from other countries. Attachment is useful not only to establish quasi-in-rem jurisdiction when personal jurisdiction cannot be established, but also to meet the special needs for security that distinguish maritime practice from land-based practice. Enforcement of a personal judgment may be more difficult, more often.

C(6)(b)(i)(A)

The Advisory Committee recommends publication in August 2003 of this amendment of Admiralty Rule C(6)(b)(i)(A) and the accompanying Committee Note:

Rule C. In Rem Actions: Special Provisions

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(6) Responsive Pleading; Interrogatories.

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(b) ***Maritime Arrests and Other Proceedings.*** In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

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Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

Discussion: The Committee Note tells the story. The problem with Rule C(6)(b)(i)(A) arises from the December 2000 amendments that divided Rule C(6) into separate provisions for forfeiture proceedings — subdivision (a), and for maritime proceedings — subdivision (b). For forfeiture proceedings, C(6)(a)(1)(A) allows a statement of interest to be filed "within 20 days after the earlier of receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." That provision works. For maritime proceedings, the earlier rule had required that a claim be filed within 10 days after process has been executed, or within such additional time as may be allowed by the court. The admiralty bar was concerned that the 10-day period be retained, and also that it begin to run with execution of process — it was well established that the time runs from execution of process whether or not the claimant has actual notice. So the "actual notice" provision, newly added for forfeiture proceedings, was not added for maritime proceedings. At the same time, unthinking parallelism with the forfeiture proceeding retained the structure setting the date "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4) * * *." The problem is that Rule C(4) requires publication of notice

only if the property that is the subject of the action is not released within 10 days after execution of process. It makes no sense to refer to completed publication of notice as if it could occur before process is executed — publication begins, at the earliest, 10 days after process is executed.

The "dead letter" character of the provision to be deleted might justify deletion as a technical amendment adopted without publication and comment. The Advisory Committee discussed this possibility without attempting a definitive recommendation. If the Rule B(1) amendment is to be published, however, there is little added cost in publishing the Rule C(6) amendment as well. The admiralty bar is small and specialized, and the benefits of the amendment will be realized in large part by publication, and indeed are likely to be substantially realized by authorization in January to publish in August. Judges and lawyers will be spared the chore of working through to the conclusion that indeed the provision for filing after publication of notice has no meaning. Although the Standing Committee may wish to consider the issue further, the circumstances suggest that the easier path is to publish. Publication would reflect the general preference for grouping amendments in packages.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) Notice. A party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute must promptly:

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B);

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

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General.

(b) Certification. When the constitutionality of an Act of Congress or a state statute is drawn in question the court must certify that fact to the Attorney General of the United States or to the State Attorney General under 28 U.S.C. § 2403.

(c) Intervention. The court must set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General.

(d) No Forfeiture. A party's failure to file and serve a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and serve it on the United States Attorney General or State Attorney General. The notice must be promptly filed and served. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or the State Attorney General. The notice will ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's § 2403 certification obligation remains, and is the only notice when the constitutionality of an Act of Congress or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any Act of Congress or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the Attorney General is able to determine whether to seek intervention on the ground that the Act or statute affects a public interest.

The 60-day period for intervention mirrors the time to answer set by Rule 12(a)(3)(A). Pretrial activities may continue without interruption during this period, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the period has expired without response. The court may, on the other hand, reject a challenge at any time. This rule does not displace any of the statutory

or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period expires. All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

Other changes are made to conform Rule 6(e) to current style conventions.

Rule 24. Intervention

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

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

Committee Note

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C.A. § 2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn in question.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

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~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or~~

~~without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing on the petition. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an

attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent on behalf of persons not served and not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions.

Rule 45. Subpoena

(a) Form; Issuance.

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~~**(2)** A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for~~

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

(2) A subpoena must issue as follows:

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

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

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, in the name of the court for the district where the production or inspection is to be made.

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Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

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

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

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

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Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the

complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule C. In Rem Actions: Special Provisions

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(6) Responsive Pleading; Interrogatories.

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(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

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Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.