



**ANALYSIS OF THE 1997 CIVIL PROCEDURE RULES  
(RULES 1-71 OF THE RULES OF COURT)  
FOR THE REPUBLIC OF THE PHILIPPINES**

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## **Analysis of the 1997 Civil Procedure Rules (Rules 1-71 on Rules of Court) for the Republic of the Philippines\***

### **I. Introduction**

The Supreme Court of the Philippines (hereinafter “SC”), through ABA-Asia Law Initiative’s (hereinafter “ABA-Asia’s”) Philippines Law Reform Project has requested the assistance of the American Bar Association Rule of Law Initiative (hereinafter “ABA Rule of Law Initiative”) in conducting an assessment of the 1997 Civil Procedure Rules (Rules 1-71 of the Rules of Court) for the Republic of the Philippines (hereinafter “Civil Procedure Rules” or “Rules”). The Philippine Supreme Court has recognized the need to determine whether the current Civil Procedure Rules are adequate to handle civil cases in the courts of the Philippines, and if not, have asked for the ABA to provide suggestions on how to amend the existing rules so that they will be adequate. In particular, the Supreme Court is interested in ascertaining what revisions are necessary to ensure that the Civil Procedure Rules do not impede the flow of commerce and foreign investment, and to promote international arbitration as well as enforcement of foreign judgments.

Based upon this request, ABA Rule of Law Initiative’s Office of Research and Program Development solicited commentary from various experts with backgrounds in civil procedure and commercial matters. The following assessment provides general and specific comments designed to aid the Philippine Supreme Court in revising the Civil Procedure Rules accordingly.

### **II. Historical Context**

The Philippine nation was once a civil law jurisdiction as a result of the Spanish colonization which began in 1521. A written code as the primary source of legal authority serves as the hallmark of the civil law tradition and a central distinction from the common law. However, after the Spanish American war, the control of the Philippine islands was transferred to the United States under the auspices of the 1898 Treaty of Paris. The American common law influence is apparent as judicial institutions based on the Anglo-American tradition were created and American common law trained judges developed legal methodologies consistent with that tradition.<sup>1</sup>

“The Philippines has a US-style, post-WWII constitution, which was revised and re-enacted in 1987, after the fall of the Marcos government. The legal system and the system of courts are unitary rather than federal.”<sup>2</sup> The Philippine courts are organized similar to the U.S. court system. Today the Philippines is considered a “mixed jurisdiction,” a hybrid of civil and common law traditions, along

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<sup>1</sup> See José Trías Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 TUL. L. REV. 333, 344-45 (2003).

<sup>2</sup> Rosemary Hunter, *Reconsidering ‘Globalisation’: Judicial Reform in the Philippines*, 6 LTC 41, 47 (2002).

with Quebec, Louisiana, and Puerto Rico.<sup>3</sup> The Philippine judicial system does not include jury trials. Judges are the triers of fact. The court system currently does not follow a continuous trial system, where all witnesses and evidence are taken in immediate succession, although efforts are being made towards that end in some courts. Instead, witnesses appear separately on an intermittent basis, typically monthly, often returning to court repeatedly. At present, many court cases take up to six years to complete. The reason for the lengthy process includes a dearth of prosecutors and public attorneys, particularly in the provinces, as well as a 30% judicial vacancy rate, the volume of filings of motions, multiple interlocutory appeals, and a lack of physical resources.

### Structure of the Courts

There are a variety of first level courts (hereinafter “FLCs”) in the Philippines, depending on their location: Metropolitan Trial Courts (hereinafter “MeTCs”) in each metropolitan area, Municipal Trial Courts in Cities [hereinafter MTCCs] not part of a metropolitan area, Municipal Trial Courts (hereinafter “MTCs”) in other municipalities, and Municipal Circuit Trial Courts (hereinafter “MCTCs”) in circuits comprising municipalities grouped together. The MeTC has jurisdiction over civil cases not exceeding PHP 400,000 (approximately USD 7,800),<sup>4</sup> while the MTCC, MTC, and MCTC have jurisdiction over civil cases not exceeding PHP 300,000 (USD 5,860). In addition, all of these courts have original jurisdiction in criminal cases punishable by a maximum of six years of imprisonment.

Regional Trial Courts (hereinafter “RTCs”) are second level courts that are established in each of the country’s 13 regions, with each RTC having several branches. RTCs act as trial courts in cases over which the FLCs do not have jurisdiction, and also hear appeals from the decisions of the FLCs in their respective jurisdictions. There is a specialized Commercial Court at the RTC level. It has original jurisdiction in cases of intracorporate disputes and other commercial issues such as intellectual property claims, as well as criminal cases involving commercial fraud or theft.

In October 1997, Family Courts were established in every province and city in the Philippines. At present, these courts operate at the level of RTCs designated to handle family cases. They have original jurisdiction over: criminal cases where the accused is between the age of 9 to 18 or where the victim is a minor; petitions for guardianship, child custody, adoptions, annulments, and declarations of nullity of marriage; support petitions; and cases of domestic violence against women and children.

The Court of Appeals (hereinafter “CA”) is organized into 23 divisions of three members each. It reviews cases from the RTCs and from quasi-judicial agencies, such as the Civil Service Commission, Securities and Exchange Commission, National Labor Relations Commission, and Land Registration Authority. Although it reviews cases *de novo*, it generally does so only on the basis of the record, and usually without oral argument. However, it may, and sometimes does, conduct hearings and receive additional evidence.

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<sup>3</sup> See MARY ANN GLENDON ET AL, *COMPARATIVE LEGAL TRADITIONS* 48 (2nd ed. 1999).

<sup>4</sup> Throughout this assessment, Philippine Pesos (PHP) are converted to United States Dollars using the average exchange rate at the time of the assessment (approximately USD 1 = PHP 51.19).



There are also two additional specialized courts that are at the level of the CA: the Sandiganbayan (hereinafter “SB”) and the Court of Tax Appeals (hereinafter “CTA”). The SB is an anti-corruption court that tries public officers with a salary grade of 27 or higher (*i.e.*, salary range of PHP 20,279-24,105 (USD 396 to USD 471)), who are charged criminally with graft or other corrupt practices, as well as corresponding civil claims for recovery of fruits of the crimes. It is composed of a Presiding Justice and 14 Associate Justices, sitting in 5 divisions of 3 justices each. It is served by the Office of the Ombudsman, which investigates and prosecutes crimes under the Anti-Graft and Corrupt Practices Act. The CTA, elevated to appellate level in 2004, is composed of a Presiding Justice and 5 Associate Justices, and may sit *en banc* or in 2 divisions of 3 each. It reviews decisions of the Bureaus of Internal Revenue and Customs involving disputed assessments or refunds. It also has original jurisdiction over all criminal offenses arising from violations of the Tax or Tariff Codes. Decisions of both the SB and the CTA *en banc* are appealable directly to the SC.

The SC stands at the apex of the judicial hierarchy and is the court of last resort. It is composed of a Chief Justice and 14 Associate Justices who may sit *en banc* or in divisions of 3, 5, or 7 members each, though the most typical composition is 3 divisions of 5 justices. It has the power to settle actual controversies involving legally demandable and enforceable rights, and to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of government. Decisions become the law of the land. The SC exercises appellate jurisdiction from judgments of the lower courts, and original jurisdiction in certain instances by petitions for certiorari and other special writs. Generally, it reviews only questions of law.

Shari’a Courts exist in Muslim regions to interpret and apply the Muslim code on personal laws (primarily marriage, divorce, and inheritance). There are Shari’a Circuit Courts (FLC level) and Shari’a District Courts (RTC level), as well as a Shari’a Appellate Court.

The Armed Forces maintain an autonomous military justice system. Military Courts are under the authority of the judge advocate general of the Armed Forces, who is also responsible for the prosecutorial function in these courts. They operate under their own procedures but are required to accord the accused the same constitutional safeguards received by civilians. Military tribunals have jurisdiction over all active duty members of the Armed Forces. This authority notwithstanding, all of their decisions are ultimately reviewable by the Supreme Court.

There is no separate Constitutional Court. Issues concerning constitutionality of legal acts may be brought before any court in the Philippines.

### **III. Legal Standards**

Since the Civil Procedure Rules seem to be based, at least in part, on some of the Federal Rules of Civil Procedure of the United States (hereinafter “FRCP”), the FRCP offer a starting point for the reform of the current Civil Procedure Rules. The FRCP govern civil procedure in United States federal courts and informally serve as a model statute for many of the 50 States. This assessment also refers to the American Law Institute Model Rules of Transnational Civil Procedure (hereinafter

“ALI Model Rules”) that were drafted in 2005 and, where appropriate, provides examples from Canada, as a mixed civil and common law system, and Germany as a model for a civil law system.

## **IV. General Definitional and Procedural Recommendations**

### **A. Structure and Organization**

#### **SUMMARY:**

The Rules should contain an initial section to establish the definitions of the various terms used throughout the Rules.

#### **DISCUSSION:**

The Rules would benefit greatly from definitions of certain terms that are utilized throughout the Rules. A couple of examples are discussed below.

For example, Rule 13 (5) provides that service shall be made personally or by mail. Rule 13 further provides that service shall be made by delivering a copy of the papers personally to the party or his counsel. If the party is not found in office or if the whereabouts of the office is not known, service may be effected at the party or counsel residence under Rule 6. Service can also be effected by mail by depositing a copy at the post office and instructing the postmaster to return the mail (Section 7). The means of substituted service as laid down by the rule is by delivering the copy to the Clerk of Court with proof of personal service and service by mail (Section 8). The provisions for service of process under Rule 13 make no mention of who can effect service or the definition of a “person of sufficient age.” Substituted service, as used under the rule, also appears to totally differ from the global definition of the term.

Rule 14, providing for the issuance and service of summons, states that summons can be served by the Sheriff, his deputy, other proper court officer, or any suitable person authorized by the court by handing a copy to the defendant in person or tendering it to him if he refuses to receive and sign for it. The rule appears to exclude the litigants from trying to effect service, unless they are included under “any suitable person authorized by the court.” FRCP Rule 4 (c) not only allows the U.S. Marshall, deputy, or other person or officer specially appointed by the court for that purpose to serve summons along with complaint, it also provides that service may be effected by any person who is not a party and who is at least 18 years of age. Rule 4 also provides that “...the Plaintiff is responsible for service of a summons and complaint...”<sup>5</sup> It is suggested that the Civil Procedure Rules be amended to accommodate service by litigants, to properly define “suitable” person, and to state the age limit for process servers.

### **B. Pre-trial Procedural Issues**

#### **SUMMARY:**

Procedures regarding pre-trial mechanisms under Rule 18 need to be clarified and the court should be designated as the entity responsible for scheduling.

#### **DISCUSSION:**

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<sup>5</sup> United States, Fed. R. Civ. P. Rule 4 (c).

Pre-trial procedures or preliminary mechanisms may cover what is referred to as the pleading and discovery phases of a trial, as well as pre-trial settlement meetings or scheduling conferences. Some U.S. States have mandatory pre-court procedures, in certain cases, aimed at settling the dispute before going to trial. Pre-trial proceedings are routine in U.S. federal courts. Conferences are held at which trial judges establish time limits for completing various stages of the proceedings and familiarize themselves with the case. The trial judge may schedule a conference in an effort to simplify the issues and facilitate an out-of-court settlement of the dispute, as well as to make plans and set schedules. Under the FRCP, the trial judge has broad discretion to set deadlines and impose pre-trial procedures.<sup>6</sup> Federal judges usually require an elaborate pre-trial order that establishes deadlines and requires the parties to file a great deal of specified information.

In addition, a trial judge has the power to require strict adherence to the deadlines they set. With respect to time limits, the American system does provide for the sanction of dismissal of a case, or default judgment, for willful failure to abide by court imposed time deadlines. Thus, one may not have the right to turn to the court once the time limit on pre-court procedures has passed. In practice, however, most judges will excuse the failure to adhere to a court-imposed time limit if the party can show good cause for failure to comply and if no prejudice to the other party will result.

In the discovery phase of American civil procedure, the parties “discover” the relevant evidence by sending written questions to each other and requesting documents, physical exams, and other items. Discovery begins with the parties, under the FRCP, making certain “initial disclosures.”<sup>7</sup> Much of this discovery is done without court supervision. Ultimately, the parties prepare a report on discovery matters for the court to review at the pre-trial conference.<sup>8</sup> The judge may enter an order limiting the time for future discovery or take other actions. Therefore, there are time limits, either under the discovery rules themselves or as set by the judge.

As for the pre-trial settlement of disputes, there is no mandatory requirement to settle. A judge can, however, require the parties to meet among themselves to discuss settlement or to meet with him or her to discuss settlement. Unfortunately, American courts very infrequently dismiss a case because of failure to abide by discovery rules and probably almost never dismiss a case because of a settlement issue. In fact, an out-of-court settlement is a voluntary agreement of the parties to compromise or resolve the issues in the litigation, perhaps encouraged by the trial judge, but nonetheless represent the parties' free act. If the parties do not settle the case out-of-court, the consequence under the U.S. system is that the litigation will go forward and a decision will be rendered by the court. However, there is one particular type of pre-trial procedure that is gaining popularity in American courts. It is called “court-annexed mediation,” and it allows the judge to order the parties to present their cases to a professional mediator in an effort to settle the dispute. The mediator has no power to order the parties to settle, and the parties are completely free to reject the mediator's suggestions. However, the use of mediation has proven highly effective and its use is rapidly increasing. Mediation allows the parties to come up with a mutually acceptable resolution of the dispute instead of having a resolution imposed upon them by a judge or jury. Mediation saves the litigants time and money, and it helps clear court dockets, because settlements result from approximately 80% of mediated cases.

German law does not have mandatory pre-court procedures. Therefore, there are no pre-court time

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<sup>6</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 16.

<sup>7</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 26.

<sup>8</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 16.

limits to exceed. In addition, German law does not require an attempt to settle out-of-court. As in the Philippines, under *Zivilprozessordnung* Article 1027 (a)<sup>9</sup>, the court can turn down a claim as unallowable if the parties have made an arbitration agreement concerning litigation and the defendant invokes this arbitration agreement. Finally, under *Zivilprozessordnung* Article 93, the plaintiff must bear the costs of the lawsuit if the defendant's behavior has given no cause for litigation and he responds to (“recognizes”) the claim immediately.<sup>10</sup>

In Canada, the degree of involvement of the court in pre-trial procedures varies from jurisdiction to jurisdiction, but in most cases a pre-trial conference is obligatory. In such a pre-trial conference, a judge ascertains whether there is a possibility of settlement. This conference is called by the court and the parties attend, but there are frequently no immediate results and no penalties. More severe are mechanisms of case management, in which a judge is assigned to a case from its inception and actively controls pre-trial procedures. This development has obvious parallels with the notion of the “*juge de la mise en état*” in French procedure or what is often referred to as a pre-trial review judge. The development of this kind of case management indicates a major shift in responsibility in the conduct of civil litigation in North American legal systems. Where there is failure on the part of a party to adhere to deadlines or delays set out in case management procedures, dismissal of the suit is one sanction available. Use of this penalty is, however, a matter of discretion on the part of the court.

In terms of the Civil Procedure Rules, Rule 18 (1), states that it “...shall be the duty of the plaintiff to promptly move *ex parte* that the case be set for pre-trial.” If a pre-trial phase is mandatory, as stated under Rule 18 (2), the setting of the case for pre-trial should be the task of the court, not a duty of the plaintiff. In addition, Rule 18 should be revised to address what the parties are assumed to do before the hearing (Section 6), the development of the hearing, and the decisions that the court may make (Section 2). It should also provide that the court attempt to settle the case, or send the party before an arbitrator (court-annexed arbitration) or a mediator (court-annexed mediation), specifying the conditions, proceedings, and effects under these forms of alternative dispute resolution (hereinafter “ADR”). Reference should be made directly to the applicable Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes, Republic Act No. 9285 (April 2, 2004)<sup>11</sup> (hereinafter “Law on ADR”) and the Supreme Court Circular on Court Annexed Mediation. Furthermore, Rule 18 should also contain a provision regulating the simplification of the issues, affording to the court the power to strike out any redundant or useless argument, and to consider and strike out issues that are not seriously contested.

The admission of evidence during the pre-trial phase also needs to be addressed and should correspond to the applicable Rules of Evidence. For example, evidence should be offered in the pleadings in which the facts are stated, and specify the details of any item of evidence, such as name and address of witnesses and types of documents to be attached. Furthermore, the relevancy and admissibility of evidence should be assessed at the pre-trial phase in accordance with Sections 3 and 4 of Rule 128 and Rule 130 of the Rules of Evidence. The provisions for the pre-trial brief under Rule 18 (6), and in particular subsection (f), for “the number and names of witnesses, and the

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<sup>9</sup> Germany, *Zivilprozessordnung* Article 1027 (a).

<sup>10</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 93.

<sup>11</sup> Republic of the Philippines, Congress of the Philippines, Twelfth Congress 3<sup>rd</sup> Regular Sess., Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes, Republic Act No. 9285 (April 2, 2004).

substance of their respective testimonies,” are inadequate both from the substantive and procedural viewpoint. The current Rule makes no reference to other kinds of evidence, such as parties’ examination, expert evidence, inspections, and other matters. Moreover, it implies that the other parties would have no opportunity to contest these requests or to offer any contrary evidence. Correspondingly, the court should not limit itself to reducing the number of witnesses under Rule 18 (2)(e), but should be afforded the leeway to admit all the relevant and admissible evidence and to exclude the irrelevant and inadmissible evidence. If at the end of the pre-trial hearing, it appears that there is no need to present any evidence, the court may establish that the case can be decided on the merits: in such a case there will be no trial, and the judgment could be delivered immediately.

### **1. *Service of Process***

#### **SUMMARY:**

Civil Procedure Rule 13 should not only be amended to include electronic means as a means of effecting service, but also should state that such means are not effective if the party making service learns that the attempted service did not reach the person being served.

#### **DISCUSSION:**

In general, American law allows service upon a party at home or their workplace. Service may also occur, at the home or workplace of the party, on a person of “suitable age or discretion” or on the agent of the defendant. Therefore, American civil procedure would allow service at home on a spouse or housekeeper, or at work on an agent, such as an office manager or nurse (in a doctor’s office). The drafters may wish to delineate more clearly who may be served.

These methods failing, some American jurisdictions permit various forms of acceptable substituted service, such as publication.<sup>12</sup>

In terms of the Civil Procedure Rules, the provisions of Rule 13 appear to be based on FRCP Rule 5, except regarding electronic means as contained in Rule 5 (b)(2)(d) of the FRCP. Therefore, it is recommended that the Civil Procedure Rules be amended to include electronic means as a means of effecting service, but also noting that such means are not effective if the party making service learns that the attempted service did not reach the person being served.

### **2. *Substituted Service***

#### **SUMMARY:**

Rule 13 should be amended so that it is clear that it does not cover service of a summons, which is covered by Rule 14. Additionally, Rule 13 is overly broad for foreign companies or parties and other forms of substituted service should be addressed.

#### **DISCUSSION:**

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<sup>12</sup> There is some debate among American experts about the desirability, or perhaps handiness, of notice by publication. For example, in New York State the civil practice rules allow service by publication in a newspaper to obtain jurisdiction over the defendant who cannot be “found” by regular means of serving process. In contrast, under the rules of Louisiana, no one may be summoned to appear in court by way of an announcement in the newspaper. *See* Louisiana Code of Civil Procedure Articles 1201 through 1314. The FRCP Rule 4 adheres to the latter position. However, under FRCP Rule 23 (c) (2), there are certain types of court notices (but never a summons) that may be given by a newspaper publication if this is the “best notice practicable under the circumstances.”

In the United States, courts have allowed other forms of substituted service where normal service has failed. For example, under the FRCP Rule 4, service upon individuals in a foreign country may be made “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 Extra judicial Documents.”<sup>13</sup> In addition, under FRCP Rule 4 (f), if there is no internationally agreed means of service, service is proper if it is reasonably calculated to give notice and it is (1) “in the manner prescribed by the law of the foreign country for service”; (2) as directed by the foreign authority in response to a letter rogatory or letter of request; or (3) personal delivery or receive/receipt mail.<sup>14</sup>

In terms of the Civil Procedure Rules, Rule 13 (8) provides that “if service of pleadings, motions, notices, resolutions, orders and other papers cannot be made under the two preceding sections, the office and place of residence of the party or his counsel being unknown, service may be made by delivering the copy to the clerk of the court, with proof of failure of both personal service and service by mail. The service is complete at the time of such delivery.” However, it appears that this rule does not apply to service of a summons (for purposes of commencing an action) or a subpoena (to compel testimony or production of documents). Although Rule 13 (8) appears to limit the means of substituted service, it is potentially overbroad as it would apply to non-Philippine companies in that they should not be expected to monitor filings in the clerk’s office. The drafters should consider whether allowing papers to be served in this manner before there has been proper service of process commenced in an action should be allowed. In addition, the drafters may wish to clarify that Rule 13 (1), which states that “this rule shall govern the filing of all pleadings and other papers, as well as the service thereof, except those for which a different mode of service is prescribed”; specifically sets out to exclude service of summons for which separate rules of service are set out in Rule 14, and for subpoena, which incorporates the procedures for service of a summons.

*a. Summons and Complaint*

**SUMMARY:**

Rule 14 (12) should be amended to provide a definition of what constitutes doing business in the Philippines.

**DISCUSSION:**

Rule 14 (12) states that “When the defendant is a foreign private juridical entity which has transacted business in the Philippines, service may be made on its resident agent designated in accordance with law for that purpose, or should there be no such agent, on the government official designated in accordance with the law for that purpose, or on any of its officers or agents within the Philippines.” This rule seems to be directed at entities that are registered to do business in the Philippines and have designated an agent for service of process. Because service may be made on a designated government official, there needs to be some clear and certain requirement that the government official is obligated to ensure that a foreign entity served in this fashion receives actual notice and a copy of the complaint. In addition, service on a resident officer or agent within the Philippines on a claim related to business that the foreign entity has transacted in the Philippines poses no problems. However, it is essential that it cannot merely be a foreign officer or agent who is passing through the

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<sup>13</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 4.

<sup>14</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 4 (f).

Philippines on business unrelated to the business transacted in the Philippines giving rise to the cause of action. The drafters are encouraged to provide a definition of what constitutes doing business as settled under case law in the Philippines. This clarity will avoid any question that foreign businesses may have regarding the scope of service, which could potentially jeopardize foreign investment and commercial activities or lead to problems of enforcement of Philippine judgments outside of the Philippines.

*b. Letters Rogatory and Commissions*

**SUMMARY:**

Rules 9 (3) and 23 (12) should be amended to limit letters rogatory and to clarify the rule regarding default judgment.

**DISCUSSION:**

Rule 23 (12) states that “a commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms, and with such direction as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed to the appropriate judicial authority in the foreign country.” As a form of substituted service, this rule raises several issues, especially for international persons or businesses without residence or agents in the Philippines. For example, this form of substituted service on the clerk of court raises potential default judgment issues for international defendants. Such default issues could arise, where, for example, an Internet-based company that does not own any property in the Philippines and does not have a registered agent in the country is sued in the Philippines. If the plaintiff is unable to effect service by personal service or mail, service could be made by simply delivering proof of failure to serve by those means to the clerk of court. In examining this provision a foreign company or other foreign party might interpret it to mean that the defendant would then be subject to a declaration of default under Rule 9 (3), and possibly entry of judgment against them. As this practice is not the norm in the Philippines, the language of Rule 23 (12) and Rule 9 (3) should be altered to make this clear.

*c. Service by Publication*

**SUMMARY:**

The drafters should clarify provisions in the Rules relating to service by publication to include specific methods and time frames.

**DISCUSSION:**

One form of substituted service that has not been addressed is service by publication. In jurisdictions that allow service by publication, a party must obtain court permission to serve a person by publication. In addition, the newspaper announcement must generally run for several weeks (*e.g.*, once a week for three weeks), and, at the same time, a copy of the summons is mailed to the defendant's last known address. All of these rules apply to initially serving the defendant with a summons.

As for witnesses, American law generally requires the court to issue a subpoena. A new rule in the federal courts allows attorneys in some instances to issue subpoenas as well. A subpoena must generally be served on the named person; thus, a newspaper announcement would have no legal effect. It is,

therefore, possible for persons to evade a subpoena.<sup>15</sup>

In sum, if the address of the party is available, specific notice must be sent directly to the person. It is true that, in most cases, newspaper notice will not result in actual notice to the affected party. However, if the person's location and address are unknown, newspaper notice is considered “better than no notice at all.”

Under German law, if the place of abode of a party is unknown, the court may authorize the necessary service of process to be made by public notification, as per *Zivilprozessordnung* Articles 203 *et seq.*<sup>16</sup> A party must first request the court to grant such public notification.

Public notification comes into effect when the service of process is affixed to the court notice board. If the written document to be served contains a summons, then the document must also be published in the Federal Gazette (*Bundesanzeiger*) at least one time. However, as the publications which appear in the latter are practically inaccessible and the parties concerned do not take notice of them, the court can also rule that they appear in other publications. The authority to decree that the excerpt be published in other publications and/or be published repeatedly is found in *Zivilprozessordnung* Article 204.<sup>17</sup> The power of the court to require multiple publications of the notice is of particular importance because of Article 33 of the Basic Law. This article guarantees the right to be heard.

The public notification must carry the title of the court, the names of the parties, the subject of the action, and, in the case of a summons, contain the reason for and the time of the hearing. The summons is considered as having been served on the day from a month following the last publication. The court can declare a longer time-limit to be necessary. The general time-limits, the time for summons, or period for filing an offence begin from then on.

Finally, under Canadian law, where personal service is not possible, notice of action may be given, on order of the court, by newspaper (designated) or by any other means likely to be effective, including by advertisement on the radio or television.

### **3. Proof of Service and Filing Requirements**

#### **SUMMARY:**

Rules 13 and 14 should be amended to allow for a waiver of service.

#### **DISCUSSION:**

In terms of Rules 13 and 14 of the Civil Procedure Rules, regarding the initial service of process on defendants, the drafters might want to consider adding a provision allowing for a plaintiff to request a “waiver of service” as an alternative to perfecting service, if efforts by defendants to evade or contest service pose a significant problem in the Philippines. For example, FRCP Rule 4 allows a plaintiff to request a waiver of service providing both positive and negative incentives to defendants to keep from avoiding service, such as a longer time period to answer and liability for costs of service if they do not. It is important to note that the waiver approach does not replace traditional means of service, but merely provides an alternative.

A Waiver of Service Requirement is based upon a duty to avoid unnecessary costs of service of

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<sup>15</sup> However, if a defendant cannot be located, under certain circumstances an attorney can be appointed by the court to represent the defendant and receive the suit papers on his behalf.

<sup>16</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at arts. 203 *et seq.*

<sup>17</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 204.



summons that should be contained in the Civil Procedure Rules. As such, the Civil Procedure Rules should require certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant who, after being notified of an action and asked to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause can be shown for its failure to sign and return the waiver. It is not good cause for a failure to waive service that a party believes that the complaint is unfounded or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or even its person or property.

A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

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

**Example of a standard Waiver of Service:**

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

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the (court information). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided under the law.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion is not served upon you within 60 days after (date request was sent), or within 90 days after that date if the request was sent outside the Philippines.

Date Signature

Printed/typed name: { as } { of }

a. *Electronic Filing*

**SUMMARY:**

Rule 13 should be amended to allow for electronic filing.

#### **DISCUSSION:**

Rule 13 of the Civil Procedure Rules provides for the manner of filing of pleadings and other papers. In particular, Rule 13 (3) states that filings shall be made by presenting original copies personally to the Clerk of Court or by registered mail. The opportunity to elect to mail the papers as opposed to personally presenting them to the Clerk of Court appears to give an avenue for litigants who are incapable of filing the required papers in person. However, considering the current wave in the global economy, many courts in developed countries have resorted to e-filing. Litigants are now given a wide range of options including on-line filing or facsimile to the Court. A good example involves the United States District Courts, which encourage e-filing by litigants. This practice not only makes filing of pleadings easier, but also saves cost. Some United States Circuit Courts are also in the process of following suit. Pleadings, even when filed personally in the court, do not in some cases require personally filing before the Clerk of Court any longer. When the level of investment in computers and electronic communications in the Philippine courts and among the legal profession becomes sufficient, it may become desirable to permit electronic, rather than paper filing. Given the explosion of technology in transnational business, a provision allowing for electronic filing would be welcomed by foreign businesses. In the interim, the drafters may wish to allow such filings in Philippine courts specializing in international business litigation, which have the capacity to handle such filings, even before it is allowed in all Philippine courts.

#### **4. *Other Pre-Trial Evidentiary Mechanisms***

##### *a. Subpoenas*

#### **SUMMARY:**

Rule 21 should be amended to provide guidance as to what the scope of discovery is and should contain language specifying that discovery shall proceed only by court order.

#### **DISCUSSION:**

Rule 21 provides for the issuance of subpoenas, who may issue a subpoena, the proper form and content of a subpoena, and other related procedural matters. In general, Rule 21 provides for the issuance of subpoenas for “valid purposes.” It may be helpful for the drafters to provide some guidance regarding the scope of discovery and clarity for the parties involved than is provided by the current “valid purpose” language. For example, the drafters may wish to consider language similar to that in Rule 26 (b)(1) of the FRCP.<sup>18</sup> Furthermore, Rule 21 appears to be guided by a general principle that discovery shall proceed only on an order of the court. However, it would be helpful to have this principle included in the general statement regarding the scope of discovery.

##### *b. Depositions*

The drafters may wish to consider placing a time limit on depositions. For example, in the United States, the FRCP now limits the time available for a deposition to seven hours, except upon agreement of the parties or by order of the court. In addition, many states have imposed even shorter time limits.

#### **5. *Class Action***

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<sup>18</sup> United States, Fed. R. Civ. P., *supra* note 5 at Rule 26 (b) (1)

## **SUMMARY:**

Rule 3 should be amended to: (1) provide a better definition of what a class is; (2) specify what *res judicata* effect a judgment will have; (3) include language providing for fair notice to the class; (4) more clearly delineate the scope of the class and whether the class may act only as the plaintiff or whether the class may also be sued as a defendant in the suit; and (5) within the context of expansive aggregate litigation, address the lack of specifics regarding class action practice, which could be of major concern to foreign investors.

## **DISCUSSION:**

Rule 3 (12) states that “[w]here the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. Any party in interest shall have the right to intervene to protect his individual interest.” Rule 3 (12) also provides for the possibility of class litigation, where there is a “common or general interest” and the persons involved are so numerous that it is impracticable to join all of them as parties in the same proceedings. However, the text of Rule 3 (12) is insufficient in several regards. First, the definition of the class is too vague and general, mainly referring to the impracticability of the joinder of all parties. This allows too much discretion to the court in deciding whether or not the class suit is allowed to continue as such.

Second, although Rule 3 (12) states that the class suit should work “in the benefit of all,” it is not clear whether the judgment will have the *res judicata* effect only when it is favorable to the class, or also when it is contrary to the class. This distinction is important in light of the American model under which the judgment is binding on all the members of the class independently of its being favorable or unfavorable to the class. If the judgment is binding in any case, then a possibility of “opting out” should be afforded to the members of the class who may not want to wait for the final decision of the class suit, or who may prefer to pursue their cases on an individual basis and with separate proceedings.

Third, fair notice for all members of the potential class needs to be addressed. For example, the drafters may wish to consider language in the Civil Procedure Rules that will provide for the less expensive and most efficient means to inform all potentially interested persons of the class suit that is being started on their behalf, or that they are members of a class which could be a defendant in a class suit.

Fourth, Rule 3 (12) should more clearly delineate the scope of the class and whether the class may act only as the plaintiff or whether the class may also be sued as a defendant in the suit. Furthermore, it should specify whether a transnational class action is allowed in the Philippines. Specifically, the Civil Procedure Rules should make clear whether a foreign class may sue a Philippine defendant or a foreign defendant may sue a Philippine class. The transnational aspects of such proceedings need more effective regulation.

Finally, the current text of Rule 3 (12) potentially provides for expansive aggregate litigation, and its lack of details regarding the class action practice could be a major concern to foreign investors who might find themselves targets of class suits.

## **6. Pleadings and Dispositive Motions**

*a. Pleadings***SUMMARY:**

Rules 6-8 should be amended to be more concise and less detailed. However, Rule 9 is too vague regarding the consequences of default. In addition, the Rules do not require the indication of the evidence that the parties intend to present.

**DISCUSSION:**

In general Rules 6, 7, and 8 concerning pleadings are too analytical and unnecessarily detailed. The drafters may wish to consider whether shorter and clearer provisions will suffice. If the Philippines is interested in adopting the American system of fact pleading, it will be enough for the Civil Procedure Rules to simply require that the parties should allege in complete and sufficiently detailed terms the facts supporting their own claims (of any kind) and their own defenses (of any kind).

Rule 7, which states that “the pleading shall specify the relief sought, but it may add a general prayer for such further or other relief as may be deemed just or equitable,” affords too much discretion to the court in determining the nature and contents of the relief. At most, the court may be allowed, by the parties, to determine discretionarily the amount of monetary compensation for damages or credits. As to the nature of the relief, the plaintiff has to make their own final choice, and the court should be allowed only to accept or reject the plaintiff’s request. Furthermore, Rule 7 (4), which requires verification of pleadings, is unnecessary and should probably be deleted.

Rule 8 (1) states that “every pleading shall contain in a methodical and logical form, a plain, concise and direct statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, omitting the statement of mere evidentiary facts.” The statement that evidentiary facts should be omitted is unnecessary. In a consistent system of fact pleading, the pleadings should include a narrative of all of the relevant facts, *i.e.* the facts corresponding to the cause of action (the so-called material facts) *and* all the circumstances that may be useful in order to understand and to prove the material facts (the so-called circumstantial facts). A complete narrative of the facts is necessary not only to substantiate the pleading and to allow all of the other parties to prepare their defenses, but also to state the premises for the judgment concerning the relevancy and the admissibility of evidence.

Rule 9 (3) is vague concerning the consequences of default, particularly regarding the discretion of the court in determining whether a default is an admission of effects pleaded by the other party or whether the default should be considered a waiver of defense. In the former case of an admission of effects pleaded by the other party, the consequence of default would involve the court making a decision on the basis of the facts as pleaded by plaintiff even if they are not proved. In the latter case, a waiver of defense would leave the plaintiff with the burden of proving the facts with the consequence that the plaintiff would only prevail if plaintiff proved the material facts supporting its case.

Finally, the Civil Procedure Rules do not require the indication of the evidence that the parties intend to present with the aim of demonstrating the facts they have the burden to prove. Usually, such an indication is required in the pleadings in which the facts are stated, with the goal of providing the court and opposing parties information regarding the facts. This presentation allows the other parties to contest the relevancy and admissibility of the evidence offered and submit contrary evidence. It also allows the court to assess the relevancy and the admissibility of the

evidence offered.

*b. Dispositive Motions*

**SUMMARY:**

There are practical concerns that arise in the context of dispositive motions under Rule 16, motions for judgment on the pleadings under Rule 34, and motions for summary judgment under Rule 35 with regard to timing of hearings, notice of hearings, and the opportunity to submit opposition papers. Rule 15 makes no distinction between the timing for hearings on non-dispositive and dispositive motions.

**DISCUSSION:**

Dispositive motions are a critical part of litigation practice. There are some practical concerns that arise in the context of dispositive motions (including motions to dismiss under Civil Procedure Rule 16, motions for judgment on the pleadings under Rule 34, and motions for summary judgment under Rule 35) with regard to timing of hearings, notice of hearings, and the opportunity to submit opposition papers.

The Civil Procedure Rules make no distinction between the timing for hearings on non-dispositive and dispositive motions. Rule 15 provides that hearings on all motions must be noted at least 10 days after filing the motion. In the case of dispositive motions, which could undoubtedly affect a party's right to proceed, this is a very quick turnaround. In comparison, in some United States District Courts, the Court generally notes dispositive motions on at least a 28-day calendar.

In addition, in terms of notice of hearings, Rule 15 provides that the non-moving party be notified and receive a copy of the motion (except for summary judgment motions) at least 3 days in advance of the hearing. Again, in the case of dispositive motions, this is a very quick turnaround. In comparison, U.S. District Courts require notice of the hearing, and a copy of the motion, at least 28 days before the hearing.

On motions for summary judgment under Rule 35, non-moving parties are afforded an opportunity to respond in writing at least 3 days before the hearing. It appears that, on other dispositive motions, non-moving parties are not afforded an opportunity to respond in writing. The drafters should consider several rules governing motion practice including: (1) scheduling hearings on dispositive motions on more than 10 days' notice; (2) requiring that copies of dispositive motions (other than motions for summary judgment, which provide for service 10 days before a hearing) be served on the non-moving party more than 3 days before the hearing; and (3) providing non-moving parties the opportunity to respond in writing to dispositive motions.

In addition, the drafters should consider whether the second paragraph of Rule 7 (3), which states that "the signature of counsel constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay," adequately addresses the possibility of frivolous or harassing pleadings. If frivolous or harassing pleadings are a problem in the Philippines, this could be a deterrent to foreign and domestic commerce, and may demand more stringent provisions. For example, in the United States, FRCP Rule 11 is designed to prevent frivolous or harassing pleadings by imposing a strict disciplinary measure onto attorneys. In addition, the drafters must determine whether the Philippines follows the general rule of losers' liability for some portion of winners' reasonable

attorney fees, which would reduce the need for measures resembling FRCP Rule 11.

**7. *Provisional Remedies***

*a. Attachment*

**SUMMARY:**

Rule 57 (8) should be amended to include “in the Philippines” after “property” so that attachment is not seen as potentially overreaching.

**DISCUSSION:**

Rule 57 appears to avoid the risk of overreaching in terms of attachment by limiting the reach of the court to property and persons “in the Philippines.” The drafters should consider adding the words “in the Philippines” in Section 8 after the word “property” in the first sentence. This will help to avoid any issues relating to an attempt of the court to control property located out of the jurisdiction, but belonging to persons doing business in the Philippines or having branch offices in the Philippines. This will also help to alleviate concerns of foreign companies that doing business in the Philippines would expose them to being subjected in an overbroad manner to the jurisdiction of a Philippine court. Although the Philippines adhere to the tradition of many common law countries that preliminary attachment, such as that found in Rule 57, or preliminary injunctions, such as those found in Rule 58 (see below), are granted only after an action has been commenced, the Philippines may wish to consider permitting a court to issue preliminary measures before proceedings are commenced if it is necessary. In terms of authority for such a decision, the Philippines can rely on the American Law Institute (hereinafter “ALI”) UNIDROIT Principles of Transnational Civil Procedure (hereinafter “UNIDROIT Principles”). For example, under Principle 8.1, “the court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.”<sup>19</sup> In international cases, special measures like freezing orders (working *in personam* and not *in rem* like attachments) or search orders (patent or copyright cases) may be very useful, and perhaps they should be specifically mentioned.

*b. Preliminary Injunction*

**SUMMARY:**

Rule 58 should be amended so that it does not imply that a party must establish that it would prevail on the merits to obtain a preliminary injunction and Rule 41 should be amended to allow appeal for preliminary injunctions.

**DISCUSSION:**

Generally, workable rules that are traditionally applied in the U.S. appear to be set out in Rule 58. However, it seems anomalous that Section 3 states that a preliminary injunction may be granted “when it is established that the applicant is entitled to the relief demanded....” On its face this appears to suggest that the party must establish its right to relief on the merits (*i.e.* to a permanent injunction) before receiving a preliminary injunction. The drafters should consider specifying that a preliminary injunction does not require that the party must establish its rights to the relief on the

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<sup>19</sup> ALI, UNIDROIT Principles of Transnational Civil Procedure, Principle 8.1 (adopted by the American Law Institute in May 2004). Available at <http://www.unidroit.org/english/principles/main.htm> (last visited 1 September 2006).

merits before obtaining a preliminary injunction to avoid any confusion.

In addition, Rule 41 (1) (c) in combination with the concluding sentence at the end of the section appears to define very narrowly the circumstances in which the grant, denial, or modification of a preliminary injunction may be appealed immediately. However, this is contrary to the American practice under which interlocutory appeal of trial court actions, using the common standard of abuse of discretion, acts as an exception to the requirement that a final judgment is required before appeal. The drafters should include language in the Civil Procedure Rules to clarify that interlocutory appeals of trial court actions should only be allowed under a clear and stringent standard requiring abuse of discretion to avoid the use of such appeals to delay proceedings.

## **8. *Discovery***

### **SUMMARY:**

Rules 23-28 should be amended to either provide for a broad discovery model or a more limited discovery model. Rule 14 (15) and Rule 21 (6) should be amended to include extra-territorial discovery and service. Rule 27 should be amended to designate the required evidence to obtain a court order to produce documents or tangible things.

### **DISCUSSION:**

The Philippines' system appears to be modeled on the "broad discovery" model of the United States in which any item of evidence may be discovered in the pre-trial phase. The question the drafters should consider is whether a broad discovery model should be maintained under Rules 23 and 24 (Depositions), Rule 25 (Interrogatories), Rule 26 (Admissions), Rule 27 (Inspections), and Rule 28 (Examinations). The broad U.S. approach is not utilized in other common law countries, such as England, where discovery is limited to documents, or in civil law systems, where discovery is also limited to documents. A broad discovery model is unpopular in many countries, many of which have made reservations under Section 23 of the Hague Convention on the Taking of Evidence Abroad<sup>20</sup> (hereinafter "Hague Convention on Evidence"), or the so-called "blocking statutes" enacted by a number of countries to prevent the enforcement of American discovery orders. Therefore, the trend has been to move away from the American model.

In addition, a broad discovery model is aimed at obtaining a forced disclosure of the evidence in possession of other parties or non-parties, as well as to obtain facts that may support the case of the party seeking discovery. This is consistent with a "notice-pleading" system, such as that in the FRCP. However, this is inconsistent with a "fact-pleading" system adopted in most parts of the world, including Great Britain, where a plaintiff is supposed to file a claim only after verifying that the facts exist to support it. In a fact-pleading system, pre-trial discovery should be strictly restricted to the disclosure of relevant evidence and the drafters may wish to consider limiting discovery to documents. It is important to note that only documents relevant to the facts specified in the pleadings, rather than broad and vague standards such as those in the U.S., should be maintained. Essentially, relevancy of facts to the pleadings should be interpreted in a strict sense, thereby prohibiting so-called "fishing expeditions."

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<sup>20</sup> Hague Conference on Private International Law, HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD Section 23. Available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82) (last visited 1 September 2006)

Another area of consideration involves alternate means of discovery; for example, it may be worth considering including a provision for electronic discovery. However, allowing electronic discovery without seeking the leave of the court for discovery of e-documents that are not reasonably accessible should be avoided, as it could lead to an abuse of the discovery process.

The drafters may also wish to consider amending the language of Rule 25, to limit the number of interrogatories available during discovery. For example, many jurisdictions set a limit of 25.

Furthermore, the drafters should address the issue of extraterritorial discovery. For example, Rule 21 (6) governing the service of a subpoena, states that “service of a subpoena shall be made in the same manner as personal or substituted service of summons...” However, this provision does not appear to address circumstances in which extraterritorial discovery will be permitted to parties or non-parties. Rule 14 (15), which governs extraterritorial service of summons, is linked to the kind of lawsuit in which that form of service is permitted (actions relating to personal status or Philippines-sited property). This limitation does not easily translate into a guide for determining when a subpoena with extraterritorial effect may issue for testimony or documents, particularly as the subpoena rule, unlike the summons rule, applies to non-parties. Greater clarity on this would be helpful. In addition, limitation on the scope of extraterritorial discovery with respect to non-parties is important. Limiting the scope of extraterritorial discovery will promote the use of less intrusive means of obtaining discovery, such as letters rogatory.

Rule 23 (12) provides that “a commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms, and with such direction as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed to the appropriate judicial authority in the foreign country.” However, this means of obtaining international discovery is not mentioned elsewhere, nor are the means for obtaining issuance of letters provided in any detail. There also appear to be no indications of what standards will be applied in issuance and whether this rule is intended to be in lieu of, or merely in addition to, the broad subpoena power provided in Rule 21. Although, as noted, there appears to be broad ability to serve subpoenas extraterritorially, Rule 21 (10) seems to eliminate the enforcement mechanisms at least for non-party witnesses residing more than 100 kilometers from the place of testimony. In the case of party witnesses, other remedies are available, such as preclusion of evidence. Given the narrow scope of extraterritorial litigation, and the ability of the court to quash a subpoena on grounds that it is oppressive or unreasonable, this may be sufficient protection, but some clarification of intent would be helpful. If the use of letters rogatory were required in order to obtain non-party discovery not located in the Philippines, this would prevent overreaching and potential friction in foreign relations among the relevant governments. Although the U.S. has not always adhered to this view, it does continue to recognize that principles of international comity may require use of such means of discovery that involve the assistance of the relevant foreign government. A greater respect for foreign sovereignty by endorsement of letters rogatory would be appropriate. It should be noted that the Philippines is not a signatory to the Hague Convention on the Taking of Evidence Abroad. Doing so would provide a direct means of addressing these issues.

Finally, it may be important to indicate the availability of discovery of information lodged in the Philippines in connection with non-Philippine litigation. Among other things, many countries will want assurances of reciprocity before honoring letters rogatory, and these rules provide none. For example, the United States addresses this issue in 28 U.S.C. § 1782, which permits broad U.S.-style

discovery in aid of a foreign proceeding.<sup>21</sup> A more narrowly drawn version of that provision would indicate a willingness to participate on an appropriate basis in the international field.

Rule 27 (1) provides that “upon motion of any party showing good cause therefor, the court in which an action is pending may (a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control, or (b) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place and manner of making the inspection and taking copies and photographs, and may prescribe such terms and conditions as are just.” However, Rule 27 does not provide reasonable specification of evidence as a prerequisite of a court order to produce documents or tangible things. According to UNIDROIT Principle 11.3, “in the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.”<sup>22</sup>

### **C. Trial Phase Procedural Issues**

#### **1. Evidence**

##### **SUMMARY:**

The Rules of Evidence should be directly referenced to clearly identify how evidence may be presented and to provide for a general rule on relevancy consistent with those rules. Rule 30 (5) should be amended to include a provision on the examination of witnesses (or also expert witnesses and/or parties). Rule 30 (9) and Rule 32 should be amended to ensure evidence is presented directly to the trier of fact.

##### **DISCUSSION:**

The Philippines’ Civil Procedure Rules need to make direct reference to the applicable Rules of Evidence for the Philippines in order to provide a clear regulation of the presentation of evidence. Such cross references should be introduced into the Civil Procedure Rules, taking into consideration specific rules determining which evidence is excluded, such as illegally obtained evidence, privileged evidence (*i.e.* Rule 130, Sections 21-25), or evidence inadmissible for any other reason. The drafters can determine which provisions of the Rules of Evidence are relevant and either cross-reference or provide verbatim sections as appropriate. This will alleviate any questions and ambiguity that may arise, especially on the part of foreign businesses (see Rules of Court 128 to 134, Rules of Evidence adopted March 14, 1989, Appendix C). In addition, a general rule of relevancy of the evidence to the facts in issue should be clearly stated. Moreover, there are additional changes or clarifications that should be made. First, it is worth noting in the Rules that the evidence should be offered by the

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<sup>21</sup> United States, 28 U.S.C.A. § 1782.

<sup>22</sup> ALI, UNIDROIT Principles, *supra* note 19 at Principle 11.3.

parties in the pleadings, in which the parties allege the facts that should be proved. The court should then decide relevancy and admissibility of the evidence offered by the parties in the pre-trial hearing, or at the latest, before trial. Second, the Civil Procedure Rules should provide the court with the power of ordering its own motion for the presentation of any relevant and admissible evidence not offered by the parties. In some cases, the court may order the presentation of any kind of evidence, while in other cases, only some items of evidence may be ordered. The drafters will have to make this policy choice regarding procedure for evidence. Third, the probative weight of documents and the devices to verify their authenticity should be addressed. Specific kinds of evidence, such as expert evidence, should be regulated in detail. Finally, other issues, such as whether a party may be examined as a witness, should be solved by specific rules.

Rule 30 (5) provides that the parties will “adduce” the evidence in a specific order. However, there is no provision indicating the way in which the evidence should be adduced. In particular, there is no provision concerning how the witnesses (or also expert witnesses and/or parties) should be examined. The Civil Procedure Rules should specify that witnesses are to be examined by the court, or the parties’ lawyers according to the technique of direct and cross examination, as contained in the Rules of Evidence.

Rule 30 (9) is problematic in regards to allowing delegation by the court to other bodies for receipt of evidence. In all modern systems, the fundamental rule is that the evidence has to be presented directly to the trier of fact (jury, judge, or panel of judges) that will determine the probative value of the evidence presented. In addition, Rule 32 is also problematic in the same regard.

Again, the drafters are encouraged to cross-reference or include relevant sections of the applicable Rules of Evidence as appropriate.

The basic American rule is that the judge is neutral and it is the responsibility of the parties to present their own case. Under the FRCP and most State laws, evidence is produced by the parties. It is not routine for an American court to “offer to produce supplementary evidence or gather evidence on its own initiative.” Evidence generated on a court's own initiative is normally limited to cases where conflicting “expert” evidence (scientific, medical, etc.) is crucial to the decision of the issue. Many American tort cases depend on conflicting expert testimony as to causation. For example, the question may arise of whether the defendant's chemical caused the plaintiff's illness or whether the defendant's design for a truck contained an inherent defect causing the truck to crash and burn and kill three people. Some trial judges will see their way out of a seeming impasse, where equally well-qualified experts present diametrically opposing views or analyses, by appointing a neutral expert.

In Germany, the civil lawsuit is characterized by the principle of party autonomy. Essentially, it is up to each party to state, and to try to prove, such facts as may be necessary to sustain his or her legal point of view. Parties have to decide for themselves on the facts to be presented in court and the manner of their presentation. Party autonomy is limited only where overriding general interests are involved. In addition, if a party fails to offer evidence for a fact contested by the opposing party, the court may remind the party making the assertion of the “*onus probandi*” (i.e., the necessity to offer suitable evidence).

Under *Zivilprozessordnung* Article 144, a court may also take evidence *ex officio*.<sup>23</sup> This provision entitles the court to order the production or gathering of evidence by judicial inspection or expert opinion, even in the absence of a party motion. In matrimonial, family, and parent-child cases, the principle of judicial

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<sup>23</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 144.

investigation is applied extensively.

In Canada, reflecting the tradition of continental civil procedure in Quebec, the present Code of Civil Procedure explicitly authorizes the judge to intervene for purposes of adducing new evidence. For example, Article 292 provides that: “[a]t any time before judgment, the presiding judge may draw the attention of the parties to any gap in the proof or in the proceedings and permit them to fill it, on such conditions as he may determine.”<sup>24</sup> Case law has determined that there is now an obligation on the part of the judge to intervene in such a case. In addition, Article 2810 of the Civil Code goes further in providing: “The court may, in any matter, take judicial notice of the facts in dispute in the presence of the parties or where the parties have been duly called. It may make any verifications it considers necessary and go to the scene, if need be.”<sup>25</sup>

In terms of the production of evidence, an American trial judge has discretion under the Rules of Evidence to determine what documentary evidence is admitted in a civil trial. It is always within the control of the trial court whether a particular evidentiary request is unreasonably burdensome, repetitive, irrelevant, or a waste of time for any other reason. If a given request for evidence would be unreasonably burdensome or repetitive, then the court has two choices. Either the party calling for that witness can be compelled, by the court, to reimburse the non-party witness for that witness’ time, trouble, or expenses or the court can simply “quash” the subpoena and excuse the witness from complying with what is deemed to be an unnecessary or unreasonable request.

In Germany, production of evidence by the parties is not obligated. Under the German civil procedure law there is no general obligation on parties to submit relevant documents. As a consequence of the principle of party presentation, the parties are free to decide whether they want to introduce a document into the litigation or not. The opponent of a party bearing the burden of proof is only obliged to submit a document, if the party bearing the burden of proof is entitled to claim the surrender or submission of the document in question by virtue of the civil law.<sup>26</sup> By way of example, Articles 371, 402, 716, 985, and 1144 of the Civil Law contain obligations to surrender documents.

The key is Article 810 of the Civil Law, which reads as follows:

A person having a legal interest in inspecting the contents of a document, which is in possession of another person, is entitled to request permission of the possessor to inspect the document, if the document was set up for his benefit or if the document records a legal relationship existing between him and another person, or if the document contains negotiations relating to a legal transaction, conducted between himself and another person, or between one of the two and a common mediator.

In Canada, the duty to present documentary evidence is limited by professional privileges which exist, by what is known as the litigation privilege (extending to work produced for purposes of litigation), and by a further notion of general privilege which may be extended, through judicial decisions, to relations of confidentiality where privilege is considered justifiable.

In terms of time limits on the presentation of evidence, the general practice in the United States is that after a case has been tried and a final judgment has been entered, most jurisdictions give an unsuccessful

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<sup>24</sup> Canada, Code of Civil Procedure Article 292.

<sup>25</sup> Canada, Code of Civil Procedure, *supra* note 24 at art. 2810.

<sup>26</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 422.

party no more than a week to ten days to present new evidence to the court for a rehearing or new trial. If an unsuccessful litigant wishes to have a new hearing, the litigant must show the judge that any new evidence was not available during the first trial.

In addition, as is the case in the Philippines, many United States judges require “pre-trial orders” including an exchange of witness and exhibit lists. American judges will decline to allow parties to use exhibits or call witnesses not listed, unless there is a good explanation for the failure. As this discretion is also an option for Philippine judges, it is important that they feel empowered to use this option when necessary to ensure fair and timely proceedings.

In American practice, the most important cut-off point for the presentation of evidence is the end of the trial.

In Germany, in preparation of the court hearing<sup>27</sup> and in the course of the preliminary written proceedings,<sup>28</sup> the court may require the parties to supplement and clarify preparatory pleadings, submit documents, present means of defense, and submit a written statement in reply to the defendant's plea. The obligation may be subject to a deadline. If the parties submit statements or offer evidence after the expiration of the deadline set by the court, these submissions or motions are only admissible if the court is of the opinion that the admission will not cause a delay in terminating the lawsuit and if the court finds that the parties have offered satisfactory excuses for the delay.<sup>29</sup> When setting a deadline, the court has to instruct the parties as to the consequences of delay.

In Canada, a court on its own initiative may call for new evidence at any point during the trial itself. Where evidence is sought to be introduced by a party which is not within the pleadings, the evidence will be refused unless an amendment to the pleadings is granted. This grant will not be given if prejudice is caused to the opposite party, though prejudice may often be offset by delay or adjournment to allow response. Amendments are given rather liberally.

## 2. Contempt

### SUMMARY:

Rule 71 (1)'s authorization for contempt for “offensive personalities toward others” is too broad and the drafters should further define and delineate the scope of contempt, balancing the discretion of the judge while taking into consideration the ability of foreign businesses to defend their interests. Rule 71 (8) should be amended to specifically include language authorizing the possibility of a daily fine and/or imprisonment to coerce compliance with a court order.

### DISCUSSION:

Fines and custody or arrests are not usually part of American civil procedure, except when a party may be in contempt of court. In the United States, monetary sanctions, in the nature of fines, can be imposed for failure to comply with pre-trial obligations or court orders, or for totally frivolous conduct in litigation. However, such sanctions are requested far more often than they are granted. The situation has occurred where litigants requested sanctions against their adversaries for filing a frivolous sanctions application against the litigants themselves. Some years ago monetary sanctions were considered by

<sup>27</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at arts. 273 (2) (1), 275 (1) (1) and (3), and 277.

<sup>28</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at arts. 276 (1) (2) and 276 (2) (3).

<sup>29</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 276.

many judges to be a possible solution to unmerited lawsuits and unwarranted delays by lawyers, but most judges now feel (except in extreme cases of dishonest or unethical behavior) that far too much time is wasted in arguing about sanctions. Nonetheless, this option is within total discretion of the trial court.

As for custody, this concept is almost entirely irrelevant in American civil practice. Imprisonment for debt is improper under the United States Constitution and even those very few circumstances under which civil arrest theoretically had been allowed to secure the plaintiff (for example, if the defendants had defrauded the plaintiff) are no longer available. For example, New York repealed its civil arrest statute (Article 61 of the Civil Practice Law and Rules) in 1979.

What amounts to “custody” or arrest is, however, relevant in cases of both civil and criminal contempt of court. Civil contempt, in the United States system, is coercive and is the remedy for a person who refuses to obey an injunction. If a person is enjoined (*i.e.*, required by court order), for example, to remove an obstruction on a public bridge and fails to do so, he or she can be fined or imprisoned (or both) until he or she complies with the injunction. So too, if a person has been served with a subpoena (a court order to appear in court) and fails to appear in court, the person may be held in contempt of court. As a practical matter, the vast majority of people actually put in jail for civil contempt are those who do not pay alimony or child support to their ex-spouses and children.<sup>30</sup>

Before a person can be found in contempt of court, they must be given an opportunity to be heard (a “show cause hearing”). Contempt of court should be utilized to coerce compliance, not to punish. As indicated, punishment could include fines or imprisonment, but, normally, a money judgment is not enforceable by arrest or imprisonment.

A judge can exercise substantial discretion through the use of subpoena and contempt powers. It is incumbent upon judges to take control of their courtrooms and set the standard for the flow of cases. Given the large backlog of cases in the Philippines, the drafters should ensure that the rules provide the necessary mechanisms to move cases forward. Judges should have and utilize powers of contempt and subpoena where necessary to ensure that justice is not delayed.

In Germany, if a witness fails to appear after being duly summoned, the court can impose an administrative pecuniary penalty on that person. This penalty can be imposed again should the witness repeatedly fail to appear. In the alternative, the court may fix an administrative confinement ranging from one day to six weeks. The witness is also required to pay the costs caused by their failure to appear.

If the witness has already been punished for failure to appear, and fails to appear again in the same case, compulsory attendance can be ordered. The court can order mandatory appearance to be effected by the bailiff with the assistance of the police, if necessary.

Should an expert not follow court orders to give a written or oral expert opinion, the same sanctions may be applied, except that no confinement and no compulsory attendance can be ordered.

Should one of the parties fail to appear at a trial despite a court order for that party's personal

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<sup>30</sup> For historic reasons, which are far beyond the scope of this assessment, divorce proceedings take place in courts of equity. Courts of equity issue mandatory orders and injunctions rather than money judgments. Therefore, a defendant ordered to pay his ex-wife \$100 a week in alimony who fails to do so can be arrested and jailed for contempt of a court order, rather than be merely subjected to having his property seized by the sheriff.

appearance, that party may be subject to administrative pecuniary penalties, just like the witness who fails to appear. A party will not be subject to sanctions, however, if their representative, who is familiar with the case and who is entitled to reach a settlement, is present.

Finally, it is possible to lodge an appeal, the so-called “ordinary appeal”, against the administrative penalties. Such an appeal has a postponing effect on the imposition of the sanctions.

In Canada, fines may be levied for contempt of court, broadly defined as impairing the administration of justice. Imprisonment is also possible.

In terms of the Civil procedure Rules, Rule 71 (1) states that “[a] person guilty of misbehavior in the presence of or so near a court as to obstruct or interrupt the proceedings before the same, including disrespect toward the court, offensive personalities toward others, or refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when lawfully required to do so, may be summarily adjudged in contempt by such court and punished by a fine not exceeding two thousand pesos or imprisonment not exceeding ten (10) days, or both, if it be a Regional Trial Court or a court of equivalent or higher rank, or by a fine not exceeding two hundred pesos or imprisonment not exceeding one (1) day, or both, if it be a lower court.” The authorization for contempt for “offensive personalities toward others” can be threateningly broad. It is suggested that the drafters consider further defining and delineating the scope of this term, balancing the discretion of the judge while taking into consideration the ability of foreign businesses to defend their interests.

In addition, Rule 71 (8) provides that “when the contempt consists in the refusal or omission to do an act which is yet in the power of the respondent to perform, he may be imprisoned by order of the court concerned until he performs it.” This section should be amended to specifically include language authorizing the possibility of a daily fine and/or imprisonment to coerce compliance with a court order. Strong enforcement provisions against disobedience of court orders are, of course, entirely appropriate, and daily fines should be available to the courts as flexible and effective enforcement tools. Essentially, courts should have the option to impose either a fine and/or jail sentence, depending on the severity of the contempt, or to determine whether a fine and/or imprisonment is the best means to obtain compliance. The drafters should consider whether the amount of the fine should be limited, as it is under Rule 71 (1), and whether the term of imprisonment can exceed the ten day limit contained in Rule 71 (1) as well. If the purpose of Rule 71 (8) is to provide alternative means of enforcement and punishment, then these amounts should be set at levels that can best guarantee compliance.

## **D. Post Trial Issues**

### **1. *Drafting of Judgment***

#### **SUMMARY:**

Rule 36 (1) should be amended so that a judge is only required to sign off on the final orders or judgments of the court and not required to personally write them.

#### **DISCUSSION:**

Rule 36 (1) states that “a judgment or final order determining the merits of the case shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of the court.” Although this clause is consistent with the Rules of Court as well, the drafters should consider revising the language of Rule 36 (1) such that a judge is only required to sign off on the final orders or judgments of the

court, and not require that they be personally written by a judge. In addition, it should not be enough for the judge to “state clearly and distinctly the facts and the law” on which the judgment is based. A reasoned opinion should include the arguments on the basis of which the judge has found that the fact(s) were proved or not proved (*i.e.* the reasons supporting the judge’s evaluation of the evidence presented), and the arguments justifying the judge’s interpretation of the law that have been used as a basis for the decision. The obligation of the judge to provide a reasoned opinion concerning both the facts and the law is a general principle in most modern procedural systems and is considered a fundamental guarantee of the administration of justice. When the court is composed by a panel of justices, the possibility for each member of the panel to deliver concurring or dissenting opinions should be admitted. Therefore, the drafters should include language requiring the judge or panel of justices to provide a reasoned opinion and analysis even if merely signing off on the reasoned opinion drafted by a delegated member of the court. The Civil Procedure Rules should also encourage the use of form decisions or templates where appropriate, especially in minor criminal or civil cases. The forms can be designed to comply with any constitutional requirements to state the facts as well as the legal conclusion, in a brief synopsis.

## ***2. New Trial and Relief from Judgment***

### **SUMMARY:**

Rule 38 (5) should be amended to provide guidelines for when a preliminary injunction can be issued and to provide for bond sufficient to cover any potential harm.

### **DISCUSSION:**

Rule 38 (5) states that “[t]he court in which the petition is filed may grant such preliminary injunction as may be necessary for the preservation of the rights of the parties, upon the filing by the petitioner of a bond in favor of the adverse party, conditioned that if the petition is dismissed or the petitioner fails on the trial of the case upon its merits, he will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction or the other proceedings following the petition, but such injunction shall not operate to discharge or extinguish any lien which the adverse party may have acquired upon, the property, of the petitioner.” The scope of this section is so broad that it could invite corrupt activity. Given the current efforts to stem corruption in the judiciary, this provision should be amended to allow for less discretion by an individual judge. Much would depend on how readily or reluctantly judges granted such preliminary injunctions, and on whether grants were conditioned on bonds that were fully compensatory for any harm the judgment-winner might suffer from enforcement being temporarily enjoined.

## ***3. Appellate Issues***

### ***a. The Extent to Which Evidence Is Presented to a Second-Tier/ Appellate Court***

In the United States, evidence is usually not admissible in an appellate court. American procedural rules (or rules of evidence) operate on the general assumption that facts are conclusively decided by the trier of fact and are thus generally not subject to review on appeal. Therefore, American appellate courts normally decide to affirm, reverse, or modify the judgment of the trial court entirely on the basis of the record created in the lower court. There is one exception to this worth mentioning: in many states, inferior, local courts (often called “courts not of record” such as country justices of the peace or small-town municipal courts) hear small civil cases. The jurisdiction of such courts is often limited to

cases involving less than \$5,000, as well as traffic violations and other petty criminal matters. The “appeal” from such courts is often to the superior trial court of the state. In those cases, there is often a right of a “trial *de novo*.” The so-called “appeal” is not a true appeal at all, but merely a right to have the case heard over again by a higher-level court.

In Germany, the text of Article 98 makes clear that it is within the discretion of the court of appeals to reevaluate evidence that was previously examined by the lower court.<sup>31</sup> The German Code of Civil Procedure provides some guidance. If the appeal is timely and the amount in controversy meets the minimum requirement under *Zivilprozessordnung* Article 525, the case may be completely retried before the court of second instance. All procedural acts of the proceedings at first instance remain valid. The testimony of witnesses is also deemed to be testimony in the second instance and is, therefore, not treated as proof by document. In addition, admission of facts made in the proceedings of first instance remains valid for the purpose of the appeal proceedings.<sup>32</sup>

The pertinent provisions of the *Zivilprozessordnung* (Articles 523 et. seq.), and court decisions interpreting these provisions, establish that appellate courts have a certain degree of discretion to assess anew evidence that was presented and examined in the court of first instance. However, that discretion is limited. Reevaluation may become mandatory if the appellate court intends to deviate from a finding adduced by the lower court. For example, if the appellate court has doubts about the credibility of a witness on whose testimony the lower court rested its holding; the appellate court has no discretion but must hear this witness again. The same result follows in cases in which the appellate court feels, contrary to the court of first instance, that the testimony of one witness carries greater weight than that of another witness. The mandatory reevaluation of evidence by the court of appeals is not limited to witnesses but applies to all other kinds of evidence as well. Thus, the court of appeals cannot simply discard as unpersuasive an expert opinion on which the lower court relied. The appellate court will have to obtain a new expert opinion to support its decision not to follow the original opinion. Similarly, the appellate court cannot read into the expert's written report a conclusion that differs from the interpretation of the lower court. Instead, the expert must be called to testify in the appellate court.

In conclusion, under German law, reevaluation of evidence appears to be mandatory if the court of appeals disagrees with the lower court's interpretation of evidence and if accuracy in interpretation is felt to require the independent assessment of such evidence through the appellate court.

In Canada, evidence is not re-heard in the Court of Appeal. The appeal is based on the written transcript of the proceedings below. Exceptionally, permission to adduce new evidence may be given, though this is rarely done.

*b. The Extent to Which Procedures Are Simplified in Second-Tier/ Appellate Courts*

In American courts, appellate courts can award the equivalent of “summary judgment” through a similar procedure, called a “motion to affirm,” whereby the Court can summarily dispose of a meritless appeal.

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<sup>31</sup> Article 98 reads:

(1) If a witness, an expert, a party under truth affirmation have been examined or a view of the locus in quo has been held in the lower court, the production of that evidence once again in the court of appeals shall not be obligatory unless the court of appeals considers it necessary or any of the participants in the suit insists on that and the court finds that the reproduction of the evidence is important.

(2) If the evidence is not produced once again in the court of appeals, the respective records and documents shall be disclosed.

<sup>32</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 522.

Normally, a corresponding procedure for a summary reversal does not exist. The difference between a “motion to affirm” and a regular appeal simply means that the parties may not be required to file the regular detailed legal memoranda or “briefs” and to appear for an oral argument on an appeal which is found to be without merit on its face.

Under German law, it appears that simplified procedures for appeals exist only for purposes of determining whether an appeal is allowable or not. Specifically, under *Zivilprozessordnung* Article 519 (b), the court of appeals has to examine *ex officio* whether the appeal as such is permissible, whether it has been submitted in the proper statutory form, within specified time-limits, and whether it sets forth reasons for the appeal. If these requirements have not been complied with, the court may reject the appeal as inadmissible without any oral hearing.<sup>33</sup>

The law enables courts of appeal to reject appeals in a simplified procedure. In addition, the court of appeal will summarily vacate the lower court's judgment and remand the case to the lower court if “a grave procedural error”<sup>34</sup> affected the decision of that lower court. Article 318 lists, among other things, those grave procedural errors that force the court of appeal to vacate the lower court's decision.

In Canada, an appeal may be dealt with summarily on motion by the respondent, alleging an irregularity in the appeal, the non-existence of the right of appeal, or the improper, dilatory, or abusive character of the appeal.

*c. The Extent to Which a Second-Tier Court Reviews a Case or Appeal*

In Germany, pursuant to *Zivilprozessordnung* Article 525, the appellate court hears the lawsuit anew within the limits set by the parties' appeal petitions.<sup>35</sup> *Zivilprozessordnung* Article 537 specifies that the “object of the proceedings and decision of the court of appeals comprise all issues relating to a granted or denied claim which require a proceeding and decision in accordance with the petitions, even if these issues were not adjudicated in the court of first instance.”<sup>36</sup> “Issues” denote all factual or legal arguments either in support of or in defense against a claim. For example, if the lower court failed to consider the defendant's argument that the plaintiff's claim was subject to a statute-of-limitation defense, the appellate court will have to pass judgment on this issue.

There are good reasons for limiting the appeal to the original claim. In particular, if a new or expanded claim required factual considerations that were not presented to the lower court, claim expansion or the addition of new claims would undermine key functions of the lower court proceedings, *i.e.*, to evaluate and to decide all relevant factual issues in a speedy fashion.

If, on the other hand, an expanded claim or a new claim rests on the same set of facts as the original claim before the lower court, the adjudication of all claims on appeal may promote judicial efficiency. The final disposition of all claims would then tend to obviate future litigation between the parties, without depriving the original court of its fact-finding function.

In sum, while German courts of second instance are able to fully reexamine the facts of a case and issue a new decision, German courts of third instance are exclusively concerned with issues of law and the

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<sup>33</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 519 (b).

<sup>34</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 292(1)(1).

<sup>35</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 525.

<sup>36</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 537.

correct application of procedural or substantive law by the court of second instance.

In Canada, most jurisdictions adhere to the maxim *tantum devolutum quantum appellatum*. The Court of Appeal is seized only to the extent of the appeal. Amendment is possible, however, with leave of the court.

*d. Review of Appellate Court Decisions by Still Higher Judicial Bodies, or, Review by a Supreme Court*

Under German law, one can seek review of the decisions of the court of appeals. This review remedy is limited to the legal examination of the contested judgment. The facts, as established by the prior judgment, are binding on the Federal Court of Justice (*Bundesgerichtshof*) as the court of review, unless a procedural error occurred in the course of establishing the facts. Review proceedings aim at maintaining the uniformity of the case law of the courts while developing the legal system. Proceedings to review appellate court decisions also serve to ensure that justice prevails in individual cases. In the case of lawsuits pertaining to property rights, in which the value of the complaint does not exceed 60,000 DM (approximately USD 40,000), or relating to non-property rights, review of the appellate court's judgment is only allowed if the Higher Regional Court (*Oberlandesgericht*) has granted leave to review. The court has to grant leave if the lawsuit is of fundamental importance or if the judgment digresses from a ruling of the Federal Court of Justice or of the Joint Senate of the Supreme Federal Courts (*Gemeinsamer Senat der Obersten Gerichtshofe des Bundes*) and the decision of the court of appeals is based on the dissenting legal opinion. A lawsuit is considered to be of fundamental importance if the issue in dispute has not yet been decided by a Supreme Court. It also seems that review is available if the court of appeals has rejected an appeal on the grounds that the appeal was not permissible. That is, it appears one may appeal the rejection of an appeal. More specifically, *Zivilprozessordnung* Article 551 lays down the absolute grounds of review.<sup>37</sup> A ruling not based on one of these grounds is always deemed to constitute a violation of the law.

With respect to what in North America might be termed “Supreme Court” procedures, it must be noted at the outset that “cassation” is not known in North America. Rather, Supreme Courts function generally as courts of appeal with power to dispose of the merits of the case. Access is generally only with leave, and the volume of cases is vastly inferior to that of courts of cassation in Europe.

*e. The Extent to Which a Second-Tier Court Reviews a Case or Appeal; the Authority of Appellate Courts; and Review of Appellate Court Decisions by Still Higher Judicial Bodies, or, Review by a Supreme Court*

## **SUMMARY:**

Rules 40, 41, and 42 should be amended to remove the possibility of two successive appeals and provide for one appeal against the judgments delivered by the court of first instance, with a further appeal to the Supreme Court against the judgments delivered by the intermediate appellate courts.

## **DISCUSSION:**

In American practice, appellate courts review cases only upon the trial court record. As noted above, appellate courts do not retry the case and usually reverse only when there are errors of law.

Parties to a lawsuit who receive a trial in a competent court should be entitled to one plenary review of what occurred in the trial court. This review can take place in the second-tier or intermediate appellate court. Accordingly, the highest court, the court of “last resort” could (in civil cases) properly limit its

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<sup>37</sup> Germany, *Zivilprozessordnung*, *supra* note 9 at art. 551.

appellate review to cases where a “third look” is important. Situations where the opportunity for a third look might be appropriate might include:

- (a) Cases where the appellate court reversed the decision of the trial court for reasons of constitutional or legal significance;
- (b) Cases where the views of the judges sitting on the intermediate appellate court were sharply divided;
- (c) Cases of extraordinary legal or national significance, but such a certification could appropriately be made by either the trial court or the second-tier court;
- (d) Cases in which various intermediate or second-tier appellate courts have reached different results as to applicable law, and it would be desirable to have a question settled definitively; and, perhaps,
- (e) Cases where the actual amount in controversy was so large as to justify, in the public interest, review by a court of last resort.

In sum, with respect to the general questions on “authority” and “procedures” in an appellate court, the basic American view is that one plenary appellate review of the trial court's determination should suffice in the normal case.

Under most circumstances in the United States, an arbitration ruling is not appealable to a court. Therefore, a party dissatisfied with an arbitration ruling should usually not be allowed to “run to the court” for a second adjudication of the merits. If arbitration in a given case has been contractually required, a party dissatisfied with arbitration can only seek judicial review if there was fraud or collusion in the arbitration process.

In terms of the Civil Procedure Rules, Rules 40, 41, and 42 create a system based upon the possibility of two successive appeals, while Rule 45 provides a further appeal by *certiorari* to the Supreme Court. The drafters should consider whether these provisions create an excessively complex system given that the modern trend is to limit the possible number of appeals. The most common system is based on one appeal against the judgments delivered by the court of first instance, with a further appeal to a supreme court against the judgments delivered by the intermediate appellate courts. Although the Philippine state system may explain this preference, the drafters may still wish to limit the appeals to conform to the common approach in most systems. In addition, although the current regulation of appeals is detailed, it is in some ways vague and defective. For example, it is not clear which kind of appeal is provided. Specifically, it is not clear whether the appeal can be based upon any kind of error of fact and of law, thus vesting the appellate court with the power to decide the case *de novo*, or whether the appeal is aimed at attacking the legal grounds of the lower judgment and the legal fairness of the proceedings in the lower court. Rule 40 (7) (b) states only that the appellant shall submit a memorandum discussing the errors imputed to the lower court, but does not clarify which errors can be imputed. Rule 44 (13) (b) also states that the appellant's brief should contain an “assignment of errors,” and that such errors should be “separately, distinctly and concisely stated,” but it does not say anything about the nature of the errors on which the appeal should be based. Moreover, Section 13 (a) says that the brief should contain “a clear and concise statement of the issues of fact or law” that are submitted to the appellate court, and Section 14 (b) says that the appellee shall “accept the statement of facts” made by the appellant, or point out the insufficiencies or inaccuracies of such a statement.

Currently, litigants often take interlocutory appeals on specific issues and thereby delay the trial of

the case. Once the issue is decided on appeal, which in some cases takes a year or more, litigants often find other issues for which to file additional interlocutory appeals. This system creates a “ping-pong” effect whereby cases are continually moving from the trial court to the appellate court without a final resolution. In order to speed the process, the drafters might want to consider a rule that would eliminate this delaying tactic and reserve these issues for one appeal at the resolution of the case.

These provisions are vague and difficult to understand. Therefore, they should be revised on the basis of a clear policy choice concerning the kind of final decision appeal system (not interlocutory appeals) that is wanted. Essentially, if the appeal is aimed at revising the lower court’s decision both on its aspects of fact and of law, it should be clearly stated, and various consequences (such as the possibility of adducing evidence or new evidence to the appellate court) should be specifically regulated. If, on the other hand, the appeal is intended as a *revisio prioris instantiae*, i.e. as a control upon the errors made by the lower court, it should be clearly stated and some consequences, such as whether a new trial in the first instance court should take place, should be specifically regulated.

## V. Specific Recommendations

### A. Promoting the Flow of Commerce

#### 1. *Expropriation*

#### SUMMARY:

Rule 67 (2) and (11) should be amended to have the posting of a market-value bond rather than an assessed tax-value bond.

#### DISCUSSION:

Rule 67 (2) and (11) focus on the ability of a plaintiff government to take property on an interim basis in the exercise of its eminent-domain power. While a foreign business would have to acknowledge that it was subject to the same sort of government action in its own country as it would be in the Philippines, it could hesitate to engage in commercial transactions in the Philippines if such provisions were more government-biased than similar rules elsewhere. A primary concern of prospective investors is whether they might be put out of business without fairly advanced adjudication or fully adequate compensation. This problem is particularly acute given Section 2’s bond requirement requiring posting of only the amount of assessed tax value of the property, which might be below market value and also takes no account of losses from business interruption. While American courts generally will not compensate for such interruption losses either, the combination of no government liability for business interruption with the ability to take upon mere posting of a tax-value bond and without regard to appeal, could create significant ground for concern.<sup>38</sup>

#### 2. *Aggregate Litigation*

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<sup>38</sup> In the Philippines, foreigners as individuals cannot own land. However, they can own up to 40% interest in a corporation, which can own land.

The current text of Rule 3 (12) potentially provides for expansive aggregate litigation,<sup>39</sup> and its lack of specifics regarding the class action practice could create a major concern to foreign investors who might find themselves targets of class suits.

### **3. *Transactional Jurisdiction and Service of Process***

#### **SUMMARY:**

Rule 14 (12) and (15) should be amended to place a clear limitation on the scope of jurisdiction over foreign entities doing business in the Philippines and to clarify extra-territorial service requirements.

#### **DISCUSSION:**

In terms of service upon foreign private juridical entities, Rule 14 (12) states that “[w]hen the defendant is a foreign private juridical entity which has transacted business in the Philippines, service may be made on its resident agent designated in accordance with law for that purpose, or should there be no such agent, on the government official designated by law to that effect, or on any of its officers or agents within the Philippines.” In addition, Rule 14 (15) addresses extraterritorial service stating that “[w]hen the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 6; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time which shall not be less than sixty (60) days after notice, within which the defendant must answer.

A clear limitation on the scope of jurisdiction might be appropriate to make clear the limits on jurisdiction over foreign entities doing business in the Philippines. Looking at Rule 14 (12) and (15) together, it remains unclear what kind of cases may fall within the jurisdiction of the Philippine courts when the defendant is a non-Philippine entity. While Section 15 appears to restrict “long arm” jurisdiction only to a very limited class of cases where the “issue affects the personal status of the plaintiff or property located in the Philippines,” Section 12 broadly confers jurisdiction in cases where the defendant “has transacted business” in the Philippines. The judiciable scope of “transacted business” is uncertain. If the reference is to be limited to cases relating to business that was transacted, such as may be the case where an entity has registered to do business in the Philippines, the terms of the registration may be definitional. However, the current text of Section 12 allows for a broad interpretation, subjecting to Philippine jurisdiction a foreign entity that has chosen to do business in the Philippines for any extraterritorial dispute. Additionally, the use of the term “transacted” in the past tense appears to suggest that the foreign entity that has departed the Philippines might still be subject to jurisdiction on unrelated matters.

### **4. *Appeal of Preliminary Injunctions***

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<sup>39</sup> Aggregate litigation refers to class actions and other multi-claimant proceedings—cases brought on behalf of more than one (sometimes hundreds or thousands) of similarly situated parties seeking significant aggregate relief.

**SUMMARY:**

Rule 41 (1) (c) should be amended to allow for an immediate appeal on preliminary injunctions to remove uncertainty for foreign companies. Rule 65 should also be amended to prevent unwarranted appeals aimed to delay the proceedings.

**DISCUSSION:**

The drafters should consider whether Rule 41 (1) (c), which states that no appeal may be taken from an interlocutory order, such as a preliminary injunction (also called an interlocutory injunction) may create uncertainty to foreign companies. The inability to immediately appeal an interlocutory order, such as a preliminary injunction, could be seen by foreign businesses as a hindrance to seeking relief against possible erroneous trial court action on a matter involving claims of irreparable harm pending final judgment as a disincentive to do business in the Philippines.

However, a common practice in the Philippines is to use Rule 65, alleging “grave abuse of discretion amounting to lack or excess of jurisdiction.” Litigants file multiple special “interlocutory type” appeals to the Supreme Court, which cause a ping-pong type effect between the trial courts and the Supreme Court and result in lengthy delays. This rule should be amended to stop this practice, except in extraordinary circumstances, or the terminology of “grave abuse of discretion” should be specifically and narrowly defined so as to prevent unwarranted appeals aimed only at delay.

***Damage Awards*****SUMMARY:**

Rule 9 (3) should be amended with a provision allowing offers of proof, so that courts can determine amounts when a claim is initially for liquidated damages.

**DISCUSSION:**

Under Rule 9 (3) (d), “a judgment rendered against a party in default shall not exceed the amount or be different in kind from that prayed for nor award unliquidated damages.” This clause appears to ban awards of unliquidated damages when a defendant has defaulted. However, a party with a legitimate claim for unliquidated damages could simply stay away and avoid impunity. This could be a concern for businesses that may find themselves with unliquidated damage claims with unconscionable defendants. A provision allowing offers of proof so that the court can determine amounts when a claim was initially for unliquidated damages, if that is not possible now, could be fairer and more reassuring to those who contemplate engaging in commerce in the Philippines.

**B. International Commercial Arbitration****1. *Alternative Dispute Resolution*****SUMMARY:**

The Civil Procedure Rules, and Rule 18 (2) in particular, should indicate that nothing in the Rules prevent the parties from agreeing to use ADR, subject to court approval where needed.

**DISCUSSION:**

Rule 18 (2) (a) allows for the possibility of an amicable settlement or of a submission to alternative modes of dispute resolution. The Philippines has provided for both voluntary mediation and court annexed mediation through Republic Act 9285 (known as the “Alternate Dispute Resolution Act of

2004”) and Supreme Court Administrative Memorandum No. 01-10-5-SC-PHILJA. While it is generally recommended that the courts encourage or mandate mediation or settlement of disputes prior to proceeding to trial, the Civil Procedure Rules do not adequately address the key provisions governing ADR. ADR is conducive to avoiding costly litigation and calendar congestion of the courts. At a minimum, the Civil Procedure Rules should indicate that nothing in the Civil Procedure Rules prevent the parties from agreeing to use ADR, subject to court approval where needed. Other ADR provisions to be considered include:

- Defining actions subject to ADR;
- Confidentiality of ADR proceedings (*e.g.* settlement conferences and mediation) separate from court proceedings;
- The binding or non-binding nature of ADR proceedings;
- Articulating standards and protections for ADR neutrals;
- Scheduling settlement conferences, mediation, or arbitration as a required part of trial proceedings;
- Providing guidelines for selection of neutrals;
- Providing guidelines for ADR procedures during settlement, conference, mediation, or arbitration;
- Presenting arbitration order to court and determining effect of the arbitration order on court proceedings;
- Enforcement of arbitration provisions in contracts between the parties and motions to compel arbitration;
- Registering of arbitral awards as judgments;
- Providing for the production of documents and other evidence located in the Philippines in aid of an international arbitration, in appropriate circumstances; and
- Provisional remedies (*e.g.* stays) in support of arbitration.

ADR is a key consideration given that a large number of international transactions provide for the resolution of disputes by arbitration, and the interplay between local law and arbitration needs to be addressed. The drafters should also consider whether ADR proceedings are to be restricted to the pre-trial stage, in light of UNIDROIT Principle 24.2, which provides that “[t]he court should facilitate parties’ participation in alternative dispute resolution processes at any stage of the proceeding.”<sup>40</sup>

## **C. Enforcement of Foreign Judgments**

### **1. Procedural Issues**

#### **SUMMARY:**

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<sup>40</sup> ALI, UNIDROIT Principles, *supra* note 19 at Principle 24.2.

The Rules should include specific provisions governing the recognition and the enforcement of foreign judgments in the Philippines.

#### **DISCUSSION:**

Under the Civil Procedure Rules, there is a significant lack of procedure to be followed in the enforcement of a foreign judgment. The lack of a clear process was noted in attempts to enforce *Hilao v. Estate of Marcos*, 910 F. Supp. 1460 (D. Haw. 1995) in the Philippines. In the *Hilao* case, victims of human rights violations won a judgment in United States District Court against the Estate of Ferdinand Marcos. The judgment included an injunction restraining the Estate and its agents from transferring any funds or assets held on behalf of, or for the benefit of, the Estate pending satisfaction of the judgment. The matter reached the Supreme Court of the Philippines, which noted that the “rules of comity, utility and convenience have established a usage among civilized states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in certain countries” *Mijares v. Javier*, G.R. No. 139325 (2005). In *Mijares*, the Supreme Court of the Philippines recognized that the “rules are silent as to what initiatory procedure must be undertaken in order to enforce a foreign judgment in the Philippines,” but noted that there is “no question that the filing of a civil complaint is an appropriate measure for such purpose.” Given the issues raised in *Mijares* regarding posting of a bond to file an action and the fact that the rules are silent on procedures that should be followed to enforce foreign judgments or final orders, development of procedures for filing to enforce foreign judgments should be considered.

In view of the needs arising from international and global commerce, the Civil Procedure Rules should include specific provisions governing the recognition and the enforcement of foreign judgments in the Philippines. Should a party feel that a favorable judgment obtained abroad would not be recognized and could not be enforced in a given jurisdiction, the party may be disinclined to have commercial relationships with entities existing under that jurisdiction, or make transactions concerning goods located in that territory. It is critical that businesses engaged in international commerce feel confident that countries such as the Philippines concur with international principles of comity in enforcing foreign judgments, which the Philippines does, but also provide a clear procedure allowing for enforcement.

## **2. Venue**

#### **SUMMARY:**

Rule 4 should be amended so that venue is determined based on where a substantial portion of the events giving rise to a claim occurred, or based on the residence of the defendants rather than the plaintiffs. In addition, the Philippines may wish to adopt the *forum non-conveniens* approach.

#### **DISCUSSION:**

Rule 4 governs the venue of real actions, personal actions, and actions against nonresidents. The Rule includes an important exception in Section 4 (b) which provides that “where the parties have validly agreed in writing before the filing of the action on the exclusive venue thereof.” This provision is of critical importance to businesses engaged in international commerce in allowing private parties to consent to exclusive jurisdiction and by confirming that judgments resulting from such proceedings may be enforced. The Hague Conference on Private International Law,

Convention on Choice of Court Agreements<sup>41</sup> (hereinafter “Convention on Choice of Court Agreements”), addresses this concern, containing provisions that govern the recognition and enforcement of foreign judgments that result from proceedings based upon exclusive choice of court agreements.

Rule 4 (2), on personal actions, states that “all other actions may be commenced and tried where the plaintiff or any of the principle plaintiffs resides, or where the defendant or any of the principal defendants resides, or in the case of a non-resident defendant where he may be found, at the election of the plaintiff.” This provision is troubling in view of international enforcement of Philippine judgments. Venue based on plaintiff’s residence is often regarded as unfair and potentially oppressive to defendants who may have nothing to do with the area where plaintiffs reside. On the other hand, venue based on where a non-resident defendant may be found resonates of “tag” or “transient” jurisdiction, in which a defendant is caught passing through on travel unrelated to the plaintiff’s claim. The provision of Rule 4 (2) regarding commencement of an action on “a non-resident defendant where he may be found, at the election of the plaintiff” poses a serious problem. Such a broad provision regarding the siting (location) of a defendant for purposes of commencing litigation could render a Philippine judgment unenforceable elsewhere if the foreign court finds that such authority might have been used. Less objectionable would be a provision for venue, not solely based on the siting of the defendant, based on where a substantial portion of events giving rise to a claim took place, or based on the residence of defendants rather than plaintiffs.

On a related matter, although it does not appear in the FRCP, both federal and state courts in the U.S. recognize the doctrine of *forum non conveniens* as a means of assessing whether a jurisdiction is appropriate for litigation even if the court has the power to adjudicate the matter and has personal jurisdiction over the parties. Although it is common in civil law countries to apply the doctrine of *lis pendens* to prohibit jurisdiction if another suit is already pending in another jurisdiction, this approach is not as flexible as the doctrine of *forum non conveniens*, which the drafters may find more useful in the context of the Philippines. As the Philippines recognize *forum non conveniens* in regards to conflicts in Private International Law, the drafters may wish to consider if this theory might also be more appropriate for other conflicts situations.

### **3. Recognition of Arbitral Awards**

#### **SUMMARY:**

The Rules in general, and Rule 39 (48) specifically, should be amended to clearly define the limits and conditions under which a foreign arbitral award will be recognized within the Philippines.

#### **DISCUSSION:**

Under United States law, arbitration decisions, which are termed arbitral awards, are binding. A number of nations have signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The “New York” Convention (1958)<sup>42</sup> (hereinafter “New York Convention”), under

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<sup>41</sup> Hague Conference on Private International Law, CONVENTION ON CHOICE OF COURT AGREEMENTS (30 June 2005). Available at [http://www.hech.net/index\\_en.php?act=conventions.text&cid=98](http://www.hech.net/index_en.php?act=conventions.text&cid=98) (last visited 1 September 2006).

<sup>42</sup> UN, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS - THE “NEW YORK” CONVENTION (10 June 1958). Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (last visited 1 September 2006).

which it is actually easier to enforce an arbitration award in a foreign country than a foreign court judgment. Under either American law or the the New York Convention, the role of a court is normally confined to enforcing the award, *e.g.*, providing official machinery (a sheriff or comparable officer) to collect the sums awarded from an unwilling judgment-debtor.

Arbitration is, of course, a matter of contract: to be obliged to arbitrate a controversy, a person must agree to do so. The court review of arbitration awards under United States law is very limited and is normally confined to the questions of (i) whether there was an agreement to arbitrate at all, and (ii) whether the arbitration was conducted in a lawful manner.

More specifically, under sections 9, 10, and 11 of the United States Federal Arbitration Act, a court must confirm an arbitration award unless:

- (a) the award was procured by corruption, fraud, or undue means,
- (b) there was evident partiality or corruption in the arbitrators,
- (c) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party had been prejudiced, or
- (d) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The courts also have the power to modify or correct an arbitration award where:

- (a) there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award,
- (b) the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision made upon the matter submitted, or
- (c) the award is imperfect in matter of form not affecting the merits of the controversy.<sup>43</sup>

As disputes concerning civil and commercial transactions are more and more frequently solved by means of arbitration, the drafters are encouraged to consider provisions inclusive of enforcement of foreign arbitration awards important in promoting international trade. While Rule 39 (48) presumably covers foreign arbitration awards, there remains significant ambiguity regarding their enforcement. General trends indicate that such awards may be recognized in national jurisdiction on the basis of a control performed by a court. Such a control does not include any appreciation of the merits of the decision, but is confined to determining whether the matter could be subject to arbitration in the country in which the recognition is asked, and whether the award is in conflict with the “public order” of that country. The New York Convention, to which the Philippines is a Party, includes provisions under which the recognition of a foreign award may be contested, such as the

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<sup>43</sup> United States, FEDERAL ARBITRATION Act 9 U.S.C. §§ 9-11 (enacted 12 February 1925, last amended 15 November 1990). Available at [http://www.chamber.se/arbitration/shared\\_files/laws/arbitract\\_us\\_cont.html](http://www.chamber.se/arbitration/shared_files/laws/arbitract_us_cont.html) (last visited 1 September 2006).

invalidity of the arbitration agreement, the violation of the rules concerning the fairness of the arbitration proceeding and the choice of the arbitrators, the invalidity of the award, and the previous nullification of the award by a court of another jurisdiction. It is, therefore, advisable that the Civil Procedure Rules clearly define the limits and conditions under which a foreign arbitral award may be recognized within the Philippines.

It is worth noting that in areas of integrated commerce such as the European Union, issues concerning the recognition and enforcement of foreign judgments are provided for by the former Brussels and Lugano Conventions, recast in EU Regulation No. 44/2001 and valid for all the Member States. With just a few exceptions regarding bankruptcy and social security matters, the regulation applies to all civil and commercial cases.<sup>44</sup>

Under Article 33 (1), the fundamental rule *vis à vis* recognition is that on motion of a party any judgment delivered in a Member State is recognized automatically, without any special proceeding, in any other Member State unless the recognition is contested.<sup>45</sup> Recognition may be contested when:

- The recognition is manifestly in conflict with the “public order” of the State requested;
- The defendant did not have a fair opportunity to be heard in the former proceeding;
- The judgment is in conflict with a decision issued among the same parties in the State requested; or
- The judgment is in conflict with another decision concerning the same parties and the same subject matter, delivered in another Member State or in any other country, and such a judgment could be recognized in the State requested.<sup>46</sup>

If recognition is contested due to one of these reasons, the case is decided by a court of the State requested, which may provide or deny the recognition, but cannot revise the merits of the foreign judgment.<sup>47</sup> Once recognized, the foreign judgment has all its effects in the recognizing State.

Under Article 38, regarding enforcement, the fundamental rule is that a foreign judgment may be enforced in another Member State when it has been declared enforceable in the State where issued. Such a declaration has to be requested by the interested party to the court that has jurisdiction of it.<sup>48</sup> The law of the State in which the enforcement is requested should regulate the modes of such a request. A decision on this request should be issued immediately, without any revision of the merits of the judgment.<sup>49</sup> Appeals may be filed against the decision, and a special proceeding takes place. In such a case, the declaration of enforceability may be nullified for the same reasons for which the

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<sup>44</sup> European Union, Council REGULATION NO. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (22 December 2000) at art. 1. Available at [http://europa.eu/eur-lex/pri/en/oj/dat/2001/l\\_012/l\\_01220010116en00010023.pdf](http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf) (last visited 1 September 2006).

<sup>45</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at art. 33 (1).

<sup>46</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at art. 34.

<sup>47</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at art. 36.

<sup>48</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at art. 39.

<sup>49</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at art. 41.

recognition of a foreign judgment may be refused.<sup>50</sup>

EU Regulation 44/2001 has effect inside of Member States of the European Union. However, each Member State must enact its own domestic norms for the implementation of such rules clarifying regulations concerning the recognition and enforcement of foreign judgments. The Philippines' procedural system would be greatly improved if it could include a clear and consistent set of rules concerning the conditions, procedures, and effects of the recognition and the enforcement of foreign judgments in the territory of the Philippines.

#### 4. *Reciprocity*

##### **SUMMARY:**

Rule 39 (47) and (48) should be amended so that the effect given to a foreign judgment or final order is equal to that of a Philippines court, in order that reciprocity is attained and Philippine judgments and final orders are given equal treatment by other jurisdictions.

##### **DISCUSSION:**

Under Rule 39 (47), “[t]he effect of a judgment or final order rendered by a court of the Philippines, having jurisdiction to pronounce the judgment or final order may be as follows:

- a) In case of a judgment or final order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or status of a particular person or his relationship to another, the judgment or final order is conclusive upon the title to the thing, the will or administration or the condition, status or relationship of the person, however, the probate of a will granting of letters of administration shall only be *prima facie* evidence of the death of the testator or intestate;
- b) In other cases, the judgment or final order is, with respect to the matter directly adjudged or as to any other matter that could have been missed in relation thereto, conclusive between the parties and their successors in interest, by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity; and
- c) In any other litigation between the same parties or their successors in interest, that only is deemed to have been adjudged in a former judgment or final order which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.”

Rule 39 (48) appears to be significantly narrower and more limited with regard to effect given to a foreign judgment than the provisions governing the effect of judgments or final orders rendered by a court of the Philippines under Section 47. In the case that a judgment-rendering country requires reciprocity, the limit on the effect of foreign judgments will act as a limit on the effect that such a country will give to judgments of Philippine courts. As stated under UNIDROIT Principle 30: “A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires

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<sup>50</sup> European Union, Council REGULATION NO. 44/2001, *supra* note 44 at arts. 34 and 35.

otherwise....”<sup>51</sup>

## **5. Enforcement**

### **SUMMARY:**

Rule 39 (1) should be amended so that it is not possible for a party to delay execution of a judgment through appeals and should require a supersedeas bond.

### **DISCUSSION:**

Under Rule 39 (1), “If the appeal has been duly perfected and finally resolved, the execution may forthwith be applied for in the court of origin, on motion of the judgment obligee, submitting therewith certified true copies of the judgment or judgments or final order or orders sought to be enforced and of the entry thereof, with notice to the adverse party.” The second paragraph appears to delay, as a routine matter, execution of judgments until after resolution of appeals. It should usually be possible for appellants to delay execution during appeals, but this approach appears loser-friendly in that it makes delay the default mode and does not seem to condition it on posting of a supersedeas bond. If appeals tend to take a long time and interest on judgments does not compensate winning plaintiffs at a full market rate, this provision could create incentives for delay and result in under-compensation of plaintiffs. A business that foresaw the need to bring damage suits could find this provision, if it has the effect described, a disincentive to doing business in the Philippines.

## **6. Discretionary Execution**

### **SUMMARY:**

Rule 39 (2) should be amended to provide a standard for court discretion in ordering execution of a judgment before the expiration of the appeal period rather than granting the court full discretion in whether or not to order execution of a judgment.

### **DISCUSSION:**

Rule 39 (2) (a) *Execution of a judgment or final order pending appeal*, states that “On motion of the prevailing party with notice to the adverse party filed in the trial court while it has jurisdiction over the case and is in possession of either the original record or the record on appeal, as the case may be, at the time of the filing of such motion, said court may, in its discretion, order execution of a judgment or final order even before the expiration of the period of appeal. After the trial court has lost jurisdiction the motion for execution pending appeal may be filed in the appellate court. Discretionary execution may only issue upon good reasons to be stated in a special order after due hearing.” In addition, under Rule 39 (2) (b) *Execution of several, separate or partial judgments*, “[a] several, separate or partial judgment may be executed under the same terms and conditions as execution of a judgment or final order pending appeal.”

Under Rule 39 (2), the court is granted full discretion in ordering or not ordering the execution of judgment. While the court should show “good reasons” when the execution is ordered, it does not appear that the court’s discretion is to be limited or guided by any standard. According to UNIDROIT Principle 26.1, “the final judgment of the first-instance court ordinarily should be

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<sup>51</sup> ALI, UNIDROIT Principles, *supra* note 19 at Principle 30.

immediately enforceable.”<sup>52</sup> The first instance final judgment is immediately enforceable as of right, not by discretion of the court. Only in exceptional cases should the court exercise its discretion, and in such instances according to standards stated by the law to order a stay of execution.

### 7. *Effect of Foreign Judgments and Final Orders*

#### **SUMMARY:**

Rule 39 (48) should be clarified to include a stricter standard under which a judgment would be recognized unless the losing party proves that the judgment was entered without fair notice, without proper jurisdiction, or where the party seeking to have the judgment rejected can demonstrate fraud or collusion. The standard of a “clear mistake of law or fact,” should be defined to give proper effect to the fully and fairly adjudicated outcomes of litigation in other sovereign states.

#### **DISCUSSION:**

Under Rule 39 (48), “[t]he effect of a judgment or final order of a tribunal of a foreign country, having jurisdiction to render the judgment or final order is as follows:

- a) In case of a judgment or final order upon a specific thing, the judgment or final order, is conclusive upon the title to the thing; and
- b) In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title.

In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.” This clause is consistent with international norms. For example, under Article 4 of the Hague Conference on Private International Law’s Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters<sup>53</sup> (hereinafter “Hague Recognition Convention”), a decision rendered in a Contracting State is entitled to recognition and enforcement in another Contracting State if: (1) the decision was given by a court with jurisdiction; (2) the decision is no longer subject to ordinary review in the State of origin; and (3) the decision would be enforceable in the State of origin. While the Philippines is not a signatory to the Convention, the Supreme Court of the Philippines has stated that “[w]hile [the Convention] has not received the ratifications needed to have it take effect, it is recognized as representing current scholarly thought on the topic” *Mijares v. Javier*, G.R. No. 139325 (April 12, 2005).

Furthermore, Article 5 of the Hague Recognition Convention provides that recognition or enforcement of a decision by a foreign court may be refused if: (1) recognition or enforcement is manifestly incompatible with the public policy of the State; (2) the decision resulted from proceedings incompatible with due process of law requirements; (3) either party did not have adequate opportunity to present its case; (4) the decision was obtained by procedural fraud; or (5) proceedings involving the same parties, facts, and purpose are pending or have resulted in a decision

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<sup>52</sup> ALI, UNIDROIT Principles, *supra* note 19 at Principle 26.1.

<sup>53</sup> Hague Conference on Private International Law, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (concluded 1 February 1971, entered into force 20 August 1979). Available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=78](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78) (last visited 1 September 2006).

in the State or another State already entitled to recognition and enforcement.<sup>54</sup> While the additional bases that the Hague Recognition Convention identifies for refusing to recognize or enforce a foreign judgment have not been encapsulated in the Civil Procedure Rules, they have been adopted in the Philippines through case law. *See Bank of America v. American Realty Corp.*, 378 Phil. 1279 (1999). Differences between the international norm and Civil Procedure Rule 39 (48) include the international norms of compatibility with due process requirements and issue and claim preclusion. These principles may arguably be covered under Rule 39 (48)'s "clear mistake of law or fact" and the public policy principles reflected in case law. In particular, the drafters are encouraged to clarify the language under Rule 39 (48) (a) on whether judgments are conclusive on persons as well as things, and under Section (48) (b) on the intent of a "presumptive evidence of a right between the parties."

If the provision that a judgment will be "presumptive evidence" between the parties in effect is to mean that before a foreign judgment can be enforced, it will have to be re-litigated within the Philippines, the party that has already lost abroad should have a high burden of proof. While Rule 39 (48) ends with some bases on which a judgment may be rejected - namely lack of jurisdiction, lack of notice, "collusion, fraud, or clear mistake of law or fact" - without further clarification, the current text invites re-litigation, and thereby delays and the risk of inconsistent outcomes on the same facts solely by virtue of trial in the second jurisdiction.

It may be worth considering a stricter standard under which a judgment would be recognized unless the losing party proves that the judgment was entered without fair notice, without proper jurisdiction, or where the party seeking to have the judgment rejected can demonstrate fraud or collusion. The standard of a "clear mistake of law or fact" would need to be defined to give proper effect to the fully and fairly adjudicated outcomes of litigation in other sovereign states. The state of New York has adopted the Uniform Foreign Country Money Judgments Recognition Act<sup>55</sup>, which requires recognition of foreign country judgments, except that it does not permit them to be conclusive if it is found that the foreign tribunal was not impartial, did not provide fair procedures, or if there was no personal jurisdiction over the defendant. It provides other grounds on the basis of which a court may reject a judgment, including absence of notice, evidence of fraud, violation of public policy of the enforcing state, conflict with another earlier judgment, violation of an agreement as to how the dispute was to be resolved, or *forum non conveniens* (N.Y. CPLR § 5301 *et seq.*).

## 8. Effect of Judgments on Status of People and Title to Property

### SUMMARY:

Rule 39 (47) should be amended so that it is clear what matters are encompassed by "...any other matter that could have been missed in relation thereto..." Rule 39 (48) should be amended to include arbitral awards in terms of recognition and enforcement of foreign judgments and final orders.

### DISCUSSION:

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<sup>54</sup> Hague Conference on Private International Law, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, *supra* note 36 at art. 5.

<sup>55</sup> National Conference of Commissioners on State Laws, UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT. Available at <http://www.law.pitt.edu/brand/2005%20NCCUSL%20UFCJRA%20text.pdf#search=%22Uniform%20Foreign%20Country%20Money%20Judgments%20Recognition%20Act%22> (last visited 1 September 2006).

Under Rule 39 (47) (b), “In other cases, the judgment or final order is, with respect to the matter directly adjudged or as to any other matter that could have been missed in relation thereto, conclusive between the parties and their successors in interest, by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity.” Rule 39 (47) (b) relates to the effect of a judgment rendered by a Philippine Court, making matters of the status of persons and title to property conclusive between the parties and their successors. The drafters are advised to address Section 47 (b) with regards to “...any other matter that could have been missed in relation thereto....” In particular, the drafters should clarify whether it is intended to encompass matters that could have been raised, in line with a *res judicata* approach.

Under Rule 39 (48), relating to the recognition and enforcement of a judgment or final order of a tribunal of a foreign country, there is no mention of whether an arbitral award is also entitled to the same recognition and enforcement. Since an arbitration award is distinct from a judgment, there exists some ambiguity as to whether Rule 39 (48) is applicable to foreign arbitration awards.

## 9. *Extraterritorial Enforcement*

### **SUMMARY:**

Rule 39 (9) should be amended by inserting the words “in the Philippines” after the words personal property in line 3 of subsection (c).

### **DISCUSSION:**

Rule 39 (9) provides traditional means for the execution of judgments including, in subsection (c), the garnishment of debts and credits. Issues often arise as to the enforcement in local courts of a judgment by levying upon intangibles, such as bank accounts, that may not be located in the forum. Ambiguity governing the purported execution against extraterritorial assets creates foreign relations friction and may discourage the expansion of multinational financial institutions. The drafters are suggested to address the issue by inserting the words “in the Philippines” after the words personal property in line 3 of subsection (c).

## VI. **Miscellaneous Comments**

### 1. *Case Assignment*

### **SUMMARY:**

Rule 20 (2) should be amended so that it is clear that the raffle procedure for case assignment is done after cases are sent to judges based on specialization.

### **DISCUSSION:**

Rule 20 (2) provides that “the assignment of cases to the different branches of a court shall be done exclusively by raffle. The assignment shall be done in open session of which adequate notice shall be given so as to afford interested parties the opportunity to be present.” Case assignment by raffle without consideration of the specializations of the judges and the issues involved does not adequately serve the ends of justice. In many countries, the method of assigning cases involves the chief judge making a determination as to which court calendar to assign a case based on the issue involved and the expertise of the judge. This system allows for cases to be transferred and handled by judges with sound knowledge in the areas being litigated. This analysis is based on the exact

language of Rule 20 (2). What appears to happen in practice is that cases are sent to specialized courts (*i.e.* family courts, drug courts, commercial courts, etc.) before the raffle process. Given that this reality is the general practice, the rule should be amended to clearly mandate this process, and ensure that cases are heard by judges with specialization sufficient for the type of case.

## **2. *Language***

### **SUMMARY:**

The Rules should include clear language providing for mandatory translation services for litigants that do not speak the official language of the court.

### **DISCUSSION:**

The Civil Procedure Rules make no provisions for litigants who do not speak the official language of the court. As in many judicial systems with substantial populations who speak a language other than the official language of the court (for example, Hispanics in the United States), provisions are included for translation and other services. In addition, provisions should be made for those with disabilities requiring additional services. The drafters should include clear language providing for mandatory translation services for litigants that do not speak the official language of the court even if there is a practice or provision for translators for litigants who speak local languages. While this service appears to be the practice in most Philippine courts, it should be enshrined in the Civil Procedure Rules to ensure its implementation in all courts.

## **3. *Choice of Law and Choice of Forum***

In considering the effects of the Civil Procedure Rules on the flow of commerce and investment, the drafters may wish to consider whether a specific provision providing the circumstances in which choice of law or choice of forum clauses will be enforced would be helpful. Generally, international companies take comfort from the potential enforceability of these clauses as these clauses provide more certainty and control over how and where disputes will be resolved and whether they will be subject to unknown and uncertain local law when they have agreed otherwise.

## **VII. Conclusion**

Overall, the Civil Procedure Rules are comprehensive and well written. The Civil Procedure Rules should be seen as a significant achievement for the Philippines. Efforts to update and amend the Civil Procedure Rules are evidence of the Philippines deep commitment to the rule of law and to making the legal system of the Philippines responsive and effective for both Philippine and foreign litigants. This assessment offers some suggestions for addressing areas of the Civil Procedure Rules where improvement and revision will provide a more comprehensive and complete set of rules. This assessment and similar efforts aimed at improving not only the Civil Procedure Rules, but also other aspects of the Philippine legal system, demonstrate the Philippines' desire to provide a legal system that is effective and responsive to the needs of those who seek to avail themselves of it. The ABA Rule of Law Initiative thanks the Supreme Court of the Philippines and drafters of the Civil Procedure Rules for the opportunity to comment on these Rules and hope this assessment will enable the drafters to effectively modify the existing rules.

## **Appendix A**

### **Biographical Statements of Experts Assessing the Laws**



## **Biographical Statements of Experts Assessing the Law**

### **Samuel Akeju**

Samuel Akeju is a member of the International Bar Association, American Bar Association, Washington State Bar Association, General Bar, United States District Court (Northern Illinois District), and Nigerian Bar Association. He has been in practice for 14 years and handles issues relating to international finance/commercial transactions with an emphasis on Africa, Middle East, Asia, and Europe. He is currently one of the United States Small Business Administrations Attorneys.

### **Steven S. Gensler**

Professor Gensler teaches civil procedure, conflict of laws, federal courts, and alternative dispute resolution at the University of Oklahoma College of Law. Professor Gensler currently serves as a member of the United States Judicial Conference Advisory Committee on Civil Rules. During 2003-04, he was the Supreme Court Fellow at the Administrative Office of the United States Courts. Professor Gensler began his legal career as a law clerk to the Honorable Deannell Reece Tacha on the United States Court of Appeals for the Tenth Circuit (1992-93) and to the Honorable Kathryn H. Vratil on the United States District Court for the District of Kansas (1993-94). He then worked as a litigation associate in Milwaukee, Wisconsin for four years, most recently with Michael, Best & Friedrich, LLP. Professor Gensler was admitted to the Wisconsin Bar in 1994 and is a member of the American Bar Association and the Wisconsin Bar Association.

### **Phillip L. Graham, Jr.**

Philip Graham has been a partner in Sullivan & Cromwell's Litigation Group since October 1, 1977. He has extensive experience in commercial litigation including securities, banking, tax, and products liability disputes. Much of his work has involved litigation for foreign clients involved in multi-jurisdictional disputes. Mr. Graham has also worked extensively on trust and estates litigation and on confidential internal investigations, both those conducted by special board committees and those conducted internally. Mr. Graham is a former member of the Civil Justice Reform Act Committee of the Southern District of New York and is currently an Adviser for The American Law Institute's project on Transnational Rules of Civil Procedure.

### **Jeffrey C. Hazard**

Jeffrey Hazard is the Miller Professor of Law at the University of California, Hastings College of the Law. He is also Trustee Professor of Law at the University of Pennsylvania since 1994 and Director Emeritus of the American Law Institute. Professor Hazard has held numerous positions with the American Bar Association, American Bar Foundation, and has published extensively. Professor Hazard received a B.A. from Swarthmore College in 1953 and LL.B. from Columbia University in 1954, and numerous honorary degrees over the years.

### **Masanori Kawano**

Professor Dr. Masanori Kawano is a Professor of Law at the University Graduate School of Law at

Nagoya University. Dr. Kawano has taught civil procedure law in Japan since 1973 and received his Doctor of Law degree from Kyusyu University in 1995. He joined the faculty of Nagoya University's Graduate School of Law in 1999, and was Dean for the period 2002-2004. His main fields of research are civil procedure law, bankruptcy, and arbitration. He is a member of International Association of Procedural Law. He was also a member of a joint American Law Institute / UNIDOROIT Study Group and prepared "Principles of Transnational Civil Procedure" during 2000-2003.

### **Vanessa Soriano Power**

Vanessa Soriano Power is an attorney at Stoel Rives LLP in Seattle, Washington with a range of trial and appellate experience. Her practice focuses on complex commercial litigation, including large contractual disputes, employment, land use, and civil rights and constitutional issues. Vanessa has been recognized as a "Rising Star" by Washington Law & Politics. She currently serves as pro bono counsel for the Women's Bioethics Project and is a member of the Board of Directors for Washington Appleseed.

### **Thomas D. Rowe, Jr.**

Thomas D. Rowe, Jr., is the Elvin R. Latty Professor of Law at Duke University. He graduated magna cum laude from Harvard Law School in 1970. He served as law clerk to Associate Justice Potter Stewart of the U.S. Supreme Court, worked for a U.S. Senate Judiciary subcommittee, and practiced law in Washington, D.C., before joining the Duke law faculty in 1975. His teaching and scholarship have focused on civil procedure, federal jurisdiction, and complex civil litigation. He served as a member of the U.S. Judicial Conference's Advisory Committee on Civil Rules from 1993 to 1999 and is now a consultant to the Advisory Committee. He is a co-author of teaching books on civil procedure and federal courts.

### **Rolf Sturner**

Rolf Sturner is a judge in the Court of Appeals in Karlsruhe, Germany and Professor of Law and Director of the Institute for German and Foreign Civil Procedure Law at the University of Freiburg, Germany. Judge Sturner's research interests include Civil Procedure, International Litigation, Mass Media Law, and Real Property Law.

### **Michele Taruffo**

Michele Taruffo is currently a Professor of law in the University of Pavia, Italy, where he teaches classes in Civil Procedure and other procedural domains. He has been a visiting professor in American law schools, teaching comparative and international civil procedure. His main fields of interest are civil procedure, law of evidence, comparative law, and legal theory. Taruffo published nine books about procedural and comparative topics, most of which are translated in several languages, as well as dozens of articles in various countries. He acted as a co-reporter for the American Law Institute in the ALI/UNIDROIT project about Principles and Rules of Transnational Civil Procedure. Taruffo is a member of the American Law Institute, of the International Association of Procedural Law, of the Academia dei Lincei, and other national and international associations acting in the domains of procedural and constitutional law, comparative law, and legal theory.

## **Appendix B**

# **American Law Institute – UNIDROIT Fundamental Principles of Transnational Civil Procedure**



# Fundamental Principles of Transnational Civil Procedure

## 1. Jurisdiction

Jurisdiction over parties, property, and the subject matter of legal disputes should be exercised within the limits of generally recognized principles of international law, including conventions adopted in the forum state.

## 2. Independence, Neutrality, and Competence of the Court

2.1 The court adjudicating a transnational legal dispute should be impartial and have judicial independence, including reasonable tenure in office and freedom from external influence.

2.2 The court should have a procedure for addressing contentions of judicial bias.

2.3 The judges adjudicating a transnational legal dispute should have substantial legal experience and adequate knowledge of applicable substantive and procedural law.

## 3. Equality of the Parties and Right to Be Heard

3.1 The court should ensure equal opportunity for litigants to assert or defend their rights. This includes the right to submit contentions of fact and law and to make presentations of evidence in accordance with applicable procedural law, regardless of the nationality of the litigants, their residence, or the nature of the legal dispute in which they are involved.

3.2 Nondomiciliaries of the forum state should not be required, by reason of that status, to post a security deposit for costs or liability.

3.3 Venue rules should assure that the court hearing the dispute is reasonably accessible to the parties and their counsel.

3.4 The court should afford the parties an opportunity to respond to evidence presented by another party.

3.5 The court should consider each significant contention of fact and law that has been put forward by a party.

3.6 The proceeding should be adjudicated in an expedited fashion.

## 4. Right to Assistance of Counsel

4.1 A party should have the right to engage legal counsel, both counsel admitted to practice in the forum nation and assistance of counsel practicing elsewhere.

4.2 The professional independence of legal counsel should be respected.

## 5. Due Notice

5.1 Parties should have reasonable notice of a proceeding involving their interests, both at the commencement of the proceeding and regarding important developments thereafter.

5.2 In particular, a defendant should receive formal notice, delivered by reasonably effective means, of the claims being asserted and of the possibility of default judgment upon failure of timely response.

5.3 A party should have notice and opportunity to respond to contentions of fact and law by another party.

5.4 When the court makes a decision upon application without notice to the respondent, the respondent should have a right to have the decision reconsidered de novo.

5.5 The parties should make known to each other in due course the elements of fact upon which their claims or defenses are based and the elements of law that will be invoked, so that each party has the opportunity to organize its case.

## 6. Choice of Law

Choice of law to govern the proceeding, including matters both of procedure and of substance, should be made according to generally recognized principles of private international law.

## 7. Structure of the Proceeding

7.1 The proceeding should be organized into three stages; Pleading Phase, Instruction Phase (“pretrial” in common-law terminology), and Plenary Hearing (“trial” in common-law terminology).

7.2 In the Instruction Phase the court should consider preliminary objections and substantive legal contentions, review the availability of evidence and possibilities for disclosure and discovery, and establish schedules for further proceedings.

7.3 In the Plenary Hearing relevant evidence not taken in the Instruction Phase should be presented in concentrated sequence.

## 8. Party Initiation of the Proceeding and Control of Its Scope

8.1 Litigation should be initiated by claim or claims by the plaintiff and not initiated by the court ex officio.

8.2 The scope of the proceeding should be determined by the claims and defenses asserted by the parties in the pleadings. The claims and defenses thus asserted also should be the basis for applying principles of *lis alibi pendens* and claim preclusion.

8.3 The parties should control the voluntary termination of the action by withdrawal, by admission of liability in whole or in part, or by settlement.

## 9. Responsibility of the Court for Direction of the Proceeding

9.1 The court should actively manage the litigation, exercising judicious discretion in order to achieve disposition of the dispute fairly and within a reasonable time.

9.2 The court should determine the relevancy of evidence and the validity of legal contentions.

9.3 The court should determine, upon consultation with the parties, the order in which issues are to be resolved, the dates and times of deadlines, and the schedule of hearings.

## 10. Judicial Powers of Control; Proportionality

10.1 The court should have authority to impose sanctions against failure or refusal of a party to comply with the court's directions and other procedural abuse.

10.2 Sanctions should be reasonable and proportional to the importance and seriousness of the matter involved and the intentions of the persons whose conduct may be at issue.

## 11. Responsibilities of the Parties

11.1 The parties should observe standards of fair play in dealing with the court and with other parties.

11.2 Parties should refrain from spurious claims and defenses.

11.3 The parties are responsible for alleging facts, presenting evidence to sustain their respective claims and defenses, and for giving reasonable notice to the court and other parties of the evidence and the legal contentions they seek to have considered.

11.4 The parties should present detailed statements of fact and law in the statement of claims and defenses.

11.5 A party's failure to make a required answer to an opposing party's complaint, defense, or other statement in due time is a proper basis for considering that the statement is admitted.

11.6 The parties should cooperate in the court's management of the litigation and with the taking of evidence.

## 12. Right of Amendment

12.1 In the Instruction Phase a party should have the right, upon notice to the court and other parties, to reasonably amend statements of claim and defense and contentions of law.

12.2 When necessary to prevent injustice and when it would not prejudice an opposing party's ability to respond, there should be a similar right at the Main Hearing.

## 13. Right to Proof and Duties to Disclose Evidence

13.1 The parties have, generally, the right to unrestricted access to all relevant and nonprivileged evidence and information.

13.2 The parties should have the right to give statements that are accorded evidentiary effect and should have reasonable opportunity to present relevant evidence, including expert evidence.

13.3 Examination of witnesses, parties, and experts should proceed as customary in the forum, either with the parties conducting the primary examination (as in common-law systems) or with the judge doing so (as in civil-law systems).

13.4 A party should have the opportunity for supplemental questioning whenever the judge or an opposing party conducts the primary examination.

13.5 A party should have the right in the Instruction Phase to demand disclosure of directly relevant evidence in possession or control of another party. It should not be a basis of objection that evidence produced through such a demand may be adverse to the party or person upon whom demand is made.

13.6 A party should have the right to obtain reasonable discovery from third parties.

13.7 The court may draw adverse inferences from a party's failure to produce evidence that reasonably appears to be within that party's control or access, or from a party's failure to participate in accordance with the rules of procedure.

#### 14. Evidentiary Privileges and Immunities

14.1 The court should give effect to generally recognized privileges of the parties, such as the privilege against self-incrimination and the privileges against disclosure of professional communications with legal counsel and inter-spousal communications.

14.2 The court should give effect to privileges of third parties in accordance with forum law, including choice of law.

#### 15. Third Parties

15.1 Third parties that have an interest substantially connected with the claims or defenses of the original litigants should have the opportunity to participate on the same basis and with the same obligations as the original litigants.

15.2 Third parties should cooperate in the court's management of the litigation and taking of evidence. This obligation includes duties with respect to discovery.

#### 16. Orality and Written Presentations

16.1 Testimony of witnesses, parties, and experts should be received orally whenever possible, except as the parties, with the consent of the court, may otherwise agree.

16.2 Oral testimony may be limited to supplemental questioning following presentation in written form of a witness's principal testimony or of an expert's report.

16.3 Pleadings, motions, and legal argument should be presented in writing, but the parties should have the right to present supplemental oral argument on important substantive and procedural issues.

16.4 The court may accept from nonparties written comments concerning issues presented in the proceeding.

#### 17. Public Hearings

The Main Hearing and the case record should be open to the public except with respect to matter that is protected by a right of confidentiality.

## 18. Burden and Standard of Proof

It is the burden of a claimant to prove, according to the standard in forum law, the facts necessary to the success of the claim. A defendant has the same burden regarding affirmative defenses.

## 19. Judicial Responsibility for Determinations of Law and Fact

19.1 The court is responsible for determining, upon consultation with the parties, the correct legal basis for its decisions.

19.2 The court may rely on legal principles, facts, or evidence not advanced by the parties only upon giving them opportunity to comment and, if necessary, to amend their contentions.

19.3 The court may delegate the taking of evidence or the decisions of issues of law to one of its members or, in case of necessity, delegate the taking of evidence to a suitable delegate.

19.4 The court may order the taking of evidence on motion of the parties or on its own motion.

19.5 All types of nonprivileged evidence should be admissible according to relevance, including statements of parties.

19.6 The court should determine factual issues according to the principle of free evaluation on the basis of evidence received in the proceeding.

19.7 The court controls the consideration of evidence by giving directions as to the relevant issues on which it requires evidence, as well as to the nature of the evidence required to decide those issues.

19.8 The court may appoint an expert to testify on any relevant issue for which expert testimony is appropriate. A party may present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.

19.9 The Main Hearing should be held before the judge or judges who are to give judgment.

## 20. Decision and Reasoned Explanation

20.1 Upon completion of the hearings, the court should promptly give judgment, including specification of the remedy awarded.

20.2 The decision should be accompanied by a reasoned explanation of the legal and factual basis of the decision.

## 21. Settlement

21.1 Among the responsibilities of the judge is reconciliation of the parties when reasonably possible. The court should encourage the parties' participation in prelitigation procedures, alternative-dispute-resolution procedure, and voluntary settlement at any stage of the proceeding.

21.2 The parties should cooperate in reasonable settlement endeavors.

## 22. Costs

22.1 The prevailing party should be awarded its actual and reasonable expenditures in the proceeding, including attorneys' fees, or such a substantial portion thereof as the court may determine to be fair and appropriate.

22.2 The court may withhold costs to the winning party when there is clear justification for doing so.

## 23. Finality

Subject to the right of appeal, a judgment should be final and, in general, immediately enforceable promptly after being rendered.

## 24. Appeal

24.1 The parties should have opportunity for appellate review on substantially the same terms as provided in similar litigation under the law of the forum.

24.2 The right to appellate review is limited to claims, defenses, counterclaims, and evidence adduced in the first instance.

## **Appendix C**

# **American Law Institute – UNIDROIT Principles and Rules of Transnational Civil Procedure (2005)**



**AMERICAN LAW INSTITUTE (ALI)/UNIDROIT,  
Principles and RULES OF  
TRANSNATIONAL CIVIL PROCEDURE  
(2005)**

**A. Principles of Interpretation**

1. Principles of Interpretation

1.1 These Rules must be interpreted in accordance with and to fulfill the purposes of the Fundamental Principles stated in the preamble.

1.2 These Rules must be construed to advance substantive and procedural fairness, having regard for the legal and cultural traditions of the litigants.

1.3 Each party must receive equal treatment and be granted the right to properly present its case.

1.4 The proceedings must fulfill reasonable expectations regarding fairness, and must be time- and cost-efficient.

1.5 The court must assure proper and professional conduct of all persons involved in the proceedings.

1.6 Use of procedural restrictions and penalties against parties and nonparties must be only in reasonable proportion to their purpose.

**B. Scope of Applicability of These Rules**

2. Disputes to Which These Rules Apply

2.1 Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, the courts of a state that has adopted these Rules must apply them in all disputes in which judicial relief is sought arising from a sale, lease, loan, investment, acquisition, banking, security, property, intellectual property, or any other business, commercial, or financial transaction in which:

2.1.1 The dispute is between a plaintiff and a defendant who are habitual residents of different states, and the transaction did not arise wholly within the forum state; or

2.1.2 The dispute concerns fixed property located in the forum state and at least one person who is a habitual resident of another state makes a claim of ownership, a security interest or other interest in that property.

2.2 A corporation, société anonyme, unincorporated association, partnership, or other organizational entity is considered a habitual resident both of the state from which it has received its charter of organization and of the state where it maintains its administrative headquarters.

2.3 In cases involving multiple parties or multiple claims, the court shall determine what are the principal matters in controversy. If those matters are within the scope of these Rules, the Rules

apply to all parties and claims. Otherwise, the court shall apply the rules of the forum. The court may also sever the proceeding when doing so would facilitate the efficient administration of justice.

2.4 Participation by additional parties, whether as claimant, defendant, or third party, is determined according to Rule 5.

2.5 Upon demand of all parties who are not habitual residents of the state, the litigation shall proceed according to the ordinary procedural law of the forum.

2.6 The forum state may exclude categories of matters from application of these rules and may extend application of these Rules to other transnational civil matters.

2.7 A plaintiff who invokes the authority of a court under these Rules is thereby precluded from thereafter challenging that authority, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of authority was manifest.

2.8 A defendant or other party who does not object to application of these Rules until after that party has answered concerning the merits is precluded from making subsequent challenge, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of authority was manifest.

### 3. Forum for Transnational Civil Proceedings

3.1 A Transnational Civil Proceeding must be conducted in the forum state's first-instance courts of general jurisdiction, unless a special court or special division has been established for such proceedings.

3.2 Appellate jurisdiction of a Transnational Civil Proceeding shall be in the forum-state appellate court having jurisdiction of the first-instance court of general jurisdiction, unless the forum state has provided otherwise.

3.3 To facilitate efficient determination of a dispute governed by these Rules, the court having jurisdiction of a Transnational Civil Proceeding may delegate judicial functions to another court of the forum state or to a court of another state that has authority to accept the delegation or to a judicial officer specially appointed for the purpose.

3.4 The court may conduct hearings at a location remote from its seat and may use telecommunications devices, but shall not thereby deprive a party of the right to address questions to an adverse witness.

## **C. Personal Jurisdiction, Joinder, and Venue**

### 4. Personal Jurisdiction

4.1 A proceeding under these Rules may be maintained in the courts of a state:

4.1.1 Designated by mutual agreement of the parties; or

4.1.2 In which a defendant is subject to the compulsory judicial authority of that state, as determined by principles governing personal jurisdiction or by international convention to which the state is a party; or

4.1.3 Where fixed property is located when the application of these Rules is based on Rule 2.1.2; or

4.1.4 In aid of the jurisdiction of another forum in which a Transnational Civil Proceeding is pending.

## 5. Joining Additional Parties or Claims

5.1 Jurisdiction may be exercised over another person that is subject to the compulsory jurisdiction of the court and that is so connected with the dispute that, in the interest of efficient administration of justice, the person should be made a party.

5.2 A third person made a party as provided in 5.1 should be summoned as provided in Rule 10.

5.3 A third person not subject to the compulsory jurisdiction of the court may be given notice of the proceeding and invited to intervene. The forum rules concerning intervention shall thereafter apply concerning that party.

5.4 Jurisdiction under these Rules may be exercised over claims arising from the same transaction as the original dispute, other than those within the scope of these rules, subject to the provisions of Rules 2.2 and 5.5.

5.5 Additional parties who are subject to the jurisdiction of the court may be joined in accordance with the law of the forum. Application of these Rules is not affected by joinder of claims or participation of additional parties, except as provided in Rule 2.5.

5.6 If, prior to plenary hearing, there is joinder of claim or an additional party whose presence as a party would render Rule 2 applicable, these Rules shall apply, unless in accordance with Rule 2.3 the court orders otherwise in the interest of orderly administration of justice.

## 6. Intervention

6.1 A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims

6.1.1 An interest in the subject matter of the proceeding;

6.1.2 That the person may be adversely affected by a judgment in the proceeding; or

6.1.3 That there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

6.2 On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the court may add the person as a party to the proceeding and may make such order as is just.

6.3 Any person, private or public, may file an amicus curiae brief containing data, information, remarks, legal analysis, social background and, considerations that may be useful for a fair and just decision of the case. The court may invite a third party to file an amicus brief. The parties shall have the opportunity to submit written comment addressed to the matters in an amicus brief before the brief is considered by the court.

## 7. Venue

The proceeding shall be brought in the court of first instance in the locality determined according to the state's rules of territorial competence.

### **D. Composition and General Authority of the Court**

#### 8. Composition of the Court

8.1 The court shall be composed as ordinarily provided by the law of the forum. In cases involving technical or scientific issues, the court of first instance may appoint not more than two neutral assessors, who are experts in that subject matter. In choosing the assessors, the court shall consider recommendations from the parties. The assessors have no vote.

8.2 In its deliberations the court may confer with the assessors only in the presence of the parties or through written communication, copies of which are provided to the parties. The fees and expenses of the assessors shall be paid by the parties or as otherwise directed by the court.

#### 9. General Authority of the Court

The court in a Transnational Civil Proceeding has authority to give direction to the proceedings, including establishing the schedule of hearings, and to give effect to the Fundamental Principles stated in the preamble.

#### 10. Forum Procedure

Subject to the provisions of Rule 1, the procedural law of the forum shall be applied in matters not addressed in these Principles and Rules.

### **E. Preparatory Stage**

#### 11. Commencement of the Proceeding and Notice

11.1 The plaintiff shall submit to the court a statement of claim, as provided in Rule 12. The court shall thereupon give notice of the proceeding to the parties named as defendant. The proceeding shall be designated a Transnational Civil Proceeding.

11.2 The notice to the defendant shall be in accordance with an applicable international convention or, if no such convention is applicable, by transmitting a copy of the statement of claim and a request to appear in response within a reasonable time.

11.3 The notice shall specify the time within which the defendant must respond and that the proceeding is brought under these Rules, and shall state that default judgment may be entered against the defendant if the defendant does not respond within the specified time.

11.4 The notice must be in the language of the forum, and in the language of defendant, except when it is not known what language the defendant speaks.

11.5 In determining whether the proceeding has been brought within the time permitted by the applicable rule of prescription or statute of limitation, or *lis pendens*, the proceeding is considered commenced on the date that the plaintiff submitted the statement of claim to the court as provided in Rule 11.1.

## 12. Statement of Claim

12.1 The plaintiff shall state the facts on which the claim is based, the plaintiff's contentions concerning the legal grounds that support the claim, including foreign law, and the basis upon which these Rules are applicable. The statement of facts shall, so far as reasonably practicable, set forth detail as to time, place, participants, and events. If applicable law requires that plaintiff have first resorted to an arbitration or conciliation procedure or the like, plaintiff shall describe the effort to do so.

12.2 The plaintiff shall state the judgment demanded, including, so far as practicable, the monetary amount claimed and any other remedy sought.

## 13. Statement of Defense; Counterclaims

13.1 A defendant shall, within [30 consecutive] days from the date of service of process, answer the claim by admissions and denials of the allegations. The time for answer may be extended for [30 days] upon request of the defendant, or for a reasonable time by agreement of the parties or by court order. The answer shall:

13.1.1 Deny such allegations of the statement of claim as the defendant wishes to dispute;

13.1.2 Admit, or admit with explanation, such allegations as the defendant does not wish to dispute as thus explained, or assert an alternative statement of facts;

13.1.3 State the facts and contentions as to legal grounds upon which any affirmative defenses are based.

13.2 The defendant may state a counterclaim, seeking relief from a plaintiff or against a co-defendant or third party, that is connected to the dispute in the plaintiff's complaint, for example a claim for indemnity or contribution. The party against whom a counterclaim is stated must submit an answer thereto.

13.3 The provisions of Rule 12 concerning the detail of statements of claims are applicable to the statements of other claims and of defense.

13.4 A party shall explicitly deny the allegations it intends to controvert. Failure to make an explicit denial is considered an admission. Facts admitted or deemed admitted need no proof, except as provided in Rule 15.2 with respect to a default judgment.

13.5 A party against whom a claim is stated may in the answer present objections referred to in Rule 18.1. Submitting an answer or asserting a counterclaim does not waive such objections.

## 14. Amendments

14.1 In the preparatory stage, a party may amend a pleading upon such terms as the court may permit. If the amendment refers to events occurring subsequent to those alleged in the party's previous pleading, or on the basis of newly discovered facts or evidence that could not previously have been obtained through reasonable diligence, permission to make reasonable amendment shall be afforded if the amendment will not impose unfair prejudice on another party. After obtaining evidence under Rules 19 and 20, a party may amend a pleading to address allegations based on information thus obtained.

14.2 The court must grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for in costs or an adjournment.

14.3 The amendment shall be served on the opposing party, who shall have [30 days] in which to respond, or such other time as the court may order.

14.4 If the complaint has been amended, default judgment may be obtained on the basis of an amended pleading only if the amended pleading has been served on the party against whom default judgment is to be entered.

14.5 Any party may request that the court order another party to provide a more specific statement of that party's claim or defense on the ground that the challenged statement does not comply with the requirements of these Rules.

## 15. Default Judgment

15.1 Default judgment shall be entered against a plaintiff who fails to prosecute the proceeding, or against another party who, without reasonable justification, does not answer within the time provided in these Rules, fails to offer a substantial answer, or fails to proceed after having answered.

15.2 Before entering a default judgment, the court shall determine that procedural requirements of any applicable international convention have been observed and:

15.2.1 If default is to be against a plaintiff for failure to prosecute, give reasonable warning to the plaintiff that default may be granted;

15.2.2 If default is to be against another party, determine that the procedure for giving notice to that party has been properly followed and that the party had sufficient time to respond;

15.2.3 Determine that the claim is legally justified concerning liability and remedy, including the amount of damages and any claim for costs sought under Rule 30.

15.3 The remedy awarded in a default judgment shall be no greater in monetary amount or in severity of other remedy that was demanded in the statement of claim.

15.4 A party who has answered after the time provided in these Rules, but before judgment, shall be permitted to appear upon offering justifiable excuse, but the court may order compensation for costs resulting to the opposing party.

## 16. Transnational Dispute Settlement Offer

16.1 Prior to or after commencement of a proceeding under these Rules, a party may deliver to another party a written offer to settle one or more claims and the related costs and expenses. The offer shall be designated “Transnational Dispute Settlement Offer” and must refer to the penalties imposed under this Rule. The offer shall remain open for [60 days], unless rejected or withdrawn by a writing delivered to the offeree prior to delivery of an acceptance.

16.2 The offeree may deliver a counter-offer, which shall remain open for at least [30 days]. If the counter-offer is not accepted, the party may accept the original offer, if still open.

16.3 An offer neither withdrawn nor accepted before its expiration is rejected.

16.4 Unless by consent of both parties, an offer shall not be made public or revealed to the court before entry of judgment, under penalty of sanctions or adverse determination of the merits.

16.5 Within 10 days after entry of judgment, a party may reveal the offer to the court. If the offeree fails to obtain a judgment that is more advantageous than the offer, the court must impose an appropriate sanction, considering all the relevant circumstances of the case.

16.6 Unless the court finds that special circumstances justify a different sanction, the sanction shall be the loss of the right to be reimbursed for the costs, plus reasonable costs incurred by the offeror from the date of delivery of the offer. That sanction shall be in addition to the costs determined in accordance with Rule 33. An offeree is entitled to costs up to the date upon which the offeror serves notice of acceptance, unless the offer states otherwise.

16.7 If an accepted offer is not complied with in the time specified in the offer, or in a reasonable time, the offeree may either proceed to enforce it or continue with the proceeding.

16.8 This procedure is not exclusive of the court’s authority and duty to conduct informal discussion of settlement and does not preclude parties from conducting settlement negotiations that are not subject to sanctions.

## 17. Provisional Measures

17.1 In accordance with forum law and subject to applicable international conventions, the court may issue an injunction to restrain or require conduct of any person who is subject to the court’s authority where necessary to preserve the status quo or to prevent irreparable injury pending the litigation. The extent of such a remedy shall be governed by the principle of proportionality.

17.1.1 A court may issue such an injunction, before the opposing party has opportunity to respond, only upon proof showing urgent necessity and a preponderance of considerations of fairness in support of such relief. The party or person to whom the injunction is directed shall have opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.

17.1.2 The court may, after hearing those interested, issue, dissolve, renew, or modify an injunction.

17.1.3 The applicant is liable for full indemnification of the person against whom an injunction is entered if it turns out that the injunction was wrongly granted.

17.1.4 The court may require the applicant for relief to post a bond or to assume a duty of indemnification of the person against whom an injunction is entered.

17.2 An injunction may restrain a person over whom the court has jurisdiction from transferring property or assets, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant.

17.3 When the property or assets are located abroad, recognition and enforcement of an injunction under the previous subsection is governed by the law of the country where the property or assets are located, and by means of an injunction by the competent court of that country.

## 18. Preliminary Determinations at the Preparatory Stage

18.1 On motion of a party or on its own motion or in connection with a conference under Rule 23.2, the court in the preparatory stage may determine:

18.1.1 That the dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or, on motion of a party, that the court lacks jurisdiction over a party;

18.1.2 That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules;

18.1.3 That the dispute involves only questions of law, or that a complete or partial decision can be made with the evidence available in the record with no need for an evidentiary hearing, but the court shall have regard for the opportunity for obtaining evidence under these Rules before making such a determination;

18.1.4 That a determination of liability should be made prior to consideration of the amount of damages or other remedy;

18.1.5 Other matters of substantive law or procedure necessary to advance the proper adjudication of the merits.

18.2 Upon having made a determination as provided in the previous subsection, the court must allow the party against whom the determination is made a reasonable opportunity to amend its statement of claims or defense when it appears that the deficiency could be remedied by amendment.

18.3 If necessary, before an adjudication under this Rule, the court shall order each party to reveal information as described in Rules 19 and 20.

## 19. Disclosure

19.1 A party shall attach to a pleading copies of principal documents, such as contracts and relevant correspondence, on which the party intends to rely, and list all witnesses, including parties, nonparty witnesses, and expert witnesses, then known to the party and through whom the party intends to present evidence. So far as practicable, witnesses shall be identified by name, address, and telephone number.

19.2 A party may amend the specification required in the previous subsection to include documents or witnesses not known when the list was originally prepared. Any change in the list of documents or witnesses shall be communicated in writing to other parties not later than [30 days] before the plenary hearing, unless the court orders otherwise.

19.3 Within [45 days] after the answer, each party shall supply to all other parties a summary of the testimony expected of each witness it intends to present. The court may reduce or augment this time when appropriate in the circumstances of the case. If pleadings are amended, or there is change in the expected testimony, the parties shall supply amended summaries of testimony.

19.4 In lieu of the summary referred to in the previous subsection, not later than [15 days] prior to the plenary hearing, a party may present a statement of sworn written testimony by any witness it intends to present. If the examination of that witness is necessary, it will begin with supplemental questioning by the opposing party or the court.

19.5 An advocate for a party to a proceeding under these Rules may interview potential witnesses to ascertain potential evidence and to identify potential parties, but may not interview another party or a person represented by another counsel.

## 20. Exchange of Evidence

20.1 A party who has complied with disclosure duties prescribed in Rule 20 may, on notice to the opposing party, request the court to order production by any person, including third persons as provided in Rule 30, of any matter, not privileged under applicable law, that is directly relevant to the case, not already produced in disclosure and that may be admissible in the dispute, as follows:

20.1.1 Documents and other records of information that are specifically identified or identified within specifically defined categories and which are relevant to an issue as to which the demanding party has the burden of proof;

20.1.2 The identity and address of persons having personal knowledge of matters in issue;

20.1.3 The identity of any expert that another party intends to designate under Rule 26.3 and a statement expressing the opinion of the expert concerning controverted issues, including analysis and conclusions.

20.2 The requesting party may present the request directly to the opposing party. That party may acquiesce in the request, in whole or in part, and must promptly provide the evidence accordingly. If the request is adequate, the party must comply with it within a reasonable time, unless it calls for irrelevant or privileged evidence or is otherwise improperly burdensome.

20.3 If the party refuses, the requesting party may, on notice to the opposing party, request the court to order production of specified evidence. The court, upon opportunity for hearing, must determine the request and make an order for production accordingly.

20.4 The facts alleged in the pleadings determine relevance.

20.5 Unless otherwise agreed or ordered by the court, demands for evidence may be made as follows:

20.5.1 Initial demands by the plaintiff shall be made in the complaint or within [60 days] after the defendant has answered. Initial demands by defendants shall be made in the answer or within [30 days] after the plaintiff's demands.

20.5.2 A second demand may be made within [30 days] after the opposing party has complied with initial demands.

20.5.3 The court may order additional exchange of evidence directed toward any relevant matter, not privileged, whose production appears necessary to prevent substantial injustice, including oral or written deposition of a party or other witness. Such a deposition shall be taken as provided in Rule 21.

20.5.4 A party must respond to such an order within [30 days].

20.6 A party that did not have the possession of demanded evidence when the demand was made, but that thereafter comes into possession of it, must thereupon comply with the demand.

20.7 Any person may invoke a protection against self-incrimination recognized according to the applicable law, but it is not a valid objection that the information is adverse to the interest of the party to which the demand is directed.

20.8 On its own motion or at the request of a party, the court may appoint a neutral special officer to preside at a deposition or to supervise document production or otherwise to assist in supervising compliance with this Rule. In fulfilling that function, the special officer has the same power and duties as the judge. Decisions made by the special officer are subject to immediate review by the court.

20.9 To give effect to a proper demand for evidence, and subject to the principle of proportionality, the court may:

20.9.1 Draw adverse inferences concerning facts in issue against a party that failed to comply with the demand;

20.9.2 Employ the measures authorized by Rules 28 and 29;

20.9.3 Dismiss claims, defenses, or allegations to which the evidence is relevant;

20.9.4 Enter judgment in accordance with Rule 15.

## 21. Deposition and Testimony by Affidavit

21.1 A deposition may be taken when the court so orders in the interest of efficiency as provided in Rule 20.5.3.

21.2 The testimony shall be upon affirmation as provided in Rule 28.3.1 and shall be transcribed verbatim or recorded by audio or video recording, as the parties may agree or as the court orders. The cost of the transcription shall be paid by the party that requested the deposition, unless the court orders otherwise.

21.3 The deposition shall be taken at such time and place as the parties may agree or as the court orders. All parties and the court shall be given written notice, at least [30 days] in advance, of the time and place of the deposition. The examination shall be conducted as provided in Rule 28 and may be conducted before a judicial officer specially appointed as provided in Rule 3.3. During or prior to the deposition the court may submit supplemental questions to be answered by the person deposed.

21.4 A deposition may be presented as testimony in the record by agreement of the parties or by order of the court.

21.5 A party may present an affidavit signed by a nonparty who makes an affirmation to tell the truth, containing statements about relevant facts of the case. The court, in its discretion, may consider such statements as if they were made by oral testimony. If another party denies the truth of the statements made by affidavit, that party may move for an order of the court requiring the personal appearance of the affidavit's author.

## 22. Confidentiality of Matters Concerning Disclosure and Exchange of Evidence

22.1 Information obtained under these Rules but not presented at trial must be maintained in confidence by those receiving it.

22.2 When the information sought to be revealed is a trade or business secret, is protected by a duty of confidentiality under applicable law, or is such that its public disclosure would otherwise cause injury or embarrassment that could be avoided or mitigated by a protective order, the court should issue a suitable order imposing obligation of confidentiality on the parties, their counsel, and witnesses.

22.3 When it would assist the court in exercising its authority under this Rule, the evidence that is sought may be examined by the court in camera.

## 23. Case Management

23.1 In order to further the due administration of justice, the court should assume an active management of the proceeding.

23.2 The court may schedule one or more conferences during the preparatory stage. The advocates for the parties shall attend such conferences and other persons may be ordered to do so in accordance with forum law. The court may conduct a conference by any available means of communication.

23.3 After consultation with all parties, the court may:

23.3.1 Order amendment of the pleadings for the addition, elimination, or revision of claims, defenses, and issues in light of the parties' contentions at that stage;

23.3.2 Order the isolation for separate hearing and decision of one or more issues in the case. The court may enter an interlocutory judgment addressing that issue and its relation to the remainder of the case;

23.3.3 Order the consolidation of cases pending before itself, whether under these Rules or those of the forum, when they deal with the same or related transactions, and when consolidation may facilitate the proceeding and decision. The final judgment shall address all the cases;

23.3.4 Make rulings concerning admissibility and exclusion of evidence and other procedural matters;

23.3.5 Prescribe the sequence for hearing witnesses and experts;

23.3.6 Fix the date for the plenary hearing;

23.3.7 Enter other orders to simplify or expedite the proceeding;

23.3.8 In accordance with the law of the forum, order any person subject to the court's authority to produce documents or other evidence or to submit to deposition as provided in Rule 21.

23.4 The court may suggest that the parties consider settlement, mediation, or arbitration or any other form of alternative dispute resolution. The court may stay the proceeding and direct the parties to an Alternative Dispute Resolution procedure, such as settlement or mediation.

#### 24. Languages

24.1 The proceedings, including documents, oral proceedings, and evidence, shall be conducted in the language of the court.

24.2 If there is no prejudice to the parties, the court may allow the use of one or more foreign languages in all or part of the proceedings.

24.3 Translation of documents that are lengthy or voluminous shall be limited to relevant portions, as selected by the parties or determined by the court.

24.4 Translation should be made by a neutral translator selected by the parties or appointed by the court.

24.5 The cost of translation shall be paid by the party presenting the pertinent witness or document unless the court orders otherwise.

#### 25. Relevance and Admissibility of Evidence

25.1 Except as provided in Rule 27, all evidence relevant to prove the facts in issue is admissible, including circumstantial evidence.

25.2 The competency of a witness generally is determined by forum law, but parties are in any event entitled to make statements that will be accorded probative weight.

25.3 A party has a right to proof through testimony, not privileged under applicable law, of any person whose testimony is relevant, admissible, and the production of which is subject to the court's authority. The court may call any witness having these qualifications.

25.4 The parties may offer in evidence any relevant document or thing. The court may order any party or nonparty to present any relevant document or thing in that person's possession or control.

## 26. Expert Evidence

26.1 The court must appoint a neutral expert or panel of experts whenever required to do so by forum law and may do so when the court determines that expert evidence may be helpful in resolving issues in the case. Expert testimony may address issues of foreign law and international law.

26.2 The court determines the issues that are to be addressed by the court's expert and may provide directions concerning tests, evaluations, or other procedures to be employed by the expert. The court may issue orders necessary to facilitate the inquiry and report by the expert and may specify the form in which the expert shall make its report.

26.3 A party may on its own initiative designate an expert or panel of experts on an issue. An expert so designated is governed by the same standards of objectivity and neutrality as govern an expert appointed by the court. The parties' experts and advocates are entitled to participate in or observe the tests, evaluations, or other investigative procedures conducted by the court's expert. The court may order all the experts to confer with each other before presenting their opinions. Experts designated by the parties may submit their own opinions to the court in the same form as the report made by the court's expert. Each party pays initially for an expert designated by that party.

## 27. Evidentiary Privileges

27.1 Privilege against disclosure or exchange of evidence must be recognized with respect to:

27.1.1 Legal profession privilege;

27.1.2 Communications between counsel in settlement negotiation;

[27.1.3 National defense and security].

27.2 Evidence cannot be compelled if it consists of information covered by other privileges under applicable law. If evidence is not so privileged but would be privileged under other law, the evidence shall be produced in closed session of the court but in the presence of the parties and their lawyers. The court shall order protection of the secrecy concerning the privileged material.

27.3 A claim of privilege made with respect to a document shall describe the document in detail sufficient to enable another party to challenge the claim of privilege.

27.4 A privilege may be waived by or on behalf of the person that is entitled to take advantage of it. A party waives a privilege, for example, by omitting to make a timely objection to a question or demand seeking evidence or information covered by a privilege. The court in the interest of justice may relieve a party of waiver of a privilege.

## **F. Plenary Hearing (Trial)**

### 28. Concentrated Plenary Hearing

28.1 Documentary evidence not earlier produced to the court and other parties shall be produced prior to the plenary hearing by the party intending to rely on such evidence.

28.2 Receipt of oral evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except if the court orders otherwise for the convenience of the parties or persons giving evidence or in the administration of justice.

28.3 Evidence at plenary hearing will be received according to the following rules:

28.3.1 Evidence given orally or through written testimony must be truthful, under penalty of perjury, in accordance with forum law.

28.3.2 A person giving evidence is directly questioned by the lawyer of the party who called the person. The lawyers of the other parties are then permitted to ask supplemental questions. Further direct and supplemental questioning may be permitted by the court. The court shall exclude, on objection or on its own motion, irrelevant evidence and improperly leading questions. The court shall prevent unnecessary embarrassment and harassment of persons giving evidence.

28.3.3 The court may at any time conduct questioning in order to clarify the testimony, including additional questions after the questioning by the parties.

28.3.4 A person called to give evidence by the court may be examined by the court first. The person then may be questioned by the lawyers for the parties.

28.3.5 Direct questions may deal with any relevant issue in the case. Supplemental questioning may deal with any issue addressed in the direct questioning, unless the court permits a more extensive scope.

28.3.6 A statement made by a party outside of the record against that party's own interest is admissible as evidence.

28.3.7 Any party may challenge the credibility of a witness or an expert by means of questioning or consideration of prior inconsistent statements or other evidence that may affect the credibility of the witness. The court may ask questions that affect the person's credibility.

28.3.8 The court may permit similar contest of the authenticity or accuracy of a document or an item of real or demonstrative evidence.

## 29. Powers and Remedies Concerning Evidence

The court may on its own motion or motion of a party:

29.1 Make rulings on matters described in Rule 23;

29.2 Exclude irrelevant or redundant evidence, or evidence whose presentation involves unfair prejudice, excessive cost, burden, confusion, or delay;

29.3 Draw adverse inferences from a party's failure to give testimony or to present a witness, or to produce a document or other item of evidence that the party was in a position to present;

29.4 Impose sanctions authorized by forum law, including fine or contempt of court, on any person who, upon lawful order and without justification, fails to attend to give evidence, to answer proper

questions, or to produce a document or other item of evidence, or who otherwise obstructs the administration of justice;

29.5 Relieve a party, in the interest of justice, from a failure to comply with the rules concerning evidence.

### 30. Orders Directed to a Third Person

30.1 The court may, upon reasonable notice to the person to whom an order is directed and in accordance with forum law, order persons subject to its jurisdiction who are not parties to the proceeding:

30.1.1 To comply with an injunction issued in accordance with Rule 17.1;

30.1.2 To retain funds or other property the right to which is in dispute in the proceeding, and to disburse the same only in accordance with an order of the court;

30.1.3 To give testimony as provided in Rules 21 and 28;

30.1.4 To produce documents or other things as evidence.

30.2 The court shall require a party seeking an order directed to a third person to provide compensation for the costs of compliance.

30.3 An order directed to a third person may be enforced by means authorized against such persons by forum law, including imposition of cost sanctions, a monetary penalty, contempt of court, or seizure of documents or other things.

### 31. Record of the Evidence

31.1 A summary record of the hearings must be kept by the court's clerk under the court's direction.

31.2 A verbatim transcript of the proceeding or an audio or video recording must be kept upon order of the court or demand of any party. A party demanding a transcript shall pay the expense thereof.

### 32. Final Discussion and Judgment

32.1 After the presentation of all evidence, each party is entitled to present a written submission of its contentions concerning issues of facts and law. With permission of the court all parties may present an oral closing statement. The court may allow the parties' advocates to engage with each other and with the court in an oral discussion concerning the main issues of the case.

32.2 The court may invite advocates for the parties to submit their proposed judgments. The court may issue an oral decision or must without delay publish a written judgment and an explanatory opinion. The judgment shall include findings of fact based upon the relevant evidence and the supporting inferences and the principal legal propositions supporting the decision. The judgment shall be dated. Issues of fact shall be determined according to the applicable law governing burden of proof.

### 33. Costs

33.1 Each party initially pays its own costs and expenses, including court fees, attorney's fees, fees of a translator appointed by a party, and incidental expenses.

33.2 The interim costs of the fees and expenses of an assessor, expert, other judicial officer, or other person appointed by the court shall be provisionally paid equally by the parties or as otherwise ordered by the court. The court shall order final payment according to this Rule.

33.3 The prevailing party shall be reimbursed its reasonable costs and expenses from the losing party, but determination of costs may be stayed with a stay of enforcement as provided in Rule 38.3.

33.4 The prevailing party shall within [30 days] after rendition of the judgment submit a statement, certified by the party or its attorney, of its costs and expenses. The losing party shall promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.

33.5 At the time of judgment, the court may reduce or preclude recovery of costs and expenses against a losing party that had reasonable factual or legal basis for its position. The court may also impose a penalty not to exceed twice the amount provided by Rule 33.3 against a party whose disputation the court determines was conducted in bad faith.

33.6 If there is appellate review, the rules and procedure stated above shall apply to costs and expenses incurred in connection with the appeal.

33.7 If authorized by the law of the forum, the court may require a party to give security for costs and expenses.

## **G. Subsequent Proceedings**

### 34. Appellate Review

34.1 Except as stated in the following subsection, an appeal may be taken only from a final judgment of the court of first instance. The judgment shall be enforceable pending appeal, subject to the provisions of Rules 38.3 and 38.4.

34.2 An order of a court of first instance granting or denying an injunction sought under Rule 17 is subject to immediate review. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise.

34.3 Orders of the court other than a final judgment and an order appealable under the previous subsection are subject to immediate review only upon permission of the court of first instance or of the appellate court. Such permission may be granted when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.

34.4 Appellate review is limited to the claims, defenses, and counterclaims asserted in the court of first instance. No additional previously available evidence should be admitted except to prevent manifest miscarriage of justice.

### 35. Further Appellate Review

An appeal or other form of review may be taken from the decision of a court of second instance in accordance with the law of the forum. The review performed by the court of second appeal may deal only with issues of substantive or procedural law. The facts in issue will not be reconsidered. No evidence or additional claims or defenses will be admitted.

### 36. Expiration of Time to Appeal

Except as stated in Rule 37, a judgment is not subject to reexamination for procedural regularity or substantive propriety upon expiration of the time for appellate review of such a judgment.

### 37. Nullification of Judgment

37.1 A judgment may be nullified only through a new proceeding and only upon showing that the applicant acted with due diligence and that:

37.1.1 The judgment was procured without jurisdiction over the party seeking relief; or

37.1.2 The judgment was procured through fraud; or

37.1.3 There is evidence available that was not previously available or could not have been known through exercise of due diligence, or by reason of fraud in disclosure, exchange, or presentation of evidence that would lead to a different outcome; or

37.1.4 The judgment constitutes a manifest miscarriage of justice.

37.2 An application for nullification of judgment must be made within [one year] from the date of judgment. An objection based on fraud on the court is not subject to that time limit.

### 38. Enforcement of Judgment

38.1 A final judgment, including judgment for a provisional remedy, is immediately enforceable, unless it has been stayed as provided in Rule 38.3. In particular, a final judgment may be enforced through attachment of property owned by or an obligation owed to the judgment obligor.

38.2 If a person against whom a judgment has been entered does not comply within the time specified, or within 30 days after the judgment becomes final if no time is specified, the court may impose enforcement measures on the obligor. These measures may include compulsory revelation of assets and a monetary penalty on the obligor, payable to the judgment obligee or to whom the court may direct.

38.2.1 Application for such a sanction must be made by a person entitled to enforce the judgment.

38.2.2 The penalty for noncompliance may include the cost and expense incurred by the party seeking enforcement of the judgment, including attorney's fees, and may also include a penalty for defiance of the court, not to exceed twice the amount of the judgment.

38.2.3 If the person against whom the judgment is rendered persists in refusal to comply, the court may impose additional penalties.

38.2.4 No penalty shall be imposed on a person who demonstrates to the court financial or other inability to comply with the judgment.

38.2.5 The court may order third parties to reveal information relating to the assets of the debtor.

38.3 The trial court or the appellate court, on motion of the party against whom the judgment was rendered, may grant a stay of enforcement of the judgment pending appeal when necessary in the interest of justice.

38.4 The court may require a suitable bond or other security from the appellant as a condition of granting a stay or from the respondents as a condition of denying a stay.

### 39. Judicial Assistance

The courts of a state that has recognized these Rules must, and courts of other states may, enforce orders in aid of proceedings in another state.

## **Appendix D**

### **U.S. Federal Rules of Civil Procedure Selected Provisions (2006)**



## Federal Rules of Civil Procedure- Selected Provisions (2006)

### Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

### Rule 4. Summons

#### (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 managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

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

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

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

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

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

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

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

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

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

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(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 Person.

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 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.

(h) 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) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a

managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

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

(i) Serving the United States, Its Agencies, Corporations, Officers, or Employees.

(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)

(A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States - whether or not the officer or employee is sued also in an official capacity - is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(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 be 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 than 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.

#### Rule 4.1. Service of Other Process

(a) Generally.

Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(1). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(b) Enforcement of Orders: Commitment for Civil Contempt.

An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

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

(a) Service: When Required.

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in [Rule 4](#).

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Making Service.

(1) Service under Rules 5(a) and [77\(d\)](#) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Same: Numerous Defendants.

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing; Certificate of Service.

All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under [Rule 26\(a\)](#)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

(e) Filing with the Court Defined.

The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, which the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

#### Rule 7. Pleadings Allowed; Form of Motions

##### (a) Pleadings.

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of [Rule 14](#); and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

##### (b) Motions and Other Papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with [Rule 11](#).

##### (c) Demurrers, Pleas, etc.,

Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

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

##### (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 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;

(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](#).

#### Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3)

(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim - or a reply to a counterclaim - within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim - or a reply to a counterclaim - within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or>

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Rule 56](#), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [Rule 56](#).

(d) Preliminary Hearings.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may

fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion.

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by [Rule 15\(a\)](#) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under [Rule 19](#), and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under [Rule 7\(a\)](#), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

## Rule 15. Amended and Supplemental Pleadings

(a) Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments.

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by [Rule 4\(m\)](#) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives.

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating the settlement of the case.

(b) Scheduling and Planning.

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

- (1) to join other parties and to amend the pleadings;
- (2) to file motions; and
- (3) to complete discovery.

The scheduling order may also include

- (4) modifications of the times for disclosures under [Rules 26\(a\)](#) and [26\(e\)\(1\)](#) and of the extent of discovery to be permitted;
- (5) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

(c) Subjects for Consideration at Pretrial Conferences.

At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

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

- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;
- (5) the appropriateness and timing of summary adjudication under [Rule 56](#);
- (6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to [Rule 26](#) and [Rules 27 through 37](#);
- (7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
- (8) the advisability of referring matters to a magistrate judge or master;
- (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;
- (10) the form and substance of the pretrial order;
- (11) the disposition of pending motions;
- (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
- (13) an order for a separate trial pursuant to [Rule 42\(b\)](#) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;
- (14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under [Rule 50\(a\)](#) or a judgment on partial findings under [Rule 52\(c\)](#);
- (15) an order establishing a reasonable limit on the time allowed for presenting evidence; and
- (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

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

(d) Final Pretrial Conference.

Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders.

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions.

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in [Rule 37\(b\)\(2\)\(B\), \(C\), \(D\)](#). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

## Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)

(A) When a person sues or is sued as a representative of a class, the court must  $\hat{A}$ — at an early practicable time  $\hat{A}$ — determine by order whether to certify the action as a class action..

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)

(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,

- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)

(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)

(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(d) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees.

A claim for an award of attorney fees and nontaxable costs must be made by motion under [Rule 54\(d\)\(2\)](#), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion.

A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings.

The court may hold a hearing and must find the facts and state its conclusions of law on the motion under [Rule 52\(a\)](#).

(4) Reference to Special Master or Magistrate Judge.

The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in [Rule 54\(d\)\(2\)\(D\)](#).

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in [Rule 23\(d\)](#), and the procedure for dismissal or compromise of the action shall correspond with that provided in [Rule 23\(e\)](#).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures.

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

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

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

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

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

- (i) an action for review on an administrative record;
- (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;
- (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;
- (iv) an action to enforce or quash an administrative summons or subpoena;
- (v) an action by the United States to recover benefit payments;
- (vi) an action by the United States to collect on a student loan guaranteed by the United States;
- (vii) a proceeding ancillary to proceedings in other courts; and
- (viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine

what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

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

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

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

(3) Pretrial Disclosures.

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

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

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

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

#### (4) Form of Disclosures; Filing.

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

#### (5) Methods to Discover Additional Matter.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

#### (b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

##### (1) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

##### (2) Limitations.

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

the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

### (3) Trial Preparation: Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [Rule 37\(a\)](#)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

### (4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

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

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

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

(c) Protective Orders.

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

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

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

(d) Timing and Sequence of Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a

party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses.

A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

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

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under [Rule 16\(b\)](#), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

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

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

(4) any other orders that should be entered by the court under Rule 26(c) or under [Rule 16\(b\)](#) and [\(c\)](#).

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

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

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

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

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

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

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

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

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

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition.

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

(2) Notice and Service.

At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing 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.

(3) Order and Examination.

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

(4) Use of Deposition.

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

(b) Pending Appeal.

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

(c) Perpetuation by Action.

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 29. Stipulations Regarding Discovery Procedure

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

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

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

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

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the

possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(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 the 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.

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

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

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

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by [Rule 5\(b\)](#).

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

States shall issue under the circumstances and in the manner and be served as provided in [Title 28, U.S.C. § 1783](#).

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

(c) Protection of Persons Subject to Subpoenas.

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

(2)

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

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

(3)

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

(i) fails to allow reasonable time for compliance;

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

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

(iv) subjects a person to undue burden.

(B) If a subpoena

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

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

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

(d) Duties in Responding to Subpoena.

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

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

(e) Contempt.

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

#### Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Rule 59\(b\)](#); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in [Title 28, U.S.C., § 1655](#), or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

#### Rule 62. Stay of Proceedings to Enforce a Judgment

##### (a) Automatic Stay; Exceptions--Injunctions, Receiverships, and Patent Accountings.

Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

##### (b) Stay on Motion for New Trial or for Judgment.

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to [Rule 59](#), or of a motion for relief from a judgment or order made pursuant to [Rule 60](#), or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to [Rule 50](#), or of a motion for amendment to the findings or for additional findings made pursuant to [Rule 52\(b\)](#).

##### (c) Injunction Pending Appeal.

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the

United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) Stay Upon Appeal.

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof.

When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay According to State Law.

In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

(g) Power of Appellate Court not Limited.

The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment as to Multiple Claims or Multiple Parties.

When a court has ordered a final judgment under the conditions stated in [Rule 54\(b\)](#), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

#### Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration,

and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.