EXISTING LOCAL CIVIL RULES AND NOTES ON COMMITTEE RECOMMENDATIONS

COMMITTEE NOTE

The Committee recommends the addition of a new Local Civil Rule 1.1, entitled "Application of Rules." Local Civil Rule 1.1 would provide that the Local Civil Rules apply in civil actions as defined in Federal Rules of Civil Procedure 1 and 2. The Local General Rules (which under the Judicial conference's guidelines must be renumbered as Local Civil or Criminal Rules) would be renumbered as Local Civil Rules 1.2 through 1.9. The Committee also recommends the addition of a new local general rule, which would be numbered as Local Civil Rule 1.10, dealing with acceptable substitutes for affidavits.

Rule 1. Filing Papers

(a) Unless a judge of this court shall otherwise direct, papers submitted for filing must (1) be plainly written, typed, printed, or copied without erasures or inter-lineations which materially deface it, (2) bear the docket number and judge's initials assigned to the action or proceeding, and (3) bear endorsed upon the cover the name, office and post office address and telephone number, the initials of the first and last name of the attorney for the filing party and the last four digits of his/her social security number. The foregoing also applies to an attorney admitted pursuant to Local General Rule 2(c).

COMMITTEE NOTE

The Committee recommends that parts (1) and (2) of the first sentence of existing Local Civil Rule 1(a) be retained and renumbered as parts (1) and (2) of new Local Civil Rule 11.1(a). The Committee recommends that part (3) of the first sentence of existing Local Civil Rule 1(a) be deleted, on the ground that it is duplicative of Rule 11(a) of the Federal Rules of Civil Procedure and of the portions of existing Local Civil Rule 1(b) which are recommended below to be retained and renumbered as Local civil Rule 11.1(b). The Committee recommends that the second sentence of existing Local Civil Rule 1(a) be deleted as redundant, since even without that sentence the requirements of existing Local Civil Rule l(a) and (b) apply by their terms to all attorneys, however admitted.

(b) All pleadings, motions, and other papers that are submitted for filing must be signed by an attorney of record in said attorney's own name with the name clearly printed or typed directly below the signature and must show that attorney's address, telephone number, the initials of their first and last name, and the last four digits of that social security number. Failure to sign any document will result in the clerk refusing to accept the document for filing.

COMMITTEE NOTE

The Committee recommends that the first sentence of existing Local Civil Rule l(b) be deleted as duplicative of Federal Rule of Civil Procedure 11(a), except for (a) the requirement that the name of the signer be clearly printed or typed directly below the signature, and (b) the requirement that a document signed by an attorney must show the initials of the attorney's first and last name and the last four digits of the attorney's social security number. The Committee recommends that these requirements be retained, and renumbered as parts (a)(3) and (b) of new Local Civil Rule 11.1. The Committee understands that the latter requirement is necessary to enable the Clerk's Office to check that the attorney is entitled to practice in the Court. In conformity with existing practice, the Committee recommends that attorneys be given the option of using any other four-digit number registered with the Clerk of the Court, instead of the last four digits of their social security number. The Committee recommends that the final sentence of existing Local Civil Rule l(b) be deleted because it is in conflict with the final sentence of Rule 11(a) of the Federal Rules of Civil Procedure.

Rule 2. Address of Party or Original Owner of Claim to be Furnished

A party shall furnish to any other party, within five (5) days after a demand, a verified statement setting forth said party's post office address and residence, and like information as to partners if a partnership is involved and, if a corporation or an unincorporated association, the name, post office addresses and residences of its principal officers. In case of an assigned claim, the statement shall include the post office address and residence of the original owner of the claim and of any assignee. Upon non-compliance with the demand, the court, on ex parte application, shall order the furnishing of the statement, and in a proper case, on motion, may direct that the

proceedings on the part of the non-complying party be stayed, or make such order as justice requires.

COMMITTEE NOTE

The Committee recommends that the first sentence of existing Local Civil Rule 2 be retained and renumbered as Local Civil Rule 26.1, on the ground that the rule serves a useful function in enabling the parties and the Court to ascertain readily information which may be necessary to determine the presence or absence of diversity of citizenship and the identity of real parties in interest. The Committee recommends that the final sentence of existing Local Civil Rule 2 be deleted on the ground that it is duplicative of the provisions of Federal Rule of Civil Procedure 37.

Rule 3. Motions

(a) (Repealed)

(b) Upon any motion, the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion divided, under appropriate headings, into as many parts as there are points to be determined. The opposing party shall serve and file with the papers in opposition to the motion and an answering memorandum, similarly divided, setting forth the points and authorities relied upon in opposition. Failure to comply may be deemed sufficient cause for the denial of the motion or the granting of the motion by default.

COMMITTEE NOTE

The Committee recommends that the substance of existing Local Civil Rule 3(b) be retained and renumbered as Local Civil Rule 7.1, except that the Committee recommends that the word "willfully" be added to the last sentence of existing Local Civil Rule 3(b). In the interest of brevity and clarity, the Committee recommends that the contents of the first two sentences of existing Local Rule 3(b) be combined into a single sentence.

(c) The notice of motion, supporting affidavits and memoranda, with proof of due service, shall be served in accordance with the following:

(1) All motions and exceptions under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure, and under Rules 27 and 30 (insofar as they apply to interrogatories), 31, 32, 32A, 32B and 32C of the Federal Rules of Practice in Admiralty and Maritime Cases, shall be served at least five (5) days before the return day unless otherwise provided by statute or directed by the court. Where such service is made, opposing affidavits and answering memoranda of the law shall be served no later than noon of the day preceding the return day.

COMMITTEE NOTE

The Committee believes that the timing provisions of existing Local Civil Rule 3(c)(l) and (2), which prescribe the time periods for serving motion papers by counting backward from the return day, have created confusion and difficulties for attorneys and parties because (1) the term "return day" implies that the motion will be heard orally on the return day, contrary to the present practice of most Judges and Magistrate Judges; (2) by counting backward from the return day, the present rule leaves it unclear whether and how the three additional days prescribed by Federal Rule of Civil Procedure 6(e) for responding to papers served by mail will be made available in motions covered by the rule; and (3) since the present rule contains some time periods of less than 11 days and some time periods of more than 11 days, the provision of Federal Rule of Civil Procedure 6(a) that intermediate Saturdays, Sundays, and legal holidays are excluded only in computing time periods of less than 11 days applies inconsistently to the time periods under the present rule.

The Committee believes that all of these difficulties can be resolved by counting the time periods for serving motion papers in terms of a stated number of business days forward from the service of the papers being responded to, and the Committee has adopted this approach in the recommended new Local Civil Rule 6.1(a) and (b). In addition, the Committee recommends that a new Local Civil Rule 6.1(c) be added to make clear that attorneys or parties shall only appear for oral argument of the motion if so directed by the Court by order or by individual rule or upon application.

The Committee proposes that the introductory language of proposed Local Civil Rule 6.1 be revised to make it clear that the motion schedules set forth in that rule may be altered at the direction of the Judge, either by individual rule or by direction in a particular case. Among other things, it is contemplated that the Judge may provide for different time periods than those set forth in proposed Local Civil Rule 6.1, or may direct the parties to agree upon an appropriate schedule.

The Committee also recommends the deletion of the reference in existing Local Civil Rule 3(c)(1) to the former Federal Rules of Practice in Admiralty and Maritime. Cases, which were rescinded in 1966.

(2) Unless otherwise provided by subparagraph (1), statute, or the Federal Rules of Civil Procedure, and except for petitions for writs of habeas corpus, in all civil motions and exceptions, the notice of motion, supporting affidavits, and memoranda of law shall be served at least fifteen days before the return day unless otherwise directed by the court. Where such service is made, opposing affidavits and answering memoranda shall be served at least seven days, and reply papers, if any,·at least two days before the return day.

COMMITTEE NOTE

The Committee recommends the same kinds of changes in the case of this rule (recommended to be renumbered as Local Civil Rule 6.1(b)) as in the case of existing Local Civil Rule 3(c)(1) (recommended to be renumbered as Local Civil Rule 6.1(a)), for the same reasons. The Committee also recommends that the words "all civil motions and exceptions" at the beginning of this rule be revised to refer to "all civil motions, petitions, applications, and exceptions," to make clear that the rule applies to all requests for relief in civil cases, except for discovery motions, and except as otherwise provided by a statute, rule, or direction by the Court.

(3) No papers, either in support of or in opposition to the motion, which have not been served as provided will be accepted for filing or received by the court except upon special permission granted by the court for good cause shown.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 3(c)(3) be deleted as duplicative of (and to some extent inconsistent with) Federal Rule of Civil Procedure 5(d).

(4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

COMMITTEE NOTE

The committee recommends that existing Local Civil Rule 3 (c)(4) be retained, and incorporated into new Local Civil Rule 6.1(d), on the ground that it may serve a useful purpose in alerting the bar to the showing necessary to shorten the normal periods for bringing on motions.

(d) Upon any motion based upon rules or statutes the notice of motion or order to show cause shall specify the rules or statutes upon which the motion is predicated. If such specification has not been made, the motion may be stricken from the calendar.

COMMITTEE NOTE

The Committee recommends that the first sentence of existing Local Civil Rule 3(d) be retained and renumbered as Local Civil Rule 7.2. The Committee recommends that the final sentence of existing Local Civil Rule 3(d) be deleted as redundant and potentially in conflict with Federal Rule of Civil Procedure 83(a)(2).

(e) Upon any motion, objections or exceptions addressed to interrogatories, answers to interrogatories or requests for admissions, under Rule 37(a), Federal Rules of Civil Procedure, the moving party shall specify and quote verbatim in the motion papers each interrogatory, answer or request to which the objection or exception is taken and immediately following each specification shall set forth the basis of the objection or exception.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 3(e) should be retained, renumbered as Local Civil Rule 37.1, and clarified to make clear that both the interrogatories and requests for admission, and the objections or exceptions thereto, must be quoted verbatim.

(f) No motion of the type described in subparagraph (1) of paragraph (c) of this rule shall be heard unless counsel for the moving party files with the court at or prior to the argument an affidavit certifying that said counsel has conferred with counsel for

the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement. If part of the issues raised by motion have been resolved by agreement, the affidavit shall specify the issues so resolved and the issues remaining unresolved.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 3(f) be deleted on the ground that it is duplicative of Federal Rule of Civil Procedure 37(a)(2)(A) and (B).

(g) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

COMMITTEE NOTE

Although doubts have been expressed by some concerning the usefulness of existing Local Civil Rule 3(g), the Committee notes that the rule has been repeatedly relied upon by the District Courts and the Court of Appeals, and concludes that it serves a useful purpose in sharpening and clarifying the issues on many motions for summary judgment. The Committee therefore recommends that the rule be retained and renumbered as Local Civil Rule 56.1. The Committee also recommends that the word "constitutes" in the second sentence be changed to "may constitute" in order to clarify the intent of the sentence.

(h) Motions marked off the calendar shall not be restored by consent or stipulation.

COMMITTEE NOTE

The Committee recommends the deletion of existing Local Civil Rule 3(h), on the ground that each individual judge has the authority to determine whether to hear motions that have been previously marked off the calendar.

(i) The judge may direct the parties to submit motions and may determine them without oral hearing.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 3(i) be deleted as unnecessary, because the court has the power to decide motions with or without oral argument, as is made clear by recommended new Local Civil Rule 6.1(c).

(j) A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion and shall be served at least the same number of days before the return day as was required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

COMMITTEE NOTE

The Committee notes that existing Local Civil Rule 3(j) has been repeatedly relied upon by the District Courts, and recommends that it be retained and renumbered as Local Civil Rule 6.3. In order to make it clear that the rule applies to all types of motions for reconsideration or reargument, the Committee recommends that the word "reargument" in the first sentence of existing Local Civil Rule 3(j) be replaced by "reconsideration or reargument." The Committee recommends that the reference to the "return day" in the second clause of the first sentence of the existing rule be replaced by a reference to the applicable time periods for answering and reply papers under new Local Civil Rule 6.1(a) and (b). The Committee further recommends that the words "grants the

motion and specifically" in the last sentence of the rule be deleted, because the Court may on occasion wish to grant oral argument without granting the motion.

(k) (Repealed)

(l) (Southern District only) No motion of the type described in subparagraph (1) of paragraph (c) of this rule shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.

COMMITTEE NOTE

The Committee recommends that this rule be retained, and renumbered as Local· Civil Rule 37.2 (Southern District Only). This rule applies only in the Southern District; the mode of raising discovery disputes in the Eastern District is governed by existing Standing Order 6, which the Committee recommends be shortened and renumbered as Local Civil Rule 37.3 (Eastern District Only). Instead of cross- referencing former Local Civil Rule 3(c)(1) (recommended to be renumbered as Local Civil Rule 6.1(a)), the Committee recommends that the rule refer directly to motions "under Rules 26 through 37 of the Federal Rules of Civil Procedure," as is the case with recommended Local Civil Rule 6.1(a).

Rule 4. Class Actions (Repealed)

Rule 5. Fees in Stockholder and Class Actions

(a) Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and shall disclose any fee sharing agreements with anyone. The court, in its discretion, may direct that the notice also be given the New York Regional Office of the Securities and Exchange commission. Where the court directs notice of a hearing upon a proposed voluntary dismissal or settlement of

derivative or class action, the above information as to the applications shall be included in the notice.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 5(a) be retained and renumbered as Local Civil Rule 23.1. Although Federal Rules of Civil Procedure 23(e) and 23.1 provide for notice and court approval of settlements and voluntary dismissals of class and derivative actions, they do not explicitly provide for notice and court approval of attorneys' fees. The Committee recommends that the sentence in the existing rule authorizing notice to be given to the New York Regional Office of the Securities and Exchange Commission, which is permissive only, be deleted as unnecessary, and not reflective of the existing general practice.

(b) All applications for attorneys' fees and expenses, pursuant to 28 U.S.C. § 2412(d)(1)(B), and all petitions for leave to appeal an agency fee determination, pursuant to 5 U.S.C. § 504(c)(2), must be filed within thirty (30) days after the date of the final judgment of the court or of the agency fee determination. Any response shall be filed within fifteen (15) days after service of such application or petition.

COMMITTEE NOTE

The Committee recommends that the first sentence of existing Local Civil Rule 5(b) be deleted as unnecessary, because the 30-day time period is already set forth in the statutes cited in the rule. The Committee recommends that the second sentence of the rule be deleted, with the result that the time for responding to such fee applications would be governed by the general provisions of Local Civil Rule 6.1(b).

Rule 6 Orders

(a) A memorandum signed by the judge of the decision on a motion that does not finally determine all claims for relief shall constitute the order unless the memorandum directs the submission or settlement of an order in more extended form. The notation in the appropriate docket of such memorandum, or of an oral decision, which does not direct the submission or settlement of an order in more extended form, shall constitute the entry of an order. The notation in the appropriate docket of an order

in more extended form, as required to be submitted or settled by such memorandum, shall constitute the entry of the order.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 6(a) be retained, and renumbered as Local Civil Rule 6.2, on the ground that it removes any possible ambiguity as to the date of entry of an order on a nondispositive·motion, which is important for purposes of motions for reconsideration or reargument and for other purposes.

(b) No ex parte order shall be granted, unless based upon an affidavit showing cause therefor, and stating whether a Previous application for similar relief has been made.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 6(b) be retained and incorporated into new Local Civil Rule 6.1(d).

Rule 7. Form of Orders, Judgments and Decrees

The form of an order, judgment or decree shall be entitled substantially as follows:

UNITED STATES DISTRICT COURT
. . . . . DISTRICT OF NEW YORK

CAPTION: Docket No.

The date shall immediately precede the signature of the judge, magistrate judge, referee or clerk and shall be substantially as follows:

"Dated, _____, New York, July 1, 1983"

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 7 be·deleted as unnecessary, and as duplicative of Forms 31, 32, and 34A in the Appendix of Forms to the Federal Rules of Civil Procedure.

Rule 8. Submission of Orders, Judgments and Decrees

(a) Proposed orders, judgments and decrees shall be presented to the Clerk, and not presented directly to the judge. Unless the form of order, judgment or decree is consented to in writing, or unless the court otherwise directs, two (2) days' notice of settlement is required. One (1) day's notice is required of all counter-proposals. Unless adopted by the court, such proposed orders, judgments or decrees shall not form any part of the record of this action.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 8(a) be retained, and renumbered as Local Civil Rule 77.1(a). The Committee believes that the last sentence of existing Local Civil Rule 8(a) would be in conflict with Federal Rule of Appellate Procedure 10(a) if it were construed to prevent an appellant from including, as part of the record on appeal, a proposed order rejected by the court. In order to prevent any such conflict, and at the same time keep the Clerk's Office from being required to file a mass of proposed orders as to which no issue will be raised on appeal, the Committee recommends that the last sentence of the rule be amended to make clear that a litigant anticipating an appeal may submit a proposed order that was not accepted by the Court for docketing as part of the record.

(b) The attorneys causing the entry of an order of judgment shall append to or endorse upon it a list of the names of the parties entitled to be notified of the entry thereof and the names and addresses of their respective attorneys.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 8(b) be retained, and renumbered as Local Civil Rule 77.1(b). Under Federal Rule of Civil Procedure 77(d), it is the responsibility of the Clerk of the Court to serve notice of entry of an order or judgment by mail upon each party who is not in default for failure to appear, and to note such mailing on the docket. However, since the docket may not always have an up-to-date list of such parties and their attorneys, it seems wise to require the submission of an up-to-date list. The Committee recommends two corrections to the language of the rule: the Committee believes that the words "order of judgment" should read "order or judgment," and recommends that the words "attorneys causing the entry" be changed to "party who obtains entry."

(c) *Order for Deposit--Interest Bearing Account*

(1) Whenever a party seeks a court order for money to be deposited by the Clerk in an interest-bearing account, the Party shall personally deliver the order to the Clerk or Financial Deputy who will inspect the proposed order for proper form and content and compliance with this rule prior to signature by the judge for whom the order is prepared.

(2) Proposed orders directing the Clerk to invest such funds in an interest-bearing account or other instrument shall include the following:

(i) the exact United States dollar amount of the principal sum to be invested;

(ii) (Repealed)

(iii) (Repealed)

(iv) wording which directs the Clerk to deduct from the income on the investment of a fee, not exceeding that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office at equal to ten percent (10%) of the income earned for deduction in the investment so held and without further order of the court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 8(c) be retained, and renumbered as Local Civil Rule 67.1. The Committee recommends that a sentence be added at the end of the first subsection of the rule providing that the person who obtains an order for the deposit of money must serve a copy of the signed order upon the Clerk and the Financial Deputy, in order to insure that the Clerk and the Financial Deputy will receive copies of all such orders. The Committee recommends that existing Local Civil Rule 8(c)(1)(iv) be reworded in the interest of greater clarity.

Rule 9. Preparation and Entry of Judgment, Decrees and Final Orders (Repealed)

Rule 10. Default Judgment

(a) *By the Clerk*. When a party is entitled to have the clerk enter a default judgment pursuant to Rule 55(b)(1), Federal Rules of Civil Procedure, said party shall submit with the form of judgment a statement showing the principal amount due which shall not exceed the amount demanded in the complaint, giving credit for any payments and showing the amounts and dates thereof, a computation of the interest to the day of judgment, and the costs and taxable disbursements claimed. An affidavit of the party or said party's attorney shall be appended to the statement showing: (1) that the party against whom judgment is sought is not an infant or an incompetent person; (2) that said party has made default in appearance in the action; (3) that the amount shown by the statement is justly due and owing and that no part has been paid except as therein set forth; and (4) that the disbursements sought to be taxed have been made in the action or will necessarily be made or incurred therein. The clerk shall thereupon enter judgment for principal, interest and costs.

COMMITTEE NOTE

Because existing Local Civil Rule 10(a) is confusing to many attorneys, in that it fails to highlight the distinction between the Clerk's certificate of default pursuant to Federal Rule of Civil Procedure 55(a) and the entry of a default judgment by the Clerk pursuant to Federal Rule of Civil Procedure 55(b)(1), the Committee recommends that the substance of existing Local Civil Rule 10(a) be divided between a new Local Civil Rule 55.1, dealing with the Clerk's certificate of default, and a new Local Civil Rule 55.2(a), dealing with the entry of default judgment by the Clerk.

(b) *By the Court*. An application to the court for the entry of a default judgment, pursuant to Rule 55(b)(2), Federal Rules of Civil Procedure, shall be accompanied by a clerk's certificate of the notation of the default, and by a copy of the pleading to which no response has been made.

COMMITTEE NOTE

The Committee recommends that the substance of existing Local Civil Rule 10(b) be retained and renumbered as new Local Civil Rule 55.2(b).

Rule 11. Taxable Costs and Disbursements

(a) *Request to Tax Costs*. Within thirty (30) days after final judgment, or in the case of an appeal by either party, within thirty (30) days after the disposition of the appeal, the party recovering costs shall file with the clerk a request to tax costs indicating the date and time of taxation. Costs will not be taxed during the pendency of any appeal. Any party failing to file a bill of costs within this thirty (30) day period will be deemed to have waived costs. The bill of costs shall include an affidavit of counsel that the costs claimed are allowable by law, are correctly stated and were necessarily incurred. Bills and cancelled checks in payment shall be attached as exhibits. Proof of service upon opposing counsel shall be indicated. Service of the bill of costs by mail is sufficient and constitutes notice as provided in Rule 54(d) of the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 11(a) serves an important purpose by providing a time limit within which requests for taxable costs must be made, and recommends that it be retained and renumbered as new Local Civil Rule 54.1(a). The Committee recommends that the 30- day time limit be subject to extension by the Court for good cause shown, and that the last two sentences of existing Local Civil Rule 11(a) be deleted as duplicative of the general requirement of service of papers under Federal Rule of Civil Procedure 5(a). The Committee also recommends that the requirement that copies of cancelled checks be annexed be deleted on the ground that such a requirement is burdensome in light of modern record-keeping practices and adds little to the required affidavit that the costs were incurred. The Committee further recommends that a sentence be added to new Local Civil Rule 54.1(a) requiring at least three days' notice of a request for taxation of costs, on the ground that the one day's notice specified in Federal Rule of Civil Procedure 54(d)(1) is generally inadequate.

(b) *Objections to Bill of Costs*. A party objecting to any cost item may serve objections in writing prior to or at the time for taxation. The clerk will proceed to tax

costs at the time noticed and allow such items as are properly taxable. In the absence of objection, any item listed may be taxed within the discretion of the clerk. The taxation of costs by the clerk shall be final unless modified on review by the court on motion filed within five (5) days thereafter pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 11(b) be retained and renumbered as new Local Civil Rule 54.1(b). The Committee recommends that the word "may" in the first sentence of existing Local Civil Rule 11(b) be changed to "shall," to underscore the point made in the third sentence of the rule that the Clerk may allow any item of costs that is not objected to. The Committee further recommends that the word "written" be inserted before the word "objection" in the third sentence of the rule, to make clear that a written objection is required. The Committee recommends the deletion of the final sentence of existing Local Civil Rule 11(b), on the ground that it is duplicative of the final sentence of Federal Rule of Civil Procedure 54(d)(1).

(c) *Items Taxable as Costs* **(Eastern District only)**

COMMITTEE NOTE

Since 1989, the Eastern District has retained the former joint Local Civil Rule 11(c), specifying items that are taxable as costs, while the Southern District has adopted a substantially identical list of taxable costs in the form of a standing order. The Committee believes that, from the standpoint of providing clear information to attorneys and litigants, it is preferable for the list of taxable costs to be set forth in the local rules. Accordingly, the Committee recommends that the list of taxable costs be set forth in a new joint Local Civil Rule 54.1(c). As described below, the Committee has reviewed the differences between the Eastern District and Southern District lists of taxable costs, which are not extensive, and has made recommendations regarding those differences. In addition, the Committee recommends that the categories of taxable costs listed in 28 U.S.C. § 1920 that are not presently set forth in existing Local Civil Rule 11(c) be added to the list in new Local Civil Rule 54.1(c), so that no unintended negative inference will be drawn that such categories are not taxable.

(1) Transcripts

The cost of an original trial transcript or a transcript of matters prior to or subsequent to trial is taxable only when authorized in advance or ordered by the court.

COMMITTEE NOTE

The Committee recommends that, following the Southern District standing order and the provisions of existing Local Civil Rule 12, the costs of the trial transcript be taxable if it was necessarily obtained for use in the case in the District Court or on appeal.

(2) Depositions

The original transcript of a deposition, plus one copy is taxable if the deposition was received in evidence whether or not it was read in its entirety. Costs for depositions are also taxable if they were used by the court in ruling on a motion for summary judgment. Costs for depositions taken solely for discovery or used only for impeachment purposes are not taxable. Counsel's fees and expenses in attending the taking of a deposition are not taxable except as provided by statute, rule or order of the court. Fees, mileage, and subsistence for the witness at the deposition are taken at the same rate as for attendance at trial if the deposition taken is received in evidence.

COMMITTEE NOTES

The Committee recommends that the cost of a deposition transcript be taxable, not only if it was introduced in evidence in whole or in part, but also if it was used at trial for impeachment or similar purposes. In order to prevent the entirety of a lengthy deposition transcript from automatically being taxed if a few lines therefrom are used at trial, the Committee recommends that the words "Unless otherwise ordered by the court" be added at the beginning of the rule.

(3) Witness Fees, Mileage and Subsistence

Witness fees are taxable if the witness takes the stand. Subsistence pursuant to 28 U, S.C. § 1821 is allowable if it is not practical for the witness to return to his or her residence from day to day. No party to the action may receive witness fees or subsistence. Fees for expert witnesses are taxable only to the extent of fees for ordinary witnesses unless prior court approval was obtained.

COMMITTEE NOTE

The Committee recommends that the substance of existing Local Civil Rule 11(c)(3) be retained and renumbered as new Local Civil Rule 54.1(c)(3).

(4) Interpreting Costs

The reasonable fee of a competent interpreter is taxable if the fee of the witness involved is taxable. The reasonable fee of a translator is also taxable if the document translated is admitted into evidence.

COMMITTEE NOTE

The Committee recommends that this rule be retained and renumbered as Local Civil Rule 54.1(c)(4). The reasonable costs of special interpretation services pursuant to 28 U.S.C. § 1828 should be added to this rule, because they are specifically mentioned in 28 U.S.C. § 1920(6). For the same reasons as those described under existing Local Civil Rule 11(c)(2), the Committee recommends that the words "admitted into evidence" be changed to "used or received in evidence."

(5) Exemplifications and Copies of Papers

A copy of an exhibit is taxable if the original was not available and the copy was admitted into evidence. The cost of copies used for the convenience of counsel are not taxable. The fee for certification or proof of non-existence of a document is taxable.

COMMITTEE NOTE

The Committee recommends that the final sentence of existing Local Civil Rule 11(c)(5) be amended to make clearer the nature of the fees that are taxable. For the same reasons as those described under existing Local Civil Rule 11(c)(2), the Committee recommends that the words "admitted into evidence" be changed to "used or received in evidence."

(6) Maps, Charts, Models, Photographs and Summaries

The cost of photographs, 8" x 10" in size or less, is taxable if admitted into evidence. Enlargements greater than 8" x 10" are not taxable except by order of court. Costs of models are not taxable except by order of court. The cost of compiling summaries, statistical comparison and reports is not taxable.

COMMITTEE NOTE

The Committee recommends that the words "maps" and "charts," which appear in the title but not in the text of existing Local Civil Rule 11(c) (6), be·added to the third sentence of the local rule. The Committee further recommends that an express reference to computer generated models be added to the third sentence. In addition, for the same reasons as those described under existing Local Civil Rule 11(c)(2), the Committee recommends that the words "admitted into evidence" be changed to "used or received in evidence."

(7) Docket Fees to Attorneys

Statutory docket fees pursuant to 28 U.S.C. § 1923 are taxable. Other attorney costs, fees and paralegal expenses are not taxable except by order of the court.

COMMITTEE NOTE

In order to avoid confusion, the Committee recommends that the subject of statutory docket fees be dealt with as part of a new Local Civil Rule 54.1(c)(10), dealing generally with docket and miscellaneous fees mentioned in 28 U.S.C. § 1920, and that the title of the present subsection be changed to "Attorney Fees and Related Costs."

(8) Masters, Receivers and Commissioner Fees

Fees to masters, receivers and commissioners are taxable as costs, unless otherwise ordered by the court.

COMMITTEE NOTE

The Committee recommends that fees of court appointed experts, which are expressly mentioned in 28 U.S.C. § 1920(6), be added to the title and the text of this subsection.

(9) Costs for Title Searches

A party to whom costs are awarded in an action to foreclose a mortgage on real property is entitled to tax necessary disbursements for the expenses of searches made by title insurance, abstract or searching companies, or by any public officer authorized to make official searches and certify to the same, or by the attorney for the party to whom costs are awarded, taxable at rates not exceeding the cost of similar official searches.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 11(c)(9) be extended to include all actions in which title searches or similar searches are necessary, and that the authorization for taxation of fees for searches by a party's attorney be deleted.

Rule 12. Stenographic Transcript

Subject to the provisions of Rule 54(d), Federal Rules of Civil Procedure, the expense of any party in necessarily obtaining all or any part of a transcript, for purposes of a new trial, or for amended findings or for appeal shall be a taxable cost against the unsuccessful party at the rates prescribed by the Judicial Conference.

COMMITTEE NOTE

The Committee recommends that the substance of existing Local Civil Rule 12 be combined with that of existing Local Civil Rule 11(c)(1) in new Local Civil Rule 54.1(c)(1).

Rule 13. Entering Satisfaction of Judgments or Decrees

Satisfaction of a money judgment recovered or registered in this district shall be entered by the clerk as follows:

(a) Upon the payment into the court of the amount thereof, plus interest, and the payment of the clerk's and marshal's fees, if any.

(b) Upon the filing of a satisfaction executed and acknowledged by (1) the judgment creditor; or (2) said judgment creditor's legal representatives or assigns, with evidence of their authority; or (3) said judgment creditor's attorney if within ten (10) years of the entry of the judgment or decree.

(c) If the judgment creditor is the United States, upon the filing of a satisfaction executed by the United States attorney.

(d) In admiralty, pursuant to an order of satisfaction, but such an order will not be made on the consent of the attorneys only, unless such consent is given within ten (10) years from the entry. of the decree to be satisfied.

(e) Upon the registration of a certified copy of a satisfaction entered in another district.

COMMITTEE NOTE

The Committee believes that existing Local Rule 13 may serve a useful function in alerting attorneys to the available means of entering satisfaction of judgments, and recommends that it be retained and renumbered as Local Civil Rule 54.3. The Committee recommends that the title of the rule be revised to make clear that the rule deals only with entry of satisfaction of money judgments. The Committee further recommends that existing Local Civil Rule 13(d) be revised to provide that any judgment (whether or not in an admiralty matter) may be satisfied by an order of satisfaction entered by the court.

Rule 14. (Repealed) Order of Taking Depositions

Rule 15 Counsel Fees on Taking Depositions in Certain Cases

(a) When a proposed deposition upon oral examination, including a deposition before action or pending appeal, is sought to be taken at a place more than one hundred (100) miles from the courthouse, the court may provide in the order or in any order entered under Rule 30(b), Federal Rules of Civil Procedure, that prior to the examination, the applicant pay the expense of the attendance including a reasonable counsel fee of one attorney for each adversary party at the place where the deposition is to be taken. The amounts so paid, unless otherwise directed by the court, shall be a taxable cost in the event that the applicant recovers costs of the action or proceeding.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 15(a) serves a useful role in familiarizing attorneys with the possible availability of counsel fees when depositions are taken more than 100 miles from the courthouse, and recommends that the rule be retained and renumbered as Local Civil Rule 30.1, with the title of the rule being

amended to describe more specifically the subject matter of the rule. In making this recommendation, the Committee does not mean to suggest that an award of counsel fees is appropriate in all or most cases of this kind; the Committee views the rule as leaving this issue to the sound discretion of the Court. The Committee recommends clarifying changes in language, including the insertion of a cross-reference to this rule in new Local Civil Rule 54.1(c)(2), dealing with taxation of costs of depositions. The Committee also recommends the deletion of the specific reference to Federal Rule of Civil Procedure 30(b), since that is only one of the Federal Rules of Civil Procedure under which such an order could be entered.

(b) An order pursuant to Rule 27(a)(2), Federal Rules of Civil Procedure, appointing an attorney to represent the absent expected adversary party and to cross-examine the proposed witness, shall fix said attorney's compensation and expenses; the compensation so fixed shall be paid by the petitioner prior to the appearance of such attorney upon the examination.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 15(b) be deleted, on the ground that it deals with a situation that rarely arises in practice, and that can readily be dealt with on those occasions when it arises.

Rule 16. (Repealed) Deposition for Use Abroad

Rule 17. (Repealed) Commission to Take Testimony

Rule 18. Filing of Discovery Materials

(a) Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses shall not be filed with the clerk's office except by order of the court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 18(a) be retained and renumbered as Local Civil Rule 5.1(a). Since the rule is being renumbered to refer to Federal Rule of Civil Procedure 5, the Committee recommends that the reference at the outset of the rule to Federal Rule of Civil Procedure 5(d) can be deleted. The Committee recommends that the language of the rule be broadened to make clear that it applies to all types of discovery requests and responses, not merely to the specific types listed in the present rule.

(b) A party seeking relief under Rule 26, or seeking to determine sufficiency under Rule 36, or seeking to compel under Rule 37 of the Federal Rules of Civil Procedure shall file only that portion of the deposition, interrogatory, requests for documents or requests for admissions that are objected to.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 18(b) be retained and renumbered as Local Civil Rule 5.1(b). The Committee further recommends that the language of the rule be broadened to make clear that it covers all types of discovery motions, and that the word "file" be changed to "quote or attach."

(c) When discovery material not on file is needed for an appeal, upon an application and order of the court or by stipulation of counsel, the necessary portion of discovery material shall be filed with the clerk.

COMMITTEE NOTE

The Committee recommends that the substance of existing Local Civil Rule 18(c), with some clarifying changes, be retained and renumbered as Local Civil Rule 5.1(c).

Rule 19. Masters

(a) Agreement on a master

The parties to a civil action may stipulate in writing for the appointment of a master to report on particular issues, or upon all the issues. The stipulation may suggest the master, in which case the court may appoint the person named. The procedure covering such a reference shall be the same as that governing any other reference to a master.

COMMITTEE NOTE

The Committee believes that Local Rule 19(a), which is not duplicative of any provision of Federal Rule of Civil Procedure 53, serves a useful purpose, and should be retained and renumbered as Local Civil Rule 53.1(b). The Committee proposes that the language of the rule be revised to permit the agreement of the parties to be stated on the

record in open court, and to make clear that the appointment of a master, even when the parties agree, is a determination to be made by the Court.

(b) May sit outside district.

A master may sit within or outside the district. Where the master is requested to sit outside the district for the convenience of a party and there is opposition by another party, said master may make an order for the holding of the hearing, or a part thereof, outside the district, upon such terms and conditions as shall be just. Such order may be reviewed by the court upon motion of any party, served within ten (10) days after notice to all parties by the master of the making of the order.

COMMITTEE NOTE

The Committee recommends that this provision be retained and renumbered as Local Civil Rule 53.1(c). This provision is not duplicative of Federal Rule of Civil Procedure 53(c), which provides that the Court may fix the time and place of the hearings to be conducted by the master, but which does not expressly provide that the master may make the determination to hold hearings outside the district.

(c) (Repealed) Report

(d) Fees taxable

After a master's compensation and disbursements have been allowed by the court, the prevailing party may pay such compensation and disbursements, and on payment the amount thereof shall be a taxable cost against the unsuccessful party or parties. Where, however, the court directs by order the party against whom, or the proportion in which such compensation and disbursements shall be charged, or the fund or subject matter out of which they shall be paid, the party making the payment to the master shall be entitled to tax such compensation or disbursements only against such parties and in such proportions as the court has directed, and to payment of such taxable cost only out of such fund or subject matter as the court has directed.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 19(d) be deleted because the subject matter of this rule is covered by Federal Rule of Civil Procedure 53(a).

(e) Order of reference

Whenever an order of reference to a master is made, the attorney procuring the order shall, at the time of filing, deposit with the clerk a copy to be furnished to the master.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 19(e) be omitted as inconsistent with Federal Rule of Civil Procedure 53(d)(1), which requires the Clerk to furnish a copy of the order of reference to the master.

(f) Filing of report

Upon the filing of· the report the master shall furnish the clerk with sufficient copies of a notice of filing addressed severally to the parties or their attorneys, to enable the clerk to mail copies to them.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 19(f) be stricken as inconsistent with Federal Rule of Civil Procedure 53(e)(1), which requires the master to serve on all parties notice of the filing of the master's report.

(g) Confirmation or rejection of master's report

A motion to confirm or to reject, in whole or in part, a report of a master shall be heard by the judge appointing such master.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 19(g) be deleted as duplicative of Federal Rule of Civil Procedure 53(e)(2).

Rule 20. Oath of Master, Commissioner, etc.

Every person appointed master, special master, commissioner, special commissioner, assessor or appraiser shall before entering upon those duties take and subscribe an oath, which, except as otherwise prescribed by statute or rule, shall be to the effect that those duties will be faithfully and impartially discharged and in conformance with the order of appointment and to the best of the master's ability and understanding. Such an oath may be taken before any federal or state officer authorized by federal law to administer oaths, and shall be filed in the office of the clerk.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 20 be retained and renumbered as Local Civil Rule 53.1(a). The Committee also recommends that the prescribed oath be described by reference to the oath to be taken by Judges pursuant to 28 U.S.C. § 453.

Rule 21. Marked Pleadings

Counsel for plaintiff shall at least one day before a case is actually scheduled to go to trial (unless a shorter time is allowed by the judge) supply to the judge designated to preside at the trial a copy of marked pleadings which shall consist of the following:

(a) A copy of the complaint or libel and of any third party complaint or third party libel briefly indicating in the margin at each numbered paragraph or article, the manner in which the defendant or respondent, or any third party defendant or respondent impleaded who has filed an answer, treats the allegations contained in said paragraph of the complaint or libel or third party complaint or third party libel.

(b) A complete and accurate copy of each answer filed by the defendant or respondent or any third party defendant or respondent impleaded in the case, similarly marked in case a reply has been filed.

(c) A complete and accurate copy of each reply has been filed in the case.

COMMITTEE NOTE

The Committee recommends the deletion of Local Civil Rule 21, because it deals with a subject matter which does not need to be the subject of a Local Rule. While some Judges apparently find marked pleadings useful, many Judges make no use of them, preferring to rely upon the pretrial order or pretrial memoranda to clarify the issues for trial. Those Judges who find marked pleadings to be useful can continue to require them, either by individual rules or by orders in particular cases.

Rule 22. Assessment of Jury Costs

All counsel in civil cases must seriously discuss the possibility of settlement a reasonable time prior to trial. The trial judge may, in his discretion, assess the parties or counsel with the cost of one day's attendance of the jurors if a case is settled after the jury has been summoned or during trial, the amount to be paid to the clerk of the court. For the purpose of interpreting this paragraph, a civil jury is considered summoned for a trial as of noon of the business day prior to the designated date of the trial.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 22 be retained, and renumbered as Local Civil Rule 47.1, because it serves a useful function in requiring counsel to take account of the wasteful use of juries inherent in waiting until after the jury has been summoned to begin serious settlement discussions. The Committee also recommends that the word "must" in the first sentence be changed to "should."

Rule 23. Proposed Findings of Fact and Conclusions of Law

In any civil action, where findings of fact and conclusions of law are required, the court may require from either or both parties, before or after the announcement of its decision, proposed findings of fact and conclusions of law, for the assistance of the court, but, unless adopted by the court, such proposed findings of fact and conclusions of law shall not form any part of the record of the action.

COMMITTEE NOTE

The Committee recommends the deletion of existing Local Civil Rule 23. No local rule is required to confirm the inherent power of the Court to require the submission

of proposed findings of fact and conclusions of law. The final clause of existing Local Civil Rule 23 raises the same problems as the final sentence of existing Local Civil Rule 8 (a).

Rule 24. Custody of Exhibits

(a) Except upon appeal and in proceedings before a master or commissioner, and unless the court orders otherwise, exhibits shall not be filed with the clerk, but shall be retained in the custody of the respective attorneys who produced them in court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 24(a) be retained, and renumbered as Local Civil Rule 39.1(a). The Committee recommends that the words "upon appeal and" be deleted from the first sentence of existing Local Civil Rule 24(a), on the ground that the handling of exhibits for purposes of appeal is appropriately left to the Federal Rules of Appellate Procedure and the Second Circuit Rules. The Committee recommends that the exception for proceedings before a master or commissioner be retained, because it is required by Federal Rule of Civil Procedure 53 (e) (1).

(b) In the case of an appeal or other review by an appellate court, the parties are encouraged to agree with respect to which exhibits are necessary for the determination of the appeal. In the absence of agreement and except as provided in subdivision (c), a party upon written request of any other party, or by order of the court, shall make available at the office of the clerk all the original exhibits in said party's possession, or true copies, in order to enable such other party to prepare the record on appeal, at which time and place such other party shall also make available all the original exhibits in that party's possession. All exhibits made available at the clerk's office which are designated by any party as part of the record on appeal shall be filed with the clerk, who shall transmit them together with the record on appeal to the clerk of the Court of Appeals. Exhibits not so designated shall remain in the custody of the respective attorneys who shall have the responsibility of promptly forwarding same to the clerk of the Court of Appeals upon request.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 24(b) be deleted, because it is duplicative of Second Circuit Rule 11(b) and (c).

(c) Documents of unusual bulk or weight and physical exhibits, other than documents, shall remain in the custody of the attorney producing them, who shall permit their inspection by any party for the purpose of preparing·the record on appeal and who shall be charged with the responsibility for their safekeeping and transportation to the appellate court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 24(c) be deleted, because it is duplicative of Second Circuit Rule 11(d).

(d) Exhibits which have been filed with the clerk shall be removed by the party responsible for them (1) if no appeal is taken, within ninety (90) days after a final decision is rendered, or (2) if an appeal has been taken, within thirty (30) days after the mandate of the final reviewing court is filed. Parties failing to comply with this rule shall be notified by the clerk to remove their exhibits and upon their failure to do so within thirty (30) days, the clerk may dispose of them as the clerk may see fit.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 24(d) be retained, and renumbered as Local Civil Rule 39.1(b), because it serves a useful role in authorizing the clerk to dispose of exhibits which are not timely claimed by the parties. The Committee recommends that the words "after the mandate of the final reviewing court is filed" be replaced by the words used in existing Local Civil 11(a), "after the final disposition of the appeal," because it will not always be clear, when a mandate is filed in the District Court, whether or not it is the final mandate in the case.

Rule 25. Removal of Cases from State Courts

(a) (Repealed)

(b) If the court's jurisdiction is based upon diversity of citizenship (28 U.S.C. § 1332) the petition for removal shall set forth the states of citizenship and residence, address of each party named in the caption and, in the case of a corporation, the state of incorporation and of its principal place of business, regardless of whether service of process has been effected on all parties. If such information or a designated part is unknown to defendant, defendant may so state, and in that case plaintiff within twenty (20) days after removal shall file in the office of the clerk a statement of the omitted information.

COMMITTEE NOTE

For reasons similar to those underlying its recommendation that existing Local Civil Rule 2 be retained, the Committee believes that existing Local Civil Rule 25(b) serves a useful function in assisting the parties and the Court to determine the presence or absence of diversity jurisdiction, and recommends that existing Local Civil Rule 25(b) be retained and renumbered as Local Civil Rule 81.1(a). The committee recommends that existing Local Civil Rule 25(b) be reworded in the interest of greater clarity, that the reference to the "petition for removal" be changed to "notice of removal" (the term now used in 28 U.S.C. § 1446), and that the rule be amended to require that the notice of removal also state the dates upon which all parties that have been served were served.

(c) Within twenty (20) days after filing the petition and bond, the petitioner shall file with the clerk a copy of all records and proceedings in the state court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 25(c) be retained, and renumbered as Local Civil Rule 81.1(b). The Committee recommends that the phrase "Unless otherwise ordered by the court" be added at the beginning of the rule, in recognition of the fact that in some cases it may be unfeasible or inequitable to impose the burden of filing the entire record on the removing party, particularly if the removing party has been brought into the litigation after extensive proceedings have already been conducted. The Committee also recommends, as in the case of existing Local Civil Rule 25(b), that the terminology of existing Local Civil Rule 25(c) be revised to correspond to that now used in 28 U.S.C. § 1446.

(d) Upon the entry of an order, remanding the case to the state court, the plaintiff shall deposit with the clerk a copy to be certified and mailed by the clerk to the clerk of the state court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 25(d) be deleted as unnecessary, since 28 U.S.C. § 1447(c) already provides that the Clerk of the Court shall mail a certified copy of the remand order to the clerk of the state court.

Rule 26. Transfer of Cases to Another District

In a case ordered transferred from this district, the clerk, unless otherwise ordered, shall upon the expiration of five (5) days mail to the court to which the case is transferred (1) certified copies of the court's opinion ordering the transfer, of its order, and of the docket entries in the case, and (2) the originals of all other papers on file in the case.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 26 serves an important function by providing a definite period following which an order of transfer will take effect unless it is stayed or modified. The Committee therefore recommends that existing Local Civil Rule 26 be retained, and renumbered as Local Civil Rule 83.1.

Rule 27. Review of Cases; Dismissal for Want of Prosecution

Civil cases which have been pending for more than one year and are not on the trial calendar may be called for review upon not less than fifteen (15) days' notice addressed to the attorneys or proctors of record by mail, by telephone, or in person. Notice of the call of such cases shall be published in the New York Law Journal, or otherwise as the court directs. The court may enter an order dismissing the case for want of prosecution, or continuing it, or may make such other order as justice may require.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 27 be deleted as unnecessary in light of the individual calendar system and the power of each Judge to take appropriate action when cases assigned to that Judge are not prosecuted.

Rule 28. Actions by or on Behalf of Infants or Incompetents

An action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the court embodied in an order, judgment or decree. The proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the court, for cause shown, may dispense with any New York State requirement.

The court shall authorize payment of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action, whether realized by settlement, execution or otherwise and shall determine the said fee and disbursements, after due inquiry as to all charges against the fund.

The court shall order the balance of the proceeds of the recovery or settlement to be distributed as it deems may best protect the interest of the infant or incompetent.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 28 serves an important function, and should be retained and renumbered as Local Civil Rule 83.2(a). The Committee notes that attorney fee awards in Federal Tort Claims Act cases are limited by 28 U.S.C. § 2678.

Rule 29. Settlements, Apportionments and Allowances in Wrongful Death Actions

In an action for wrongful death:

(a) The court shall apportion the avails of the action only where required by statute.

(b) The court shall approve a settlement only in a case covered by subdivision (a).

(c) The court shall approve an attorney's fee only upon application in accordance with the provisions of the Judiciary Law of the State of New York.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 29 be retained, and renumbered as Local Civil Rule 83.2(b). The Committee recommends that existing Local Civil Rule 29(a) and (b) be combined into a single paragraph in the interest of greater clarity, and that the phrase "New York State statutes and rules," which is used in existing Local Civil Rule 28, be substituted for the phrase "Judiciary Law of the State of New York" in existing Local Civil Rule 29(c).

Rule 30. Proceedings to Enjoin Expulsion in Deportation and Exclusion Cases

(a) The Petition or Complaint

(1) Any application to enjoin an alien's expulsion must be verified and, if made by someone other than the alien, must show either that the applicant has been authorized by the alien to make the application, or that the applicant is the parent, child, spouse, brother, sister, attorney or next friend of the alien.

(2) The application must state in detail why the alien's expulsion is invalid. This shall include a statement describing the irreparable harm the alien will suffer if the application is not granted and setting forth the reasons it is believed the application has a probable chance to succeed on the merits. The application shall also state in what manner the applicable administrative remedies have been exhausted and whether any prior application to the court for the same or similar relief has been made.

(3) The application shall recite the source of the factual allegations it contains. If the Immigration and Naturalization Service has been requested to grant the alien, the alien's attorney or the alien's representative access to the alien's records and access has

been refused, the application shall state who made the request to review the records, when and to whom it was made, and by whom access was refused. In the event it is claimed that insufficient time was available to examine the alien's records, the application shall state when the alien was informed of his expulsion and why he has been unable to examine the records since that time.

(4) Every application to enjoin the alien's expulsion shall contain the alien's immigration file number and the decision, if any, the alien seeks the court to review. In the event this decision was oral, the application shall state the nature of the relief requested, who denied the request, the reasons for the denial and the date the request was denied.

(b) Commencement of the Proceeding

In any proceeding to enjoin the expulsion of an alien, the original verified petition or complaint shall be filed with the clerk. In addition to service pursuant to Rule 4, Federal Rules of Civil Procedure, a copy of the petition or complaint, and application for a writ of habeas corpus or order to show cause shall be delivered to the United States Attorney prior to the issuance of any writ or order enjoining the expulsion; if the United States attorney's office is closed, delivery shall be made before 10:00 A.M. the following business day, unless the court otherwise directs.

(c) Procedure for Issuance of an Order or Writ

(1) In the event the court determines to enjoin temporarily an alien's expulsion, it shall briefly set forth why the order or writ was issued, endorse upon the order or writ the date and time it was issued, and set the matter for prompt hearing on the merits.

(2) All orders or writs temporarily enjoining an alien's expulsion shall expire by their terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the government consents to an extension for a longer period.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 30 serves an important function in alerting counsel to the necessary steps in a proceeding to stay deportation, particularly because such proceedings are frequently of an emergency nature. The Committee therefore recommends that existing Local Civil Rule 30 be retained, and renumbered as Local Civil Rule 83.4(a) through (c). In addition to recommending certain wording changes for purposes of clarification, the Committee recommends the addition (as a new paragraph (a)(5)) of a requirement that the application state the basis for the Court's jurisdiction. The Committee discussed the possibility of recommending that the rule be amended to provide for an automatic 48-hour or 72-hour stay of deportation whenever an application for a writ of habeas corpus is filed with the Court. This proposal received substantial support from some members of the Committee. On balance, however, the Committee concluded that it should not recommend such an automatic stay. The Committee noted that Congress has defined by statute the classes of cases in which automatic stays are allowed. See 8 U.S.C. § 1105a(a)(3); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-77 (1996). Moreover, the Committee was informed that it is the current policy of the United States Attorney's Offices for the Southern and Eastern Districts of New York to delay a deportation when an application for a writ of habeas corpus requesting a stay of deportation is served on those offices.

Rule 31. Service of Writ or Order Enjoining Expulsion of an Alien (Eastern District only)

(a) In all cases except those described in Rule 30(b) of the Federal Rules of Civil Procedure, service of the writ or order upon the United States attorney's office within the time specified by the court shall be sufficient service to enjoin an alien's expulsion.

(b) After delivery of an alien for expulsion to the master of a ship or the commanding officer of an airplane, the writ or order enjoining the alien's expulsion shall be addressed to and served upon only such master or commanding officer. Notice to the

respondent, or the United States attorney's office, of the allowance of the writ or issuance of the order shall not operate to enjoin an alien's expulsion if the alien is no longer in the Government's custody. Service of the writ or order may not be made upon a master after the ship has cast off her moorings or upon a commanding officer once the airplane has closed its doors and left the terminal.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 31, like existing Local Civil Rule 30, serves an important function in deportation cases. The Committee recommends that existing Local Civil Rule 31 be retained by the Eastern District and adopted by the Southern District, and that it be renumbered as Local Civil Rule 83.4(d) and (e), so as to be part of the same local rule as Local Civil Rule 30, to which it is closely related. In addition to recommending certain clarifying changes in wording, the Committee recommends the deletion of the reference to Federal Rule of Civil Procedure 30(b) in existing Local Civil Rule 31(a), since that reference does not appear to make sense.

Rule 32. Habeas Corpus and Motions Order 28 U.S.C. § 2255 [State Proceedings]

(a) The petition in all habeas corpus proceedings shall set forth whether or not applications previously have been made for writs or for similar relief, stating to what court or judge they were made, the determination in each case, and any new facts upon the present application that were not previously shown.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 32(a) be deleted as unnecessarily duplicative of the Forms now required by the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings in United States District Courts.

(b) The original verified petition shall be filed with the clerk. In addition to the service on the respondent of the writ of habeas corpus or order to show cause why such a writ should not issue in all cases where an official or employee of the United States is respondent, a copy of the petition and writ or order to show cause shall be

delivered to the United States attorney prior to issuance of the writ or granting of the order; if the office of the United States attorney is closed, these papers shall be delivered there before 10:00 A.M. on the following business day unless otherwise ordered by the court.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 32(b) be deleted as unnecessarily duplicative of Rule 3(b) of the Rules Governing Section 2254 Cases in United States District Courts and Rule 3 of the Rules Governing Section 2255 Proceedings in United States District Courts.

(c) All pro se petitions for writs of habeas corpus by state and by federal prison and all pro se motions under 28 U.S.C. § 2255 by persons in custody shall be deemed to include a petition for leave to appear in forma pauperis and the clerk is directed to file all such petitions without prepayment of fees, unless the appropriate judge otherwise directs.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 32(c) be deleted as unnecessarily duplicative of Rule 3(a) of the Rules Governing Section 2254 Cases in United States District Courts and Rule 3 of the Rules Governing Section 2255 Proceedings in United States District Courts.

(d) Applications for a writ of habeas corpus made by persons under the judgment and sentence of a court of the State of New York shall be filed, heard and determined in the district court for the district within which they were convicted and sentenced provided, however, that if the convenience of the parties and witnesses requires a hearing in a different district, such application may be transferred to any district which is found by the assigned judge to be more convenient. The clerks of the Southern and Eastern District Courts are authorized and directed to transfer such applications to the District herein designated for filing, hearing and determination.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 32(d) be retained and renumbered as Local Civil Rule 83.3. In light of 28 U.S.C. § 2244(b)(3)(A), added by Pub. L. No. 104-132, § 106, 110 Stat. 1221 (1996), the Committee recommends that the rule begin with the words "Unless otherwise provided by statute."

Rule 33. Notice of Claim of Unconstitutionality (Repealed by the Southern District)

If, at any time prior to the trial of any action, suit or proceeding, to which neither the United States nor any agency, officer or employee thereof is a party, a party draws in questions the constitutionality of an act of Congress affecting the public interest, such party shall notify the chief judge in writing of the existence of such question (to enable the court to comply with 28 U.S.C.A. § 2403) giving the title of the case, a reference to the questioned statute sufficient for its identification and the respects in which it is claimed that the statute is unconstitutional.

If, at any time prior to the trial of any action, suit or proceeding, to which neither a state nor any agency, officer or employee thereof is a party, a party draws in question the constitutionality of any statute of that state affecting the public interest, such notice shall also be given.

COMMITTEE NOTE

Although existing Local Civil Rule 33 has been repealed by the Southern District, the Committee believes that it may serve a useful purpose by helping to prevent an inadvertent failure to notify Federal or State law officers of a claim of unconstitutionality, as required by 28 U.S.C. § 2403(a) and (b). The Committee therefore recommends that the rule be reworded for conciseness and clarity, and that it be renumbered as Local Civil Rule 24.1.

Rule 34. Three-Judge Court

Whenever upon an application for injunctive relief counsel is of opinion that the relief is such as may be granted only by a three-judge court, the petition shall so state,

and the proposed order to show cause (whether or not continuing a stay), or the notice of motion, shall include a request for a hearing before a three-judge court. Upon the convening of a three-judge court, in addition to the original papers on file, there shall be handed up three copies of the pleadings, three copies of the motion papers and three copies of all briefs.

COMMITTEE NOTE

Although the requirement of three-judge courts has been eliminated in most of the cases in which it formerly applied, the Committee concludes that existing Local Civil Rule 34 serves a useful function in the three-judge court cases that remain, and recommends that it be retained and renumbered as Local Civil Rule 83.5. The Committee recommends that the final sentence of existing Local Civil Rule 34 be broadened to encompass all papers filed in the three-judge court action, not merely the specific papers listed in the existing rule. The Committee also recommends that the words "continuing a stay" be amended to "containing a stay," which make more sense in the context of the rule.

Rule 35. Publication of Advertisements

All advertisements except notices of sale of real estate or of any interest in land shall, in civil and admiralty causes, be published in a newspaper published in the City of New York and which has a general circulation or a circulation calculated to give public notice of a legal publication. The court may direct the publication of such additional advertisement as it may deem advisable.

Unless otherwise ordered, notices for the sale of real estate or of any interest in land shall be published in a newspaper of general circulation in the county in which the real estate or the land in question is located.

COMMITTEE NOTE

The Committee concludes that existing Local Rule 35 is necessary to give guidance to litigants as to the newspapers in which legal notices may be published, and recommends that the rule be retained and renumbered as Local Civil Rule 83.6. The Committee recommends that the paragraphs of the rule be numbered as paragraphs (a) and (b); that the words "in civil and admiralty causes" be deleted as redundant, since the

Local Civil Rules apply only to such cases; and that the words "published in the City of New York" be deleted because, in a particular case, publication in a newspaper of general circulation in a part of the District outside New York City may be found by the Court to be more appropriate.

Rule 36. Notice of Sale

In any civil action, the notice of any proposed sale of property directed to be made by any order or judgment of the court, unless otherwise ordered by the court, need not set out the terms of sale specified in the order or judgment, and the notice will be sufficient if in substantially the following form:

UNITED STATES DISTRICT COURT
. . . . . District of New York

NOTICE OF SALE

Pursuant to . . . . . of the United
(Order or Judgment)

States Court for the . . . . . District of New York, filed in the office of the clerk on . . . . . in the
(Date)
case entitled . . . . . .
(Name and Docket Number)
. . . . . .the undersigned will sell at . . . . . .
(Place of Sale)
on . . . . . .
(Date and Hour of Sale)
the property in said
. . . . . .
(Order or Judgment)
described and therein directed to be sold, to which
. . . . . .
(Order or Judgment)
reference is made for the terms of sale and for a description of the property which may be briefly described as follows:

Dated:

_____
Signature and Official Title

The notice need not describe the property by metes and bounds or otherwise in detail and will be sufficient if in general terms it identifies the property by specifying its nature and location. However, it shall state the approximate acreage of any real estate outside the limits of any town or city, the street, lot and block number of any real estate within any town or city and a general statement of the character of any improvements upon the property.

COMMITTEE NOTE

Although the contents of a notice of sale of realty are set forth in general terms in 28 U.S.C. § 2002, the Committee believes that existing Local Civil Rule 36 serves a useful function in providing more detailed guidance to litigants as to the drafting of such a notice, and recommends that it be retained and renumbered as Local Civil Rule 83.7.

Rule 37. Sureties

(a) Whenever a bond, undertaking or stipulation is required, it shall be sufficient, except in bankruptcy or criminal cases, or as otherwise prescribed· by law, if the instrument is executed by the surety or sureties only.

(b) Except as otherwise provided by law, every bond, undertaking or stipulation must be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or stipulation, or the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury, or the undertaking or guaranty of two individual residents of the district in which the case is pending, each of whom owns real or personal property within the district worth double the amount of the bond, undertaking or stipulation, over all his or her debts and liabilities, and over all obligations assumed by said surety on other bonds, undertakings or stipulations, and exclusive of all legal exemptions.

(c) In the case of a bond, or undertaking, or stipulation executed by individual sureties, each surety shall attach the surety's affidavit of justification, giving the surety's full name, occupation, residence and business addresses, and showing that the surety is qualified as an individual surety under paragraph (b) of this rule.

(d) Members of the bar, administrative officers or employees of the court, the marshal, the marshal's deputies or assistants, shall not act as a surety in any suit, action or proceeding pending in this court.

COMMITTEE NOTE

The Committee concludes that existing Local Civil Rule 37 is necessary, and that (together with existing Local Civil Rule 38, which also deals with sureties) it should be retained and renumbered as Local Civil Rule 65.1.1. The Committee believes that the exception for bankruptcy and criminal cases can be removed from the first paragraph of the rule, since the Local Civil Rules by definition apply only to civil cases. The Committee recommends that the prohibition in the last paragraph of the rule upon attorneys acting as sureties should be limited to attorneys who have appeared in the case.

Rule 38. Approval of Bonds of Corporate Sureties

Except as otherwise provided by law, all bonds, undertakings and stipulations of corporate sureties holding certificates of authority from the Secretary of the Treasury, where the amount of such bonds or undertakings has been fixed by a judge or by court rule or statute, may be approved by the clerk.

COMMITTEE NOTE

The Committee concludes that existing Local Civil Rule 38 is necessary, and that (together with existing Local Civil Rule 37, which also deals with sureties) it should be retained and renumbered as Local Civil Rule 65.1.1.

Rule 39. Security for Costs

The court, on motion or in its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make

such orders in regard to noncompliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 39 be retained, and renumbered as Local Civil Rule 54.2. This rule has been applied in a number of cases in the District Courts and the Court of Appeals, and such rules have been held to be within the rulemaking power of the District courts under Federal Rule of Civil Procedure 83.

Rule 40. Appeals

(a) A notice of appeal shall exhibit the names of the several parties to the judgment, and the names and addresses of their respective attorneys of record. Upon the filing of the notice of appeal the appellant shall furnish the clerk with a sufficient number of copies thereof to enable the clerk to comply with the provisions of Rule 3(a), Federal Rules of Appellate Procedure.

COMMITTEE NOTE

For essentially the same reasons as those set forth above with respect to Local Civil Rule 8(b), the Committee recommends that existing Local Civil Rule 40(a) be retained, and renumbered as Local Civil Rule 83.8. In order to conform to existing practice in the Clerk's Offices, the Committee recommends that the rule be amended to require three additional copies of the notice of appeal, in addition to the original and service copies. The Committee recommends that the title of the rule be changed to "Filing of Notice of Appeal."

(b) Whenever a notice of motion to enforce the liability of a surety upon an appeal or a supersedeas bond is served upon the clerk pursuant to Rule 8(b), Federal Rules of Appellate Procedure, the party making such motion shall deposit with the clerk one additional copy for each surety to be served.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 40(b) be retained, but that it be amended to state that three additional copies are required as well as the original copy and one copy for each surety to be served, to conform to the existing practice. The Committee recommends that existing Local Civil Rule 40(b) be renumbered as Local Civil Rule 65.1.1, to consolidate it with other provisions relating to sureties.

Rule 41. (Repealed) Supersedeas

Rule 42. Remand by an Appellate Court

Whenever an appellate court has remanded a case or matter to the district court, and further proceedings not requiring the trial of an issue of fact are appropriate, an application, whether made on motion or otherwise, shall be referred for such further proceedings to the judge who heard the case or matter below unless the appellate court otherwise directs.

(Southern District only) Any other order or judgment of an appellate court, when filed in the office of the clerk of the district court, shall automatically become the order or judgment of the district court and be entered as such by the clerk without further order, except if such order or judgment of the appellate court requires further proceedings in the district court other than a new trial, an order shall be entered making the order or judgment of the appellate court the order or judgment of the district court.

COMMITTEE NOTE

The Committee recommends that the first paragraph of existing Local Civil Rule 42 be deleted as unnecessary, in light of the individual assignment system. The Committee recommends that the second paragraph be retained, and renumbered as Local Civil Rule 58.1.

Rule 43. Contempt

(a) A proceeding to adjudicate a person in civil contempt, including a case provided for in Rule 37(b)(1) and 37(b)(2)(d) Federal Rules of Civil Procedure, shall be

commenced by the service of a notice of motion or order to show cause. The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby and such evidence as to the amount of damages as may be available to the moving party. A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage. Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon said attorney; otherwise service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons. If an order to show cause is sought, such order may upon necessity shown, embody a direction to the United States marshal to arrest the alleged contemnor and hold such person in bail in an amount fixed by the order, conditioned on the appearance of such person at the hearing, and further conditioned that the alleged contemnor will hold himself or herself amenable to all orders of the court for surrender.

(b) If the alleged contemnor puts in issue his or her alleged misconduct or the damages thereby occasioned, said person shall upon demand be entitled to have oral evidence taken, either before the court or before a master appointed by the court. When by law such alleged contemnor is entitled to a trial by jury, said person shall make written demand on or before the return day or adjourned day of the application; otherwise said person will be deemed to have waived a trial by jury.

(c) In the event the alleged contemnor is found to be in contempt of court, an order shall be made and entered (1) reciting or referring to the verdict or findings of fact upon which the adjudication is based; (2) setting forth the amount of damages to which

the complainant is entitled; (3) fixing the fine, if any, imposed by the court, which fine shall include the damages found and naming the person to whom such fine shall be payable; (4) stating any other conditions, the performance whereof will operate to purge the contempt; and (5) directing the arrest of the contemnor by the United States marshal and confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor be otherwise discharged pursuant to law. Unless the order otherwise specifies, the place of confinement shall be the Metropolitan Correction Center. No party shall be required to pay or to advance to the marshal any expenses for the upkeep of the prisoner. Upon such an order, no person shall be detained in prison by reason of the non-payment of the fine for a period exceeding six months. A certified copy of the order committing the contemnor shall be sufficient warrant to the marshal for the arrest and confinement. The aggrieved party shall also have the same remedies against the property of the contemnor as if the order awarding the fine were a final judgment.

(d) In the event the alleged contemnor shall be found not guilty of the charges, said person shall be discharged from the proceedings and, in the discretion of the court, may have judgment against the complainant for costs and disbursements and a reasonable counsel fee.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 43 be retained, and renumbered as Local Civil Rule 83.9. The Committee recommends that the title of the rule be changed to "Contempt Proceedings in Civil Cases," to avoid any implication that the rule applies to contempt proceedings in criminal cases. In addition to clarifying wording changes, the Committee also recommends that the references in existing Local Civil Rule 43(c) to the Metropolitan Correctional Center and to expenses for upkeep be deleted as obsolete in light of present-day circumstances.

Rule 44. Order of Summation

After the close of evidence in civil trials, the order of summation shall be determined in the discretion of the trial judge.

COMMITTEE NOTE

While the order of summation is clearly within the discretion of the presiding Judge, the Committee understands that existing Local Civil Rule 44 is useful because it confirms that the Court is not bound by the state court order of summation. Therefore, the Committee recommends that the rule be retained, and renumbered as Local Civil Rule 39.2.

Rule 45. Exemption from Mandatory Scheduling Order (Eastern District Only)

Matters involving habeas corpus petitions, social security disability cases, motions to vacate sentences, forfeitures, and reviews from administrative agencies are exempted from the mandatory scheduling order required by Rule 16(b) of the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The Committee concludes that the exemptions set forth in existing Local Civil Rule 45 from the scheduling order requirement of Federal Rule of Civil Procedure 16 are sound, and reflective of the general practice in the Southern District as well as the Eastern District. Therefore, the Committee recommends that existing Local Civil Rule 45 be retained, and renumbered as Local Civil Rule 16.1.

Rule 46. Interrogatories (Southern District Only)

(a) At the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 46(a) be retained, and renumbered as Local Civil Rule 33.3(a). In order to make clear that the Court may authorize interrogatories beyond those specified in existing Local Civil Rule 46(a), the Committee recommends that the words "Unless otherwise ordered by the court" be inserted at the beginning of the rule. Because the practice in the Eastern District does not generally limit the use of interrogatories in the manner specified in this rule, the Committee recommends that this rule continue to apply in the Southern District only.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a), above may only be served if they are a more practical method of obtaining the information sought than a request for production or a deposition.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 46(b) be retained, and renumbered as Local Civil Rule 33.3(b). In order to make clear that the Court may authorize interrogatories beyond those specified in existing Local Civil Rule 46(b), the Committee recommends that the words "or if ordered by the court" be inserted at the end of the rule. Because the practice in the Eastern District does not generally limit the use of interrogatories in the manner specified in this rule, the Committee recommends that this rule continue to apply in the Southern District only.

(c) At the conclusion of each party's discovery, and prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise. Questions seeking the names of expert witnesses and the substance of their opinions may also be served, if this information has not been previously obtained.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 46(c) be retained, and renumbered as Local Civil Rule 33.3(c). In order to clarify when contention interrogatories must be served, the Committee recommends that the words "at least 30 days" be inserted before the words "prior to the discovery cut-off date." The Committee recommends that the final sentence of existing Local Civil Rule 46(c) be deleted, because the timing of expert discovery is now dealt with by Federal Rule of Civil Procedure 26(a)(2). Because the practice in the Eastern District does not generally limit the use of interrogatories in the manner specified in this rule, the Committee recommends that this rule continue to apply in the Southern District only.

(d) No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of the interrogatory.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 46(d) be deleted, on the ground that it is duplicative of Federal Rule of Civil Procedure 33(b)(1).

(e) (1) Where an objection is made to any interrogatory or sub-part thereof or to any document request under Fed. R. Civ. P.34, the objection shall state with specificity all grounds. Any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, shall be waived.

COMMITTEE NOTE

The Committee recommends that existing Local Civil Rule 46(e)(1) be deleted, on the ground that it is in substance duplicative of Federal Rules of Civil Procedure 33(b)(4) and 34(b).

(2) Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion,

(i) the attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub- part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) for documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other;

(B) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

COMMITTEE NOTE

The Committee believes that existing Local Rule 46(e)(ii) serves a useful purpose in providing a standard checklist of information to be supplied in support of a claim of privilege. The Committee notes that the Eastern District's Standing Order 21 contains substantially similar provisions which apply to all types of discovery responses, including deposition testimony. The Committee recommends that existing Local Rule 46(e)(ii) be retained and renumbered as Local Civil Rule 26.2, and that its provisions be made applicable to all discovery responses. The Committee further recommends that two wording changes taken from Eastern District Standard Order 21 be incorporated into this rule: (1) the addition of the words "e.g., letter or memorandum" after "type of document;" and (2) a requirement that the party claiming privilege for a document identify not only the addressees but also any other recipients of the document. The Committee also recommends that the words "if the privilege is being asserted in connection with a claim or defense governed by state law" be replaced by "if the privilege is governed by state law," because there are situations in which a privilege claim may be governed by a law different than the law governing the underlying claim.

(f) Whenever a party answers any interrogatory by reference to records from which the answer may be derived or ascertained, as permitted in Fed. R. Civ. P. 33(c):

(1) The specifications of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought.

(2) The producing party shall make available any computerized information or summaries thereof that it either has, or can adduce by a relatively simple procedure, unless these materials are privileged or otherwise immune from discovery.

(3) The producing party shall provide any relevant compilations, abstracts or summaries in its custody or readily obtainable by it, unless these materials are privileged or otherwise immune from discovery.

(4) The documents shall be made available for inspection and copying within ten days after service of the answers to interrogatories or at a date agreed upon by the parties.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 46(f) serves a useful purpose in preventing parties from invoking Federal Rule of Civil Procedure 33(d) in a manner that needlessly increases the burden on their adversaries, and recommends that it be retained and renumbered as Local Civil Rule 33.1. Although paragraph (1) of the rule is duplicative of Federal Rule of Civil Procedure 33(d), the Committee is concerned that deleting it might lead some parties to overlook this basic and important limitation on the availability of Rule 33(d). For clarity, the Committee recommends that the word "also" be added to paragraphs (2) and (3), and that the words "Unless otherwise ordered by the court" be added at the beginning of paragraph (4).

Rule 47. Uniform Definitions in Discovery Requests

(a) The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations, or (iii) a more narrow definition of a term defined in paragraph (c).

(b) This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure for the United States District Courts.

(c) The following definitions apply to all discovery requests:

(1) **Communication.** The term 'communication' means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) **Document.** The term 'document' is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

(3) **Identify (with respect to persons).** When referring to a person, 'to identify' means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) **Identify (with respect to documents).** When referring to documents, 'to identify' means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

(5) **Parties.** The terms 'plaintiff' and 'defendant' as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) **Person.** The term 'person' is defined as any natural person or any business, legal or governmental entity or association.

(7) **Concerning.** The term 'concerning' means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) **All/Each.** The terms 'all' and 'each' shall be construed as all and each.

(2) **And/Or.** The connectives 'and' and 'or' shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) **Number.** The use of the singular form of any word includes the plural and vice versa.

COMMITTEE NOTE

The Committee believes that existing Local Civil Rule 47 plays a useful role in attempting to stem the proliferation of computer-generated definitions of standard terms in discovery requests. The Committee therefore recommends that the rule be retained, and that it be renumbered as Local Civil Rule 26.3. The Committee recommends that the language of paragraph (a) be strengthened to make clear that broader definitions of the terms in question are not permitted. The Committee also recommends that paragraph (c)(2) be amended to make explicit reference to electronic or computerized data compilations.

Rule 48. Standard Discovery in Prisoner Pro Se Actions (Southern District Only)

(a) This rule shall apply in any action commenced pro se in which the plaintiff's complaint includes any claim described in paragraph (b) and in which the named defendants include one or more current or former employees of New York State or New York City sued in matters arising out of events alleged to have occurred while the plaintiff was in the custody of either the Department of Corrections of the City of New York or the New York State Department of Correctional Services. In each such action, such defendants shall, except as otherwise set forth herein, respond to the standing

discovery Requests adopted by the Court, in accordance with the instructions and definitions set forth in the standing requests.

(b) The claims to which the standard discovery Requests shall apply are Use of Force Cases, Inmate Against Inmate Assault Cases and Disciplinary Due Process Cases, as defined below, in which the events alleged in the complaint have occurred while the plaintiff was in the custody of either the Department of Corrections of the City of New York or the New York State Department of Correctional Services.

1. "Use of Force Case" refers to an action in which the complaint alleges that any employee of the Department used physical force against the Plaintiff in violation of the Plaintiff's rights.

2. "Inmate against Inmate Assault Case" refers to an action in which the complaint alleges that any Defendant was responsible for the Plaintiff's injury resulting from physical contact with another inmate.

3. "Disciplinary Due Process Case" refers to an action in which (i) the complaint alleges that a Defendant violated or permitted the violation of a right or rights in a disciplinary proceeding against Plaintiff, and (ii) the punishment imposed upon Plaintiff as a result of that proceeding was placement in a special housing unit for more than thirty days.

(c) Responses to the Requests shall be made on behalf of the individual defendants, but shall be made on the basis of information and documents within the possession, custody or control of the City or State of New York in accordance with the instructions contained in the Requests. If no defendant is represented by the Office of Corporation Counsel of the City of New York or the New York State Department of Law,

responses based upon such information need not be made pursuant to this local rule without prejudice to such other discovery procedures as the plaintiff shall initiate.

(d) The two requests, denominated Plaintiff's First and Second Set of Interrogatories and Requests for Production of Documents, shall be answered within 90 and 150 days of service of the complaint respectively except (i) as otherwise ordered by the Court, for good cause shown, which shall be based upon the facts and procedural status of the particular case and not upon a generalized claim of burden, expense or relevance or (ii) as otherwise provided in the instructions to the Requests.

(e) Except upon permission of the Court, for good cause shown, the Requests shall constitute the sole form of discovery available to Plaintiff during the 150 day period as designated above.

(f) If the Pro Se Office determines that this rule applies, it shall provide copies of the standard Requests to those pro se plaintiffs for service upon defendants together with the summons and complaint.

(Copies of the Standard Discovery Requests, denominated Plaintiff's First and Second Set of Interrogatories and Requests for Production of Documents, are available through the Pro Se Staff Attorney's Office of the Southern District of New York.)

COMMITTEE NOTE

The Committee concludes that the standard discovery requests have served a useful purpose in narrowing the issues and helping to identify possibly meritorious cases in the pro se cases to which it applies, and recommends that the rule be retained and renumbered as Local Civil Rule 33.2. (Although the local rule relates to Federal Rule of Civil Procedure 34 as well as Rule 33, the Committee notes that the defendants to whom the local rule applies are fully familiar with it, so that no issue of ability to find the local rule is created by numbering the local rule under Federal Rule 33 rather than Federal Rule 34.) The Committee recommends that language be added to paragraph (a) of the local rule providing that the standard discovery requests are to be answered in the Southern District unless otherwise ordered by the Court, and are to be answered in the Eastern District if so ordered by the Court. The Committee finds that this distinction between the two districts is justified by the differing volumes of prisoner pro se cases in the two districts. The Committee recommends that language be added to paragraph (d) of

the local rule providing that responses shall be served upon the plaintiff and filed with the Pro Se Office of the Court.

Rule 49. Opt-Out From Certain Provisions of Federal Rules of Civil Procedure (Southern District Only)

(a) Federal Rules of Civil Procedure 26(a)(1), 26(d) (first sentence only), 30(a)(2)(A), 31(a)(2)(A) and 33(a) (only insofar as it limits the number of interrogatories), are not operative in this District.

(b) Since Federal Rules of Civil Procedure 26(d) (first sentence only) is not operative in this District, Rules 26(f) (insofar only as it relates to disclosures under Rule 26(a)(1)), Rule 26(g)(1) (insofar only as it relates to disclosures under Rule 26(a)(1)), Rule 30(a)(2)(C), Rule 31(a)(2)(C), Rule 33(a) (third sentence only), Rule 34(b) (third sentence only), and Rule 36(a) (third sentence only), are not applicable in this District.

(c) The Court regards disclosures made pursuant to Federal Rules of Civil Procedure 26(a)(2) and (3) to be within the materials that, under Local Civil Rule 18(a), are not to be filed with the Clerk's office except by order of the court.

COMMITTEE NOTE

Existing Local Civil Rule 49(c) is encompassed by the Committee's recommended broadening of existing Local Civil Rule 18 in new Local Civil Rule 5.1(a). Existing Local Civil Rules 49(a) and (b) set forth the provisions of the Federal Rules of Civil Procedure relating to discovery which are not applicable in the Southern District. In the attached proposed local civil rules, the Committee has set out these provisions under revised numbers corresponding to the respective Federal Rules of Civil Procedure involved.