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A MODEL RETAINER AGREEMENT FOR LEGAL SERVICES PROGRAMS

Plus:

Impact of the 1993 Amendments to the Federal Rules

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The Impact of the 1993 Amendments to the Federal Rules of Civil Procedure on Legal Services Practice in the Federal Courts

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On December 1, 1993, extensive changes in the Federal Rules of Civil Procedure became effective. A number of these changes have been highly controversial ^{/1/} and may have significant repercussions on legal services practice in the federal courts, particularly in the areas of discovery (Rules 26-37) and sanctions for filing baseless pleadings or papers (Rule 11). The amendments also alter the rules for service of process (Rule 4) and the submission of petitions for costs and attorney fees (Rule 54). ^{/2/} Because federal judicial districts are permitted to "opt out" of a number of new rules, as explained below, it is critical that practitioners keep abreast of developments in the judicial districts in which they practice. The changes are applicable in cases filed after December 1, 1993, and in cases pending on that date "insofar as is just and practicable." ^{/3/} This article focuses on the amendments which will have the most impact on legal services practitioners. It does not address every change in the rules.

I. Amendments to the Discovery Rules

The revisions contain the most sweeping alterations of the discovery process since the initial promulgation of the rules in 1938. In general, the new rules continue the trend, made evident in the 1983 amendments, of increasing judicial control over the discovery process. ^{/4/} They establish a system in which it is likely that the parties will be called upon to justify and obtain court approval of their discovery strategies. The seeming quid pro quo for these new restrictions is a new process of "disclosure" which is to take place at three different points in the lawsuit: the outset of the case, 90 days before trial, and again 30 days before trial. Disclosure requires the parties to exchange basic information concerning a case outside of the context of responding to discovery requests. ^{/5/}

The new rules require the parties to meet at the outset of the litigation to develop a proposed discovery plan for submission to the court. ^{/6/} The plan must list the subjects on which discovery may be needed, when it should be completed, whether a particular sequence of discovery is appropriate, and whether any of the other federal or local rules should be waived or modified in the particular case. ^{/7/} No discovery may be sought prior to the discovery meeting between the parties. ^{/8/}

The most controversial aspect of the new discovery rules is a requirement that within ten days of the parties' meeting, the parties must provide their opponents with information "relevant to disputed facts alleged with particularity in the pleadings." ^{/9/} This disclosure must include the

names of witnesses likely to have discoverable information, copies or descriptions of documents, and a computation of any damages claimed. /10/ If a party fails without justification to disclose any of this information, it will not be allowed to use those documents or witnesses at trial or on any motion and may be subject to other sanctions. /11/

In addition to requiring this disclosure at the outset of the case, the amendments also require that 90 days before trial, or as the court directs, the parties must identify any person who may be offered as an expert at trial. /12/ This disclosure must include a written report prepared and signed by the witness containing a complete statement of all the opinions the witness will express, the bases for those opinions, and the data or other information considered by the witness in forming opinions. The disclosure must also describe the qualifications of the witness, including a list of all articles published in the last ten years and a list of other cases in which the witness has testified as an expert within the preceding four years. Depositions of experts can now be taken without leave of the court. /13/

The new Rule 26(a) also mandates a final round of disclosure no later than 30 days prior to trial. Parties must reveal the identities of witnesses that they may call at trial, the portions of depositions that they may seek to introduce into evidence, and a list of documents they may offer into evidence. /14/ Many courts had routinely required that this information be exchanged in connection with pretrial conferences or orders under rule 16. /15/

In view of these mandatory exchanges of information, the amendments place limits on the use of a number of the traditional discovery devices. Attorneys must obtain leave of court before taking a deposition that "would result in more than ten depositions being taken . . . by the plaintiffs, or by the defendants or by third-party defendants." /16/ For purposes of calculating whether the limit has been met, the rules aggregate the number of depositions taken by all plaintiffs and all defendants. All coparties are expected to confer in order to allocate the ten depositions permitted on each side. /17/ The rules also limit to 25, including subparts, the number of interrogatories that each party may serve on another party. /18/ The rule places no limits on requests for admissions or the production of documents.

Although the limitations on the ability to take depositions and to propound interrogatories are presumptive only, they will adversely affect cases brought by legal services attorneys. Since legal services attorneys typically represent, in federal court, plaintiffs suing large governmental agencies over their policies or practices, legal services attorneys are generally more in need of discovery than their opposing counsel. It is frequently difficult to articulate convincingly the need for a particular deposition or interrogatory because counsel can only guess at what the witness or the party actually knows. Ironically, the more a counsel is in the dark, the harder it is to justify discovery.

In addition to the general impact on the balance of power between plaintiffs and defendants, the limitations on depositions and interrogatories pose difficulties. When a party seeks leave to take deposition number eleven, will the opponent be entitled to respond by conceding the relevance of the desired deposition but argue that deposition number three or five was unnecessary and that deposition eleven should, therefore, have been taken as part of the initial ten? If this kind of response is accepted by the courts, then discovery motions will often focus on the wisdom of

counsel's discovery strategy rather than the relevance of the information sought. What will happen in situations in which depositions three and five were taken by a coparty, rather than the party seeking to take deposition eleven?

The question, then, is, Will the mandatory disclosure procedure which requires governmental defendants to turn over information at the outset of the case counterbalance these restrictions on the traditional discovery devices? The rules provide reason to be concerned. First, the rules permit the initial disclosure of documents to be made in the form of "a description by category and location." /19/ It is not difficult to foresee that governmental defendants will attempt to make disclosure as uninformative as possible by simply providing a list of categories of documents described in terms that do little to shed light on their contents. In response to this tactic, counsel may refer to the Advisory Committee Notes, which explain that the description should be specific enough to enable opposing parties to make an informed decision about whether the documents need to be examined and to enable them to frame discovery requests. /20/

Second, defendants are likely to provide witness lists consisting of dozens of agency personnel, all of whom have some knowledge relevant to the challenged policy or practice. This practice would leave plaintiffs' counsel with little guidance on how to allocate their limited allotment of depositions. Counsel may respond to this tactic by arguing that the listing of witnesses in the initial disclosure is a sufficient admission of relevance to justify a grant of permission to exceed the ten-deposition limit, if necessary to depose them all. This argument would be supported by the Advisory Committee Notes, which state that "counsel are expected to disclose the identity of those persons . . . who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by another of the other parties." /21/ While this argument may enable counsel to avoid the impact of the ten-deposition limit, it will not address the difficulties of distinguishing important witnesses from marginal ones.

Third, the rules provide that the initial disclosure need only be made with respect to "facts alleged with particularity." /22/ Thus, if the complaint is framed in broad, general terms, as is permitted by rule 8, /23/ a court may conclude that no disclosure is warranted at all. Such a conclusion would leave the plaintiff subject to all of the limitations on discovery without receiving any of the benefits of the disclosure process. Once again, the greater a party's need for information, the less it will be able to get it.

Another troublesome aspect of the "alleged with particularity" standard is that it penalizes plaintiffs for pleading generally but places no corresponding burden on defendants. Many answers allege no facts at all but only respond to allegations in the complaint. Aside from matters pertinent to affirmative defenses or counterclaims, it seems unlikely that the courts will find the plaintiff exempt from disclosure obligations if the answer alleges no facts. The pleading-with-particularity requirement will end up looking to the complaint. If a complaint is pled with specificity, the defendant clearly will be compelled to disclose information and the plaintiff is likely to be required to engage in disclosure as well. If the complaint is pled generally, the defendant clearly need not struggle to discern plaintiff's claims in order to disclose information. But does this mean the plaintiff is also relieved of the obligation to disclose information? The rules are unclear on this point. In sum, the emphasis in the rules on pleading with particularity will further diminish the value of mandatory disclosure to plaintiffs represented by legal services attorneys. At a minimum,

the rules invite litigation about the degree of disclosure required in view of the degree of specificity in the complaint.

The initial disclosure requirements also raise the question of the types of information legal services attorneys will be required to turn over. If a legal services office sees dozens of individual clients injured by a policy or practice challenged in a potential class action, must information be turned over relating to each client who would be a class member? Although plaintiffs' counsel may not plan to call such individuals as witnesses, defense counsel may decide to call class members. Clearly, unless each client had agreed to participate in the class suit, such a disclosure requirement would pose formidable attorney-client privilege issues.

Additionally, how much information will have to be disclosed concerning named plaintiffs in class actions? In legal services cases, the parties frequently disagree about the relevance of personal information that does not bear directly on the legal claim in the case. In particular, counsel defending government policies and practices often search for past sanctions or violations of program rules by named plaintiffs. In the past, disputes over the relevance of such information arose only when defense counsel resorted to this tactic of harassing the named plaintiffs. Now legal services attorneys face, in every case, the potential for sanctions if they fail to disclose information about named plaintiffs that the defendant later seeks and the court finds to be relevant.

If these changes were not confusing enough, an added layer of complexity is presented by the rules' caveat that local judicial districts can opt out of most of the features of the new rules, including the disclosure requirements, the requirement that the parties develop a discovery plan, the prohibition on discovery until the parties have conferred, and the limitations on the use of discovery devices. /24/ According to a recent study by the Federal Judicial Center, 27 districts have already opted out of some or all of these new rules and an additional 25 have suspended them while they are under consideration. /25/ Thus, counsel must be sure to check with the clerk for each particular district court to ascertain exactly which rules are in effect. If a choice of venue is available, counsel may be able to decide whether to bring the case in a district in which these new procedures are in effect or one which has opted out.

In addition to authorizing complete opt-outs, the rules permit districts to opt out partially. The Advisory Committee has explained that a district may conclude that the disclosure requirements, or limitations on discovery, are inappropriate in certain kinds of cases or that they should be modified. /26/ For example, the Advisory Committee notes that it may be appropriate, in social security cases, to dispense with the requirements of a discovery meeting and plan, as well as the process of disclosure. /27/ Presumably, such exemptions would not extend to class actions challenging policies or practices of the Social Security Administration, since discovery is common in such cases; it is possible, however, that over-broad language in local rules may have this effect.

Furthermore, the court, in a particular case, is given the authority to dispense with, or modify, either the disclosure requirements or the limitations on discovery. /28/ Although the rules refer only to opt-outs on a districtwide basis or in particular cases, it is possible for a judge in a district that has "opted in" to decide that the judge wants to opt out, or vice versa. In fact, 13 districts which have not adopted the initial disclosure requirement as a general rule have authorized individual judges to require disclosure. /29/ Additionally, 14 districts which have opted out of the initial

disclosure requirements, either finally or provisionally, nonetheless have local rules or plans pursuant to the Civil Justice Reform Act of 1990 /30/ which are similar to the new Federal Rules. /31/ In sum, attorneys cannot assume that, because a district has opted out, no disclosure requirement or no limits on the use of discovery devices exist. Lastly, even if a case is brought in a district that has not opted out of any of the new rules and is assigned to a judge that generally applies them, the parties may be able to stipulate out of the disclosure process and the limits on the use of discovery devices. /32/

In addition to the new process of disclosure and the limitations on the use of discovery devices, the amendments also clarify the duty to supplement disclosures and responses to discovery requests. Supplementation of the initial disclosure and responses to interrogatories, notices to admit, or requests for the production of documents must now be made if the party learns that in some material respect "the information disclosed is incomplete or incorrect." /33/ In filing any motion for a protective order or motion to compel discovery, a party must certify that it conferred or attempted to confer with opposing parties to resolve the dispute before seeking a judicial ruling. /34/

Another addition to the rules is a requirement that any party withholding documents on the ground of privilege must make the claim expressly and describe the matter withheld in a manner that will enable the opposing party to assess the applicability of the privilege asserted. /35/

Finally, the amendments permit the use of nonstenographic means of recording depositions without leave of the court or consent of the opposing party. The party noticing the deposition must include in the notice the means of recording the deposition and must, as before, bear the expense of the recording. /36/ The deponent, or any other party, however, may designate an additional method of recording to be paid for by that party. Transcripts, however, are still necessary to use deposition material in court. /37/

II. Amendments to Rule 11

While many of the amendments to the discovery rules may pose difficulties in legal services cases, the picture is decidedly brighter when it comes to Rule 11. While the 1983 amendments to Rule 11 were intended, by the Advisory Committee on Civil Rules, to increase the use of sanctions, the 1993 amendments were designed to temper the harsh results that flowed from the 1983 Amendments. /38/ In fact, the Advisory Committee begrudgingly acknowledged the validity of much of the criticisms of the 1983 rule, including the charges that Rule 11 has disproportionately affected plaintiffs, "created problems" for a party seeking to assert novel legal claims or in need of discovery, and consumed the time of litigants and the courts. /39/ Despite this recognition, the new rule 11 continues to rely on "objective" tests which impose negligence standards on attorney conduct. /40/ Thus, the amendments will not ameliorate all of the problems with such standards that have become evident over the past ten years.

While retaining the basic duty to conduct a reasonable inquiry into the facts and law prior to filing a paper in court, the amendments reduce the threat of sanctions in a number of ways. First, the amendments replace the vague "well grounded in fact" standard of the 1983 rule with a more precise formulation that makes clear that a plaintiff may allege facts without evidentiary support

when access to discovery or further investigation is necessary. Thus, in filing a paper with the court, the attorney warrants that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." /41/ The Advisory Committee based this change on the recognition that "a litigant may have good reason to believe a fact is true or false, but may need discovery, formal or informal[,] . . .to gather and confirm the evidentiary basis for the allegation." /42/ This change also restores a degree of balance to the rules because a defendant, when it lacked information, could plead lack of knowledge in an answer which was be treated as a denial, but the threat of Rule 11 sanctions, before the amendments, prevented the plaintiff from making an allegation without evidentiary support.

Although this change mandates greater tolerance of allegations made without evidence in hand, it still requires attorneys to have a reasonable belief that evidence in support of such allegations is likely to surface. Moreover, the rule requires attorneys to plead such allegations "on information and belief," thereby communicating the plaintiffs' lack of evidence to the court and the other side.

Second, the amendments make the imposition of sanctions discretionary with the district court, rather than mandatory. /43/ They also discourage the use of fee shifting as the routine form of sanction. The amendments emphasize that the purpose of a Rule 11 sanction is to deter future violations, rather than to compensate the other side. Accordingly, Rule 11 states that courts should consider the use of nonmonetary forms of sanction and that, when monetary sanctions are ordered, payments should ordinarily be made to the court, rather than to the opposing party. /44/

Third, Rule 11 requires that all Rule 11 motions be made separately from other motions and that they be served 21 days prior to being filed. /45/ The purpose of the 21-day delay is to create a window period during which the respondent can reconsider whether it wishes to withdraw the submission that is the subject of the motion. /46/

Fourth, the amendments include measures to ensure that Rule 11 sanctions will not be imposed without fair procedures. In particular, while courts may still impose sanctions sua sponte, they may not impose monetary sanctions without issuing an order to show cause, providing the target of the sanction with an opportunity to be heard. /47/ Additionally, in ordering sanctions, courts are now required to set forth the conduct giving rise to the sanction and to explain the basis for the sanction chosen. /48/

Fifth, the amendments provide that Rule 11 will no longer be applicable to discovery requests, responses, or motions. /49/ Instead, Rule 37 provides the means for policing compliance with the disclosure and discovery process.

The thrust of these amendments appears to be to make the court "stop and think," before ordering harsh sanctions. The lengthy Advisory Committee Note that accompanies the amendments provides further support for arguments that Rule 11 sanctions should not be imposed casually or lightly. The note stresses that inconsequential violations should not be the bases for making Rule 11 motions and that such motions should not be used as discovery devices, as a means of testing the basis of allegations, and as a means of emphasizing a party's position, intimidating an adversary, or extracting an unjust settlement. /50/

Despite this general tenor, the amendments also expand the potential for Rule 11 liability in a few respects. The amendments make clear that law firms should ordinarily be held accountable for the actions of its principals and associates. /51/ Thus, sanctions are no longer restricted to the individual who signed the document found to violate the rule.

The amendments also extend the obligations of the rule beyond signed documents submitted to courts. An attorney or party may now be sanctioned for continuing to advocate a factual or legal contention advanced in a signed and filed document after the contention is no longer tenable. /52/ While attorneys have no duty to go back and retract documents previously filed that later prove to be factually or legally baseless, they may not continue to advance those claims. As a result, while an attorney may now make an allegation in a complaint if the attorney reasonably believes that it is "likely" that evidence to support the claim will materialize, the attorney now has an obligation to abandon the contention if supporting evidence is not forthcoming. The question of whether conduct or oral statements constitute continued advocacy of a contention creates fertile ground for future litigation and controversy over Rule 11 sanctions.

Lastly, attorneys should consider the impact of the new disclosure rules on the threat of Rule 11 sanctions. Since attorneys will be required to disclose witnesses and documentary evidence at the outset of the case, a counsel's determination that an allegation is supported by evidence, or is likely to be supported by evidence, may be challenged on the basis of information or lack of information that is disclosed. In fact, supporters of disclosure requirements have argued that one of the benefits of such requirements is that they would lead to more enforcement of Rule 11 standards. /53/

III. Other Amendments

Rule 4, which governs service of process, has been reorganized. The new rule expands the provisions providing for service by mail. The procedure has been renamed "waiver of service" to make clear that if the defendant does not cooperate by accepting service by mail, the regular service procedures must be followed. /54/ If the defendant refuses to return a signed waiver form within 30 days of the date on which the summons and complaint are mailed, personal service must be effected by other means. In such cases, the defendant must pay the costs of service, unless the defendant can show good cause for its refusal. /55/ If the defendant returns the waiver form, it has 60 days, from the date that the plaintiff sent the materials, to answer. /56/ The waiver-of-service procedure is not available as a means of serving the United States or federal agencies. /57/

Rule 4 now requires the court to provide a reasonable time for curing service defects in cases against the United States in which the United States Attorney's office or the Attorney General was properly served but service was not correctly made against other agencies or officers entitled to notice. /58/ The rule has also been amended to make the plaintiff responsible for preparing the summons and presenting it to the clerk for signature and seal. /59/

Finally, Rule 54 has been amended to provide procedures for filing claims for attorneys' fees at the conclusion of a case. The rule states that, unless otherwise provided by statute or order, fee applications must be submitted no later than 14 days after entry of judgment. /60/ The Advisory

Committee's Note explains that the deadline is intended to provide the opposing party with notice of the claim before the appeal deadline lapses. /61/ It also explains that only notice of the claim and the amount sought must be submitted within this period -- not all papers supporting a fee claim. /62/ This change will not affect deadlines for filing fee petitions under the Equal Access to Justice Act. /63/ The Advisory Committee Note lists the EAJA as an example of a statute that provides its own deadline. /64/

Footnotes

/1/ Three Justices dissented from adoption of a number of the amendments. See Amendments to the Federal Rules of Civil Procedure, 113 S. Ct. 581 (1993) (Opinion of Scalia, J., dissenting).

/2/ The full text of the amended rules, along with the advisory committee notes and other related materials, appears in the Supreme Court Reporter. Amendments to the Rules of Civil Procedure, 113 S. Ct. 475-802 (1993).

/3/ Order of the Supreme Court, 113 S. Ct. 478 (1993).

/4/ Fed. R. Civ. P. 26(b) (1983 advisory committee's note) ("The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis").

/5/ For a critique and a defense of the new rules relating to disclosure, see Griffin B. Bell et al., Automatic Disclosure in Discovery -- the Rush to Reform, 27 Ga. L. Rev. 1 (1992) (opposed to changes), and William W. Schwarzer, In Defense of "Automatic Disclosure in Discovery," 27 Ga. L. Rev. 655 (1993) (supporting changes).

/6/ Fed. R. Civ. P. 26(f).

/7/ A form for such a plan has been appended to the rules as Form 35.

/8/ Fed. R. Civ. P. 26(d).

/9/ Id. at 26(a)(1).

/10/ Id.

/11/ Id. at 37(c)(1).

/12/ Id. at 26(a)(2).

/13/ Id. at 26(a)(4)(A).

/14/ *Id.* at 26(a)(3).

/15/ *See id.* at 16(c)(5), 16(e).

/16/ *Id.* at 30(a)(2)(A). The ten deposition total includes oral depositions and depositions upon written questions. *Id.* at 31(a)(2)(A).

/17/ *Id.* at 30 (1993 advisory committee's note).

/18/ *Id.* at 33.

/19/ *Id.* at 26(a)(1)(B).

/20/ *Id.* at 26(a)(1)(B) (1993 advisory committee's note).

/21/ *Id.* at 26(a)(1)(A) (same).

/22/ *Id.* at 26(a)(1)(A).

/23/ *Id.* at 8(a). *See Leatherman v. Tarrant Co. Narcotic Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993) (rejecting court-imposed heightened specificity requirement for complaints in civil rights cases).

/24/ Fed. R. Civ. P. 26(a)(1) ("except to the extent otherwise stipulated or directed by order or local rule . . ."); *id.* at 26(b)(2) ("By order or local rule, the court may alter the limits in these rules on the number of depositions and interrogatories"); *id.* at 26(d) ("Except when authorized . . . by local rule, order or agreement of the parties" no discovery may be sought until the parties have conferred); *id.* at 26(f) ("Except in actions exempted by local rule or when otherwise ordered," the parties shall meet and develop a discovery plan).

/25/ Donna Stienstra, *Implementation of Disclosure in Federal District Courts, with Specific Attention to Court's Response to Selected Amendments to Federal Rule of Civil Procedure 26*, at 5 (Mar. 1994) (unpublished manuscript, on file with author). The requirements have been adopted by 32 districts and are in effect provisionally in an additional five districts. *Id.* This information was gathered in February 1994. The Federal Judicial Center has not completed any study of the implementation of the limits on depositions and interrogatories.

/26/ Fed. R. Civ. P. 26(a)(1) (1993 advisory committee's note).

/27/ *Id.* at 26(a)(1), (f) (1993 advisory committee's note).

/28/ *Id.* at 26(a)(1) (same); *id.* at 26(b)(2).

/29/ Stienstra, *supra* note 25, at 5.

/30/ Civil Justice Reform Act of 1990, 28 U.S.C. Secs. 471-82.

/31/ Stienstra, *supra*, note 25, at 5.

/32/ Fed. R. Civ. P. 26(a)(1), 29. The judge, however, can prevent the parties from stipulating out of these provisions of the rules.

/33/ *Id.* at 26(e). Prior to the amendment, Rule 26 required supplementation only when a party learns that a response was incorrect, or was correct when made but is no longer correct, and failure to supplement would rise to the level of "knowing concealment."

/34/ *Id.* at 26(c), 37(a)(2)(A).

/35/ *Id.* at 26(a)(5).

/36/ *Id.* at 30(b)(2).

/37/ See *id.* at 32(c).

/38/ Compare Fed. R. Civ. P. 11, 1983 advisory committee's note (intent of the amendment is to "reduce the reluctance of courts to impose sanctions" and is expected to increase the range of circumstances leading to sanctions) with Fed R. Civ. P. 11, 1993 advisory committee's note (amendment places "greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions").

/39/ See Letter from the Honorable Sam Pointer, Jr., Chairman of the Advisory Committee on Civil Rules, to the Honorable Robert Keeton, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (May 1, 1992), reprinted in 113 S. Ct. 593, 597 (1993).

/40/ Fed. R. Civ. P. 11(b) (requiring "reasonable inquiry" prior to filing papers); *id.* at 11 (1993 advisory committee's notes) (objective test for frivolousness of legal contentions).

/41/ *Id.* at 11(b)(3).

/42/ *Id.* at 11 (1993 advisory committee's note).

/43/ *Id.* at 11(c) ("the court may . . . impose a sanction").

/44/ *Id.* at 11(c)(2).

/45/ *Id.* at 11(c)(1)(A).

/46/ Thus, the new rule effectively overrules *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

/47/ Fed. R. Civ. P. 11(c)(1)(B), 11(c)(2)(B).

/48/ Id. at 11(c)(3).

/49/ Id. at 11(d).

/50/ Id. at 11 (1993 advisory committee's note).

/51/ Id. at 11(c)(1)(A). This amendment effectively overrules *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989).

/52/ Fed. R. Civ. P. 11(b) ("[b]y presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion or other paper . . .") (emphasis added).

/53/ See William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989).

/54/ Fed. R. Civ. P. 4(d).

/55/ Id. at 4(d)(2).

/56/ Id. at 4(d)(3). The amendments also provide that waiver of personal service may not be construed as a waiver of any objections to jurisdiction or venue. Id. at 4(d)(1).

/57/ Id. at 4(d)(2).

/58/ Id. at 4(i)(3).

/59/ Id. at 4(b).

/60/ Id. at 54(d)(2)(B).

/61/ Id. at 54 (1993 advisory committee's note).

/62/ Id.

/63/ Equal Access to Justice Act, 28 U.S.C. Sec. 2412.

/64/ Fed. R. Civ. P. 54 (1993 advisory committee's note).