

**RULES OF THE UNITED STATES
COURT OF FEDERAL CLAIMS**

As amended through _____



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**RULES OF THE UNITED STATES
COURT OF FEDERAL CLAIMS**

Originally effective October 1, 1982,
as revised and reissued May 1, 2002,
and as amended through _____

The United States Court of Federal Claims (formerly designated United States Claims Court) was created by the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)). The court inherited the jurisdiction formerly exercised by the United States Court of Claims. Title 28 U.S.C. § 2503(b) authorizes the United States Court of Federal Claims to prescribe rules of practice and procedure for its proceedings.

The Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury have been incorporated into the following rules to the extent appropriate for proceedings in this court.

2002 Rules Committee Note

In the 2002 revision, the court has endeavored to create a set of rules that conforms to the Federal Rules of Civil Procedure as amended through November 30, 2001, to the extent practicable given differences in jurisdiction between the United States district courts and the United States Court of Federal Claims. Consistent with this objective, interpretation of the court's rules will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure. The court's own Rules Committee Notes are intended primarily to state the source of a given rule but in some instances also to provide interpretive guidance.

Future revisions to these rules will be posted on the court's website at www.uscfc.uscourts.gov.

2005 Rules Committee Note

The 2005 revision extends the symmetry between these rules and the Federal Rules of Civil Procedure. Immediately after each rule, a parenthetical reference indicates the date of adoption and the dates of any amendments, commencing with the substantial revision and reordering of the rules that occurred in 2002. Each rule is also followed by a Rules Committee Note or Notes explaining the basis and purpose of the rule as revised in 2002 and of any substantive amendments thereafter. The evolution of the court's rules has been increasingly significant to the court's work, and the addition of historical Rules Committee Notes should aid both counsel and the court in resolving issues that may arise regarding the rules. Stylistic changes also have been made to various rules and in a few instances, minor substantive revisions have been effected. Each substantive amendment is accompanied by a Rules Committee Note.

Historical Note

The rules of this court as initially promulgated on October 1, 1982, and as thereafter amended are set forth in the United States Claims Court Reporter and, after December 1992, in the Federal Claims Reporter. The relevant citations to changes in the rules from their inception through 2002 are as follows:

1 Cl. Ct. XXII–CXLVI (1982) (General Order No. 3, adopting the Rules of the United States Claims Court, effective October 1, 1982);

9 Cl. Ct. XXI–CXXXVIII (1985) (General Order No. 11, adopting revised Rules of the United States Claims Court, effective November 1, 1985);

10 Cl. Ct. XXI (1986) (General Order No. 12, amending Rule 77(k)(2) (fee schedule), effective October 1, 1986);

12 Cl. Ct. XXV (1987) (General Order No. 14, amending Rule 77(k)(2) (fee schedule), effective May 1, 1987);

15 Cl. Ct. XXV (1989) (General Order No. 21, amending Rule 77(k)(2) (fee schedule), effective February 1, 1989);

16 Cl. Ct. XXI (1989) (General Order No. 23, adopting the Vaccine Rules of the United States Claims Court, effective January 25, 1989);

18 Cl. Ct. XIX–XXII (1990) (General Order No. 25, specifying the use of a complaint cover sheet, effective January 1, 1990);

19 Cl. Ct. XIX–XXXII (1990) (General Order No. 26, adopting Appendix J to the Rules of the United States Claims Court and specifying the procedures for reviewing decisions of the special masters on claims for vaccine-related compensation, effective January 8, 1990);

22 Cl. Ct. XXIX–CLXII (1991) (General Order No. 28, adopting revised Rules of the United States Claims Court, effective March 15, 1991);

23 Cl. Ct. XXIII–XXIV (1991) (General Order No. 29, amending Appendix J to the Rules of the United States Claims Court, effective July 1, 1991);

25 Cl. Ct. XIX–CLXVII (1992) (General Order No. 31, adopting revised Rules of the United States Claims Court, effective March 15, 1992);

26 Cl. Ct. XXVII (1992) (General Order No. 32, amending Rule 10(a) and Appendix J, ¶ 16, effective July 15, 1992);

27 Fed. Cl. XXV (1992) (General Order No. 33, recognizing the change in the name of the court to the United States Court of Federal Claims and redesignating the court’s rules as “RCFC,” effective December 4, 1992);

28 Fed. Cl. LII–XCII (1993) (General Order No. 34, adopting the Rules Governing Complaints of Judicial Misconduct and Disability, effective June 2, 1993);

30 Fed. Cl. XXIII–XXIV (1994) (General Order No. 36, amending Rule 77(f), effective January 24, 1994).

32 Fed. Cl. XXIII (1994) (General Order No. 37 concerning admission fees).

48 Fed. Cl. XXV–XXXIV (2000) (General Order 39 concerning motions for admissions;

amending fee schedule).

51 Fed. Cl. XIII–CXCIV (2002) (adopting revised Rules of the United States Court of Federal Claims, effective May 1, 2002).

Post-2002 Amendments

To maintain symmetry between the court’s rules and the Federal Rules of Civil Procedure, the court has adopted a policy of regularly amending its rules to reflect parallel changes in the Federal Rules of Civil Procedure. In keeping with this policy, citations to post-2002 amendments to the revised rules of the court are as follows:

55 Fed. Cl. XII–XVI(2003) (General Order No. 2003-42 adopting Interim Procedures for Electronic Case Filing, effective March 17, 2003).

57 Fed. Cl. CLXXIV–CLXXV (2003) (amending fee schedule).

61 Fed. Cl. XXI (2004) (amending fee schedule).

64 Fed. Cl. XIII (2005) (Notice of Adoption amending Rule 77.1).

68 Fed. Cl. XIII–CCXXXIII (2005) (amendments to Rules 77.1, 80.1, 80.3, Appendices A to H, and Forms 1, 2, 4, 6, 7A, 8, 9, 10, and 12).

72 Fed. Cl. XII–XXX (2006) (amendments to Table of Contents; Rules 7, 7.2, 52.1, 52.2, 56, 56.1, 56.2, 83.1, 86; Appendix B (Vaccine Rules 9, 11, 12, 21); and Forms 1, 2, 5, 10).

____ Fed. Cl. ____ (2008) (renumbering of Rules 5.2–5.4; amendments to Rules 5, 16, 26, 33, 34, 37, 45, 58, 77.3, 80, and Appendices A and C; adoption of new Appendix E; abrogation of Appendix G; redesignation of Appendix I (formerly Appendix E)).

____ Fed. Cl. ____ (2008) (adopting the revised rules of judicial conduct and judicial disability as promulgated by the Judicial Conference of the United States).

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in the United States Court of Federal Claims in all suits. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

The Rules of the United States Court of Federal Claims are drawn under the authority of 28 U.S.C. §§ 2071(a), (c); 2503(b) (generally); 2521(a) (subpoena and incidental powers). These rules may be cited as “RCFC.” Rule 1 has been revised to: (i) reflect the change in the court’s name; (ii) eliminate, as no longer necessary, the previous reference to proceedings pending in the court on October 1, 1982, the year of the court’s establishment; (iii) incorporate the 1993 revision to Rule 1 of the Federal Rules of Civil Procedure (FRCP) emphasizing that the rules are to be both construed and administered to ensure that civil litigation is resolved not only fairly, but without undue cost and delay; (iv) delete subdivision (a)(3) for consistency with the FRCP (while retaining the substance of this provision in RCFC 83(b), which is modeled on FRCP 83(b)); and (v) move subdivision (b) to the preamble, because it is explanatory rather than prescriptive.

2008 Amendment

The language of RCFC 1 has been amended to conform to the general restyling of the FRCP.

Rule 2. One Form of Action

There is one form of action—the civil action.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 2 is identical to its FRCP counterpart.

2008 Amendment

The language of RCFC 2 has been amended to conform to the general restyling of the FRCP.

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an Action

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

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

In the interest of achieving greater uniformity with the corresponding FRCP, a number of changes have been made to RCFC 3. First, former subdivision (a) was fully conformed to the FRCP; the reference to RCFC 40.2 calls attention to this court’s “related case” rule. Second, former subdivision (b), which addressed disputes regarding filing dates, was deleted—both in the interest of uniformity and in the belief that it was inappropriate to include a rule of decision as part of a procedural rule. Third, former subdivision (c) (prescribing a cover sheet and identifying the number of copies required for filing) was moved to RCFC 5.3(d).

2008 Amendment

The caption of RCFC 3 has been amended to conform to the general restyling of the FRCP.

In addition, the parenthetical reference to RCFC 40.2(a) (“Related Cases”) that was included in the former version of RCFC 3 has been deleted as unnecessary.

Rule 3.1. Transfers and Referrals

(a) Transfer From Another Court.

- (1) **Filing Requirements.** When the transfer of a case from another court is permitted by law, including compliance with 28 U.S.C. §1292(d)(4)(B), the case will be filed in this court when the clerk receives:
 - (A) a certified copy of the docket or record made in the other court; and
 - (B) an order granting the transfer.
 - (2) **Notice of Filing.** After a case is filed in this court, the clerk must serve the parties with a notice of the filing as required by RCFC 5.
 - (3) **Filing Fee.** No filing fee is required in this court when all filing fees required in the other court are shown to have been paid.
 - (4) **Amended Complaint; Copies.** Within 28 days after service of the notice of filing, the plaintiff must file 7 copies of an amended complaint, conforming to the rules of this court and setting forth the claim or claims transferred.
 - (5) **Serving an Amended Complaint.** The clerk must serve the amended complaint on the United States in accordance with RCFC 4.
- (b) **Referral of a Case by the Comptroller General.**
- (1) **Serving a Notice.** When a case is referred to the court by the Comptroller General, the clerk must serve a notice, under RCFC 5:
 - (A) on each person whose name and address are shown by the papers transmitted and who appears to have an interest in the subject matter of the reference; and
 - (B) on the Attorney General.
 - (2) **Contents of the Notice; Time for a Response.** The notice required by this subdivision must:
 - (A) indicate that the reference has been filed;
 - (B) explain that the person notified appears to have an interest in the subject matter of the reference; and

(C) advise that a complaint setting forth any claim of such person must be filed within 90 days.

- (3) **If a Party Fails to Appear.** If no interested person files a complaint within the time specified in the notice served by the clerk, the case will be submitted to the court upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 3.1 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 84. The renumbering of RCFC 84 was intended to reflect its more logical placement in the organizational structure of the court's rules.

2008 Amendment

The language of RCFC 3.1 has been amended to conform to the general restyling of the FRCP.

In addition, the restyled rule omits as unnecessary the former provision specifying the filing of "8 copies of the complaint filed in the other court" and the instruction that after the filing of the complaint, or after referral of a case by the Comptroller General, "further proceedings will be governed by this court's rules."

Rule 4. Serving a Complaint on the United States

- (a) **Manner of Service.** To serve a complaint on the United States, the clerk must deliver 5 copies of the complaint to the Attorney General or to an agent designated by authority of the Attorney General.
- (b) **Proof of Service.** When serving a complaint, the clerk must enter the fact of service on the docket, and this entry will be prima facie proof of service.
- (c) **Date of Service.** The date of service made is the date of filing with the clerk.

(As revised and reissued May 1, 2002; as amended
_____.)

Rules Committee Notes

2002 Revision

The title of RCFC 4 has been changed to more closely conform to FRCP 4(i). Other provisions of FRCP 4(i)—those dealing with service upon agencies, corporations, or officers of the United States—have not been made a part of this court’s RCFC 4 because, in this court (with the exception of vaccine cases), only the United States is properly the named defendant. See RCFC 10(a).

2008 Amendment

The language of RCFC 4 has been amended to conform to the general restyling of the FRCP.

Rule 4.1. Serving an Order in a Contempt Proceeding

(a) Order Initiating a Contempt Proceeding.

(1) *In General.* An order initiating a contempt proceeding against a person or entity other than a party must be served by a United States marshal or deputy marshal or by a person specially appointed by the court. A person specially appointed for that purpose should make service as provided for in FRCP 4(l).

(2) *Proof of Service.* Proof of service must be made in accordance with RCFC 45(b)(3).

(b) *All Other Orders Related to a Contempt Proceeding.* All other orders related to a contempt proceeding must be served either:

- (1) in the manner prescribed by RCFC 4, if against an agent of the United States; or
- (2) in the manner prescribed by RCFC 5, if against a plaintiff, a plaintiff’s representative, or a nonparty.

(As revised and reissued May 1, 2002; as amended
_____.)

Rules Committee Notes

2002 Revision

New RCFC 4.1 implements the contempt authority granted to this court by § 910 of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4519-20. That section, now codified at 28 U.S.C. § 2521(b), (c) (1994), reads in relevant part as follows:

(b) The United States Court of Federal Claims shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions; or

(3) disobedience or resistance to its lawful writ, process, order, rule, decree or command.

(c) The United States Court of Federal Claims shall have assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Court of Federal Claims is sitting shall, when requested by the chief judge of the Court of Federal Claims, attend any session of the Court of Federal Claims in such district.

The rule adopts the mode of service specified in FRCP 4.1, which requires that service of process, other than a summons, be effected upon non-parties through means more formal than mailing. See generally FRCP 4.1 Advisory Committee Notes (recognizing a distinction in service requirements between parties and non-parties); *I.A.M. Nat’l Pension Fund v. Wakefield Indus.*, 699 F.2d 1254, 1259-62 (D.C. Cir. 1983) (discussing service of contempt orders).

2008 Amendment

The language of RCFC 4.1 has been amended to conform to the general restyling of the FRCP.

In addition, subdivision (a)(1) has been changed in two respects. First, the phrase “or entity” has been added to make clear that the service requirements applicable to an order initiating a contempt proceeding against a nonparty apply to “a person or entity other than a party.” Second, the phrase “shall deliver a copy of the order to the person named therein” has been omitted in favor of the following new sentence: “A person specially appointed for that purpose should make service as provided for in FRCP 4(l).” No other substantive changes are intended.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party:

- (A) an order stating that service is required;
- (B) a pleading filed after the original complaint;
- (C) a discovery paper required to be served on a party, unless the court orders otherwise;
- (D) a written motion, except one that may be heard ex parte; and
- (E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under RCFC 4.

(3) ***Seizing Property.*** [Not used.]

(b) Service: How Made.

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service in General.*** A paper is served under this rule by:

- (A) handing it to the person;

(B) leaving it:

- (i) at the person’s office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
- (ii) if the person has no office or the office is closed, at the person’s dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person’s last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ***Using Court Facilities.*** [Not used.]

(c) **Serving Numerous Defendants.** [Not used.]

(d) **Filing.**

(1) ***Required Filings; Certificate of Service.***

Any paper after the complaint that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. But disclosures under RCFC 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) ***How Filing Is Made—In General.*** A

paper is filed by delivering it:

- (A) to the clerk; or
- (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) **Electronic Filing.** The court requires filing by electronic means, subject to reasonable exceptions, as provided in Appendix E to these rules. A paper filed electronically in compliance with Appendix E is a written paper for purposes of these rules.

(4) **Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

The changes made to RCFC 5 were intended to bring the rule into closer conformity with FRCP 5. Thus, in addition to a change in sequence, changes in text include the following:

First, the text of subdivision (b) has been modified to reflect the December 1, 2001, changes to the FRCP which significantly affect organization and which also make possible consensual service by electronic means. In addition, the clause “but filing is not” has been deleted from the last sentence of that subdivision. The deleted language was not in conformity with the FRCP. Filing is not complete on mailing; filing is controlled by subdivisions (d) and (e) of this rule.

Second, subdivision (e) adopts the language of the FRCP recognizing the appropriateness of permitting papers to be “filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.” *It should be noted that no decision has yet been made by the court to implement electronic filing. Such a decision, when made, will be accomplished through an amendment to the rules. Until the*

*issuance of such amendment, the clerk’s office will not accept electronic filings. Individual chambers, however, may allow counsel to transmit “courtesy” copies of filed documents by electronic means.**

Third, subdivision (e) also adds the final sentence from FRCP 5(e) stating that “[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules.” The addition of this language to the rule was not intended to alter the court’s practice of treating all non-conforming complaints as filed upon receipt in the clerk’s office while referring other non-conforming papers received in the clerk’s office to a judge for instructions as to whether to permit their filing or to require counsel’s correction of the papers’ defects.

Finally, former subdivision (e), titled “Proof of Service,” no longer appears in FRCP 5. In order to conform more closely to FRCP 5, former subdivision (e) was deleted from this rule and now appears as RCFC 5.1.

** On March 17, 2003, the court adopted General Order No. 42A instituting an interim program requiring electronic filing for some cases. The court anticipates that electronic filing procedures will be incorporated into the rules.*

2007 Amendment

RCFC 5 has been amended to reflect the court’s requirement of filing by electronic means subject to reasonable exceptions. The amendment reflects the development of electronic filing and parallels a similar change in FRCP 5(e).

2008 Amendment

The language of RCFC 5 has been amended to conform to the general restyling of the FRCP.

In addition, the phrase “except one that may be heard ex parte” has been added to RCFC 5(a)(1)(D) to conform to the FRCP.

Rule 5.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention [Not used.]

Rule 5.2. Privacy Protection For Filings Made with the Court

- (a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual’s social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
- (1) the last four digits of the social-security number and taxpayer-identification number;
 - (2) the year of the individual’s birth;
 - (3) the minor’s initials; and
 - (4) the last four digits of the financial-account number.
- (b) **Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:
- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
 - (2) the record of an administrative or agency proceeding;
 - (3) the official record of a state-court proceeding;
 - (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; and
 - (5) a filing covered by RCFC 5.2(d).
- (c) **Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.** [Not used.]
- (d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.
- (e) **Protective Orders.** For good cause, the court may by order in a case:
- (1) require redaction of additional information; or
 - (2) limit or prohibit a nonparty’s remote electronic access to a document filed with the court.
- (f) **Option for Additional Unredacted Filing**

Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

- (g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.
- (h) **Waiver of Protection of Identifiers.** A person waives the protection of RCFC 5.2(a) as to the person’s own information by filing it without redaction and not under seal.

(As added _____.)

**Rules Committee Note
2008 Adoption**

New RCFC 5.2 has been added to correspond to the adoption of the same rule in the FRCP (which became effective December 1, 2007). (The redaction of personal information as addressed in RCFC 5.2 also appears in Appendix E (“Electronic Case Filing Procedure”), paragraph 26 (“Personal Information”).)

Rule 5.3. Proof of Service

- (a) **In General.** Service is made by the party, attorney of record, or any other person acting under the attorney of record’s direction by executing a certificate of service containing the following information:
- (1) the day and manner of service;
 - (2) the person or entity served; and
 - (3) the method of service employed, e.g., in person, by mail, or by electronic or other means.
- (b) **Attaching the Certificate of Service.** The certificate of service must be attached to the end of any original document, including an appendix, and to any copies of that document.

- (c) **Amending the Certificate of Service.** The certificate of service may be amended or supplied to the court at any time unless doing so would result in material prejudice to the substantial rights of any party.

(As revised and reissued May 1, 2002; as renumbered Nov. 15, 2007; as amended _____.)

Rules Committee Notes
2002 Revision

RCFC 5.1 has no FRCP counterpart. The text of this rule formerly appeared as subdivision (e) of former RCFC 5.

2007 Amendment

RCFC 5.2 formerly appeared in these rules as RCFC 5.1 and has been renumbered in light of the adoption of FRCP 5.1, effective December 1, 2006, to preserve the consistency in numbering systems between the court's rules and the FRCP.

2008 Amendment

The language of RCFC 5.3 has been amended to conform to the general restyling of the FRCP.

RCFC 5.3 formerly appeared in these rules as RCFC 5.2 and has been renumbered to accommodate the court's adoption of FRCP 5.2 (which became effective December 1, 2007) and to preserve the consistency in numbering systems between the court's rules and the FRCP.

Rule 5.4. Contents and Length of a Brief or Memorandum

(a) Contents.

- (1) ***In General.*** A brief or memorandum must be compact, concise, logically arranged, and free of burdensome, irrelevant, immaterial, and scandalous matter. The court may disregard a brief or memorandum that fails to comply with this rule.
- (2) ***Initial Brief or Memorandum.*** Except in a brief or memorandum of 10 pages or less or in pretrial findings under Appendix A, the first brief or

memorandum must contain the following items, arranged under proper headings and in the following order:

- (A) a table of contents, including the specific contents of any appendix or appendices to the brief or memorandum, listing a description of every item or exhibit being reproduced in the appendix and the page number at which the item or exhibit appears;
- (B) a table of cited constitutional provisions, treaties, statutes, regulations, and cases, giving the volume and page number of the edition where each may be found (using the United States Claims Court Reporter or the Federal Claims Reporter for all published United States Claims Court and United States Court of Federal Claims orders and opinions) and arranging the cases in alphabetical order;
- (C) a concise statement of each question presented;
- (D) a concise statement of the case, making reference to specific findings, stipulations of fact, or other pertinent portions of the record and setting out verbatim the pertinent portions of the applicable constitutional provisions, treaties, statutes, regulations, and texts of all administrative decisions directly involved in the case (unless previously reproduced in or as an exhibit to the complaint);
- (E) a clear statement of the argument, setting forth the points of fact and law being presented and the authorities relied upon;
- (F) a concise conclusion, indicating the relief sought; and
- (G) any appendix to the brief or memorandum, numbered consecutively within itself to enable

the court to find and read the material more easily and, if set forth in a volume separate from the brief or memorandum, containing a table of contents with a description of every item or exhibit being reproduced and the page number at which the item or exhibit appears.

- (3) **Opposing Brief or Memorandum.** An opposing or answering brief must conform to the requirements set forth in RCFC 5.4(a)(2), except that the items referred to in 5.4(a)(2)(C) and (D) need not be included unless the party is dissatisfied with the other side's presentation.
 - (4) **Reply Brief or Memorandum.** A reply brief or memorandum must conform to the requirements of RCFC 5.4(a)(3).
 - (5) **Cross-Motions.**
 - (A) **Initial Motion.** Any cross-motion must:
 - (i) conform to the requirements of RCFC 5.4(a)(3);
 - (ii) be contained in the same document as the response to the original motion.
 - (B) **Response.** A response to a cross-motion must be contained in the same document as the reply to the original motion.
- (b) **Length.**
- (1) **Initial Brief or Memorandum.** Except by leave of the court on motion, a party's initial brief or memorandum must not exceed 40 pages (50 pages for a cross-movant), not including:
 - (A) the table of contents;
 - (B) the list of citations to constitutional provisions, treaties, statutes, regulations, and cases; and
 - (C) any appendix setting out the pertinent portion of any constitutional provisions, treaties, statutes, regulations, agency and board decisions, court decisions, excerpts from transcripts of

testimony, and documentary exhibits.

- (2) **Reply Brief or Memorandum.** Except by leave of the court on motion, a reply brief or memorandum must not exceed 20 pages (30 pages when a response to a motion is included).
- (3) **Relying on a Previously Filed Brief or Memorandum.** A party must not incorporate a brief or memorandum by reference; the court will disregard any such incorporation. To rely upon a previously filed brief or memorandum, a party must:
 - (A) reproduce the brief or memorandum (or, when appropriate, the selected excerpts of such document) in an appendix;
 - (B) identify the total number of pages considered relevant in a footnote included on the first page of the brief or memorandum; and
 - (C) include the number of pages identified when calculating the maximum allowable pages set forth in RCFC 5.4(b)(1) and (2).

As revised and reissued May 1, 2002; as renumbered Nov. 15, 2007; as amended _____.)

Rules Committee Notes 2002 Revision

RCFC 5.2 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 83.1. The renumbering of RCFC 83.1 was intended to reflect its more logical placement in the organizational structure of the court's rules.

Several changes have been made to the rule; they include:

First, the deletion from subdivision (a) of language identifying the plaintiff's brief or memorandum as "the first brief or memorandum" normally to be filed.

Second, subparagraphs (A) and (G) of subdivision (a) were revised to indicate that any index to a separate appendix should be included

both at the beginning of the appendix and at the beginning of the accompanying brief or memorandum.

Third, subdivision (b)(4), relating to “a motion for leave to exceed the page limitation,” was deemed unduly burdensome and was therefore stricken.

2007 Amendment

RCFC 5.3 formerly appeared in these rules as RCFC 5.2 and has been renumbered in light of the adoption of FRCP 5.1, effective December 1, 2006, to preserve the consistency in numbering systems between the court’s rules and the FRCP.

2008 Amendment

The language of RCFC 5.4 has been amended to conform to the general restyling of the FRCP.

In addition, to improve organizational structure, the subdivision dealing with the contents of cross-motions, formerly included in these rules as RCFC 7.2(e) (“Time for Filing”), has been included as paragraph 5 to RCFC 5.4(a).

RCFC 5.4 formerly appeared in these rules as RCFC 5.3 and has been renumbered to accommodate the court’s adoption of FRCP 5.2 (which became effective December 1, 2007) and to preserve the consistency in numbering systems between the court’s rules and the FRCP.

Rule 5.5. Format of Filings and Required Information

- (a) **In General.** All papers filed with the clerk, and, where applicable, all documents filed electronically, must conform to the requirements of this rule.
- (b) **Duplication.** Any method of duplication must produce clear black images on white paper and must conform to the requirements of RCFC 5.5(c).
- (c) **Size and Form.**
 - (1) **Paper Size and Type.** All papers filed with the clerk:
 - (A) must be printed on pages not exceeding 8 1/2 by 11 inches;
 - (B) must contain type matter of letter quality, except for those papers

included as exhibits; and
(C) must be of sufficient quality that the typed material does not bleed through the page.

- (2) **Type Size.** The type size for text and footnotes must be no smaller than 12 point.
 - (3) **Margins.** Margins must not be less than 1 inch on each side.
 - (4) **Spacing.** Text must be double spaced, except that quoted and indented material and footnotes may be single spaced.
 - (5) **Binding.** A paper filing of 50 or fewer pages must be stapled in the upper lefthand corner. A paper filing exceeding 50 pages must be bound or attached along the entire lefthand margin in book form and must have legible margins.
 - (6) **Numbering.** All pages, including appendices, must be numbered in large distinct type that appears in the center of the bottom margin of the page.
- (d) **Number of Copies.**
- (1) **Complaint.** Plaintiff must file an original and 7 copies of the complaint, attaching a completed cover sheet to the original (shown in Form 2 of the Appendix of Forms).
 - (2) **Subsequent Filings.** Except in an electronic case under Appendix E or in an appeal under RCFC 58.1, a party must file an original and 2 copies of any filing.
 - (3) **Filings in a Congressional Reference Case.** In a congressional reference case, a party must file an original and 4 copies of any filing.
- (e) **Date.** Each paper must bear the date it is signed on the signature page.
 - (f) **Telephone and Facsimile Numbers.** The telephone and facsimile numbers (including area code) of the attorney of record must appear directly below the signature line of every filing.
 - (g) **Name of Judge.** In all filings other than the complaint, the name of the judge assigned to the case must be included directly below the

docket number.

- (h) Bid Protest Cases.** The words “Bid Protest” must be included in the caption of all filings directly below the name of the court.

(As revised and reissued May 1, 2002; as amended July 1, 2004; as renumbered Nov. 15, 2007; as amended _____.)

Rules Committee Notes

2002 Revision

New RCFC 5.3 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 82 and 83. The consolidation and renumbering of RCFC 82 and 83 were intended to reflect their more logical placement in the organizational structure of the court’s rules.

In addition to the renumbering, the text of former RCFC 82 has been modified in several respects: First, subdivision (a) has been modified by deleting the last sentence of that subdivision which read, “[t]he clerk shall refuse to file any paper which is not in substantial conformity with this rule or not in clear type.” The deletion corresponds to the change made in RCFC 5(e) directing that “[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form.” However, as noted in the Advisory Committee Note to FRCP 5(e), the “clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.”

Second, subdivision (c) has been modified to eliminate certain redundancies, to fix the type size, and to clarify binding and pagination requirements. Appendices will now be subject to pagination. The binding requirement changes were intended to discourage rubber bands, paper clips, and other non-secure binding.

Third, former subdivision (e), now subdivision (f), has been amended to include a requirement listing a facsimile number for the attorney of record.

Fourth, subdivision (d) was added to this rule to incorporate the “number of copies” requirement that formerly appeared as RCFC 83, as well as the requirement formerly found in RCFC 3(c)

regarding the number of copies to be filed when filing a complaint.

Finally, subdivision (g) was also added. The text of this subdivision formerly appeared as part of RCFC 10(a).

2004 Amendment

Subdivision (h) has been added to the text of RCFC 5.3 to facilitate case management and administrative record-keeping requirements.

2007 Amendment

RCFC 5.4 formerly appeared in these rules as RCFC 5.3 and has been renumbered in light of the adoption of FRCP 5.1, effective December 1, 2006, to preserve the consistency in numbering systems between the court’s rules and the FRCP.

2008 Amendment

The language of RCFC 5.5 has been amended to conform to the general restyling of the FRCP.

In addition, language has been added to clarify that the rule’s requirements extend to all filings, whether in paper or electronic form, except as specifically noted.

Finally, the sentences “Such pages need not be justified on the right margin” from former RCFC 5.4(c) and “All copies shall be identical, or otherwise conformed, to the original” from former RCFC 5.4(d) have been deleted as unnecessary.

RCFC 5.5 formerly appeared in these rules as RCFC 5.4 and has been renumbered to accommodate the court’s adoption of FRCP 5.2 (which became effective December 1, 2007) and to preserve the consistency in numbering systems between the court’s rules and the FRCP.

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules:

- (1) Day of the Event Excluded.** Exclude the day of the act, event, or default that begins the period.
- (2) Exclusions from Brief Periods.** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less

than 11 days.

- (3) **Last Day.** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which weather or other conditions make the clerk’s office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk’s office is inaccessible.
- (4) **“Legal Holiday” Defined.** As used in these rules, “legal holiday” means:
- (A) the day set aside by statute for observing New Year’s Day, Inauguration Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and
- (B) any other day declared a holiday by the President or Congress.
- (b) **Extending Time.**
- (1) **In General.** When an act may or must be done within a specified time, the court may, for good cause, extend the time:
- (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
- (B) on motion made after the time has expired if the party failed to act because of excusable neglect.
- (2) **Exceptions.** The court must not extend the time to act under RCFC 52(b), 54(d)(1), 59(b), (d), and (e), and 60(b), except as those rules allow.
- (c) **Motions, Notices of Hearing, and Affidavits.** [Not used.]
- (d) **Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service and service is made under RCFC 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under RCFC 6(a).

(As revised and reissued May 1, 2002; as amended June 20, 2006, _____.)

Rules Committee Notes

2002 Revision

RCFC 6 has been changed to conform to FRCP 6. In particular, that part of subdivision (b) which formerly specified the content of motions for enlargement has been moved to a new RCFC 6.1, “Enlargements of Time.”

2006 Amendment

Subdivision (e) has been amended to reflect the corresponding changes to FRCP 6(e) that became effective December 1, 2005.

2008 Amendment

The language of RCFC 6 has been amended to conform to the general restyling of the FRCP.

Rule 6.1 Motion for an Enlargement of Time

- (a) **Contents.** A motion for an enlargement of time must set forth:
- (1) the specific number of additional days requested;
- (2) the date to which the enlargement is to run;
- (3) the total number of days granted in any previously filed motions for enlargement; and
- (4) the reason for the enlargement.
- (b) **Communication With Opposing Counsel.** The moving party must make a reasonable effort to discuss the motion with opposing counsel and must indicate in the motion whether an opposition will be filed, or, if opposing counsel cannot be consulted, an explanation of the efforts that were made to do so.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

New RCFC 6.1 has no FRCP counterpart. The text of the new rule formerly appeared in these

rules as part of RCFC 6(b). However, the language in former RCFC 6(b), which addressed the content of the reasons offered in support of a motion for enlargement of time, has been stricken as unnecessary.

2008 Amendment

The language of RCFC 6.1 has been amended to conform to the general restyling of the FRCP.

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

- (a) **Pleadings.** Only these pleadings are allowed:
- (1) a complaint;
 - (2) an answer to a complaint;
 - (3) an answer to a counterclaim designated as a counterclaim;
 - (4) a reply to any offset or plea of fraud contained in the answer;
 - (5) a third-party pleading permitted under RCFC 14; and
 - (6) if the court orders one, a reply to an answer.
- (b) **Motions and Other Papers.**
- (1) ***In General.*** A request for a court order must be made by motion. Any motion, objection, or response may be accompanied by a brief or memorandum and, if necessary, affidavits supporting the motion. The motion must:
 - (A) be in writing unless made during a hearing or trial;
 - (B) state with particularity the grounds for seeking the order; and
 - (C) state the relief sought.
 - (2) ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes 2002 Revision

Minor grammatical changes have been introduced.

2008 Amendment

The language of RCFC 7 has been amended to conform to the general restyling of the FRCP.

In addition, the provision included in former paragraph (b)(1) stating that a motion may “be accompanied by a proposed order” has been omitted in favor of full conformance with FRCP 7.

Rule 7.1. Disclosure Statement

- (a) **Who Must File; Contents.** A nongovernmental corporate party must file 2 copies of a disclosure statement that:
- (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
 - (2) states that there is no such corporation.
- (b) **Time to File; Supplemental Filing.** A party must:
- (1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and
 - (2) promptly file a supplemental statement if any required information changes.

(As added Sept. 15, 2003; as amended _____.)

Rules Committee Notes 2003 Adoption

RCFC 7.1 has been added to correspond to the adoption of the same rule in the FRCP.

2008 Amendment

The language of RCFC 7.1 has been amended to conform to the general restyling of the FRCP.

Rule 7.2. Time for Filing

- (a) **In General.**
- (1) ***Responses and Objections.*** Unless otherwise provided in these rules or by order of the court, a response or an objection to a written motion must be filed within 14 days after service of the

motion.

- (2) **Replies.** A reply to a response or an objection may be filed within 7 days after service of the response or objection.
- (b) **Motions Under RCFC 12(b), 12(c), 52.1, and 56.**
 - (1) **Responses.** A response to any of these motions must be filed within 28 days after service of the motion.
 - (2) **Replies.** A reply to a response may be filed within 14 days after service of the response.
- (c) **Cross-Motions.**
 - (1) **Initial Motion.** A cross-motion may be filed within the time allowed for responses in RCFC 7.2(a) and (b).
 - (2) **Response and Reply.** A party will have the same amount of time to respond and reply to a cross-motion as to an original motion.
- (d) **Motions Filed by Leave of Court.** The time for filing a response to a motion filed by leave of court on motion by a party will run from the date of filing and not from the date of service.

As revised and reissued May 1, 2002; as amended Sept. 15, 2003, June 20 2006, _____.)

Rules Committee Notes

2002 Revision and 2003 Amendment

RCFC 7.2 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 83.2 and, following the court's May 1, 2002, revision of its rules, as RCFC 7.1. The first renumbering of the rule (from RCFC 83.2 to RCFC 7.1) was intended to reflect its more logical placement in the organizational structure of the court's rules; the second renumbering (from RCFC 7.1 to RCFC 7.2) accommodates the court's adoption of FRCP 7.1 effective December 1, 2002, and preserves the consistency in numbering systems between the court's rules and the FRCP.

2006 Amendment

A cross-reference in subdivision (c) was revised to accord with the addition of RCFC 52.1.

2008 Amendment

The language of RCFC 7.2 has been amended to conform to the general restyling of the FRCP.

In addition, to improve organizational structure, the subdivision dealing with the contents of cross-motions, formerly included in these rules as RCFC 7.2(e), has been moved to RCFC 5.4(a).

Rule 8. General Rules of Pleading

- (a) **Claim for Relief.** A pleading that states a claim for relief must contain:
 - (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
 - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
- (b) **Defenses; Admissions and Denials.**
 - (1) **In General.** In responding to a pleading, a party must:
 - (A) state in short and plain terms its defenses to each claim asserted against it; and
 - (B) admit or deny the allegations asserted against it by an opposing party.
 - (2) **Denials—Responding to the Substance.** A denial must fairly respond to the substance of the allegation.
 - (3) **General and Specific Denials.** A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
 - (4) **Denying Part of an Allegation.** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
 - (5) **Lacking Knowledge or Information.** A party that lacks knowledge or

information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

- (6) **Effect of Failing to Deny.** An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

- (1) **In General.** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

- (2) **Mistaken Designation.** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

- (1) **In General.** Each allegation must be simple, concise, and direct. No technical form is required.

- (2) **Alternative Statements of a Claim or Defense.** A party may set out 2 or more statements of a claim or defense

alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

- (3) **Inconsistent Claims or Defenses.** A party may state as many separate claims or defenses as it has, regardless of consistency.

- (e) **Construing Pleadings.** Pleadings must be construed so as to do justice.

As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Minor changes have been made in subdivisions (b) and (c) to conform to FRCP 8. In addition, subdivision (c) was amended to require the pleading, as an affirmative defense, of assumption of risk and contributory negligence. Although these defenses are typically associated with tort claims (i.e., with claims outside this court’s jurisdiction), there can be circumstances in which reliance on these defenses would be appropriate, for example, in congressional reference cases, in some aspects of contract litigation, and with respect to counterclaims asserted pursuant to 28 U.S.C. § 2508.

2008 Amendment

The language of RCFC 8 has been amended to conform to the general restyling of the FRCP.

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

- (1) **In General.** Except when required to show that the court has jurisdiction, a pleading need not allege:

- (A) a party’s capacity to sue or be sued;
- (B) a party’s authority to sue or be sued in a representative capacity; or
- (C) the legal existence of an organized association of persons that is made a party.

- (2) **Raising Those Issues.** To raise any of those issues, a party must do so by a

specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

- (b) **Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
- (c) **Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
- (d) **Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.
- (e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
- (f) **Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.
- (g) **Special Damages.** If an item of special damage is claimed, it must be specifically stated.
- (h) **Admiralty or Maritime Claim.** [Not used.]
- (i) **Inverse Condemnation Claim.** In pleading a claim for just compensation under the Fifth Amendment of the United States Constitution, a party must identify the specific property interest alleged to have been taken by the United States.
- (j) **Citation to Statutes, Regulations, and Orders.** In pleading a claim founded on a statute, regulation, or executive order, a party must include the citation to the act of Congress, regulation of an executive department or agency, or Executive Order of the President on which the claim is founded.
- (k) **Contract or Treaty.** In pleading a claim founded on a contract or treaty, a party must identify the substantive provisions of the

contract or treaty on which the party relies. In lieu of a description, the party may annex to the complaint a copy of the contract or treaty, indicating the relevant provisions.

- (l) **Patent Claim.** In pleading a patent infringement, a party must describe the patent or patents alleged to be infringed.
- (m) **Tax Refund Claim.** In pleading a claim for a tax refund, a party must include:
 - (1) a copy of the claim for refund, and
 - (2) a statement identifying:
 - (A) the tax year(s) for which a refund is sought;
 - (B) the amount, date, and place of each payment to be refunded;
 - (C) the date and place the return was filed, if any;
 - (D) the name, address, and identification number (under seal) of the taxpayer(s) appearing on the return;
 - (E) the date and place the claim for refund was filed; and
 - (F) the identification number (under seal) of each plaintiff, if different from the identification number of the taxpayer.
- (n) **Ownership of a Claim; Assignment.** In pleading a claim or part of a claim, ownership of which was acquired by assignment or other transfer, a party must include a statement describing when and upon what consideration the assignment or transfer was made.
- (o) **Action by Another Tribunal or Body.** In relying on an action by another tribunal or body, a party must describe the action taken on the claim by Congress, a department or agency of the United States, or another court.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes 2002 Revision

Subdivision (a) (relating to "Capacity") has been changed to conform to FRCP 9.

Subdivision (h)(6) (relating to special requirements applicable to complaints in "Tax

Refund Suits”) was amended by prescribing, as additional information to be included as part of a tax refund complaint, the following: (i) the taxpayer’s or filer’s identification number; and (ii) a copy of the claim for refund.

Subdivision (h)(7) was added as a means to clarify the nature of the property interest asserted to have been taken in an inverse condemnation action.

2008 Amendment

The language of RCFC 9 has been amended to conform to the general restyling of the FRCP.

In addition, former subdivision (h) (“Special Matters Required in Complaint”), comprised of paragraphs (1) through (7), has been reorganized as separate subdivisions (i) through (o), and a requirement was added to new subdivision (m) (“Tax Refund Claim”) directing that taxpayer identification numbers be included under seal.

Rule 10. Form of Pleadings

- (a) **Caption; Names of Parties.** Every pleading must have a caption with the court’s name, a title, a file number, and a RCFC 7(a) designation. The title of the complaint must name all the parties (see RCFC 20(a)), with the United States designated as the party defendant; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.
- (b) **Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.
- (c) **Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes 2002 Revision

RCFC 10 has been changed in minor respects in order to achieve closer textual conformity with FRCP 10. The former last sentence of subdivision (a) has been moved to RCFC 5.3.

The last sentence of former subdivision (c) (“unless otherwise indicated, but the adverse party shall not be deemed to have admitted the truth of the allegations in such exhibit merely because the adverse party has failed to deny them explicitly”) was omitted as not in conformity with the FRCP and because it was deemed unnecessary.

2008 Amendment

The language of RCFC 10 has been amended to conform to the general restyling of the FRCP.

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

- (a) **Signature.** Every pleading, written motion, and other paper must be signed by or for the attorney of record in the attorney’s name—or by a party personally if the party is unrepresented. The paper must state the signer’s address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney’s or party’s attention.
- (b) **Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
 - (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
 - (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
- (c) **Sanctions.**
- (1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that RCFC 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
 - (2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates RCFC 11(b). The motion must be served under RCFC 5, but it must not be filed or presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.
 - (3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated RCFC 11(b).
 - (4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the

conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

- (5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:
 - (A) against a represented party for violating RCFC 11(b)(2); or
 - (B) on its own, unless it issued the show-cause order under RCFC 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.
- (6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.
- (d) ***Inapplicability to Discovery.*** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under RCFC 26 through 37.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

The changes to RCFC 11 reflect the corresponding revision of FRCP 11 that was introduced in December 1993. For a detailed explanation of the reasons for revision of FRCP 11, see 28 U.S.C.A. Rule 11 Advisory Committee Notes (West Supp. 2001).

2008 Amendment

The language of RCFC 11 has been amended to conform to the general restyling of the FRCP.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating

Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General

- (A)** The United States must file an answer to a complaint within 60 days after being served with the complaint.
 - (B)** If the answer contains a counterclaim, offset, or plea of fraud, a party must file an answer to the counterclaim, and may file a reply to the offset or plea of fraud, within 20 days after being served with the answer.
 - (C)** If a reply to an answer or a responsive pleading to a third-party complaint or answer is ordered by the court, a party must file the reply or responsive pleading within 20 days after being served with the order, unless the order specifies a different time.
- (2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** [Not used.]
- (3) *United States Officers or Employees Sued in an Individual Capacity.*** [Not used.]
- (4) *Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule or RCFC 56 alters these periods as follows:
- (A)** if the court denies the motion, in whole or in part, or postpones its disposition until trial, or if a party withdraws the motion, the responsive pleading must be filed by the later of:
 - (i)** 10 days after notice of the court's action or the motion's withdrawal; or
 - (ii)** the date the response otherwise would have been due.
 - (B)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1)** lack of subject-matter jurisdiction;
- (2)** lack of personal jurisdiction;
- (3)** improper venue [not used];
- (4)** insufficient process;
- (5)** insufficient service of process;
- (6)** failure to state a claim upon which relief can be granted; and
- (7)** failure to join a party under RCFC 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings.

If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement.

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

- (f) **Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
- (1) on its own; or
 - (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.
- (g) **Joining Motions.**
- (1) **Right to Join.** A motion under this rule may be joined with any other motion allowed by this rule.
 - (2) **Limitation on Further Motions.** Except as provided in RCFC 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.
- (h) **Waiving and Preserving Certain Defenses.**
- (1) **When Some Are Waived.** A party waives any defense listed in RCFC 12(b)(2)-(5) by:
 - (A) omitting it from a motion in the circumstances described in RCFC 12(g)(2); or
 - (B) failing to either:
 - (i) make it by motion under this rule; or
 - (ii) include it in a responsive pleading or in an amendment allowed by RCFC 15(a)(1) as a matter of course.
 - (2) **When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by RCFC 19(b), or to state a legal defense to a claim may be raised:
 - (A) in any pleading allowed or ordered under RCFC 7(a);
 - (B) by a motion under RCFC 12(c); or
 - (C) at trial.
 - (3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
- (i) **Hearing Before Trial.** If a party so moves,

any defense listed in RCFC 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under RCFC 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

To more closely parallel FRCP 12, subdivisions (b) and (h) of the court’s rule have been enlarged by adding the defense of “insufficiency of service of process” and the defense of “failure to join a party indispensable under RCFC 19.” Further, as an aid to practitioners, most of whom are familiar with practice in the district courts, the enumeration of defenses in subdivision (b) has been brought into conformity with the corresponding subdivision of the FRCP. Finally, subdivision (i) (“Suspension of Discovery”) has been deleted. That subdivision is not part of the comparable FRCP, and its subject matter is more appropriately dealt with as a case management matter.

2008 Amendment

The language of RCFC 12 has been amended to conform to the general restyling of the FRCP.

In addition, former paragraph (a)(1) (the text of which is unique to our court) has been reworded to provide that while a reply to an answer containing a counterclaim is mandatory, a reply to an answer containing an offset or a plea of fraud is not (unless ordered by the court). This rewording, although a departure from past practice, was deemed advisable in order to avoid the consequences of an unintended admission caused by a party’s inadvertent failure to respond to a defense of offset or plea of fraud that was not clearly designated as such in the answer.

Rule 13. Counterclaim

(a) Compulsory Counterclaim.

- (1) **In General.** A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

- (A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and
 - (B) does not require adding another party over whom the court cannot acquire jurisdiction.
- (2) **Exceptions.** The pleader need not state the claim if, when the action was commenced, the claim was the subject of another pending action.
- (b) **Permissive Counterclaim.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.
 - (c) **Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.
 - (d) **Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.
 - (e) **Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
 - (f) **Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.
 - (g) **Crossclaim Against a Coparty.** [Not used.]
 - (h) **Joining Additional Parties.** [Not used.]
 - (i) **Separate Trials; Separate Judgments.** If the court orders separate trials under RCFC 42(b), it may enter judgment on a counterclaim under RCFC 54(b) when it has jurisdiction to do so, even if the opposing party’s claims have been dismissed or otherwise resolved.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

Subdivision (d) has been changed to add the language of FRCP 13(d) in recognition of the fact that there is no statutory bar to third-party defendants filing counterclaims against the United States. See 41 U.S.C. § 114 and RCFC 14. Other significant differences between this version and the FRCP have been preserved as necessary in light of the fact that the United States is the only defendant in this court.

2008 Amendment

The language of RCFC 13 has been amended to conform to the general restyling of the FRCP.

In addition, the text of subdivisions (a) and (f) has been modified to recognize that counterclaims, while generally filed in this court by the defendant, could, under certain circumstances, also be filed by a summoned third party (see RCFC 14). Hence, the terms “pleader” and “pleading,” respectively, have been substituted for the more restrictive terms “defendant” and “answer.”

Rule 14. Third-Party Practice

(a) When the United States May Bring in a Third Party.

- (1) **Motion for Summons.** The United States may, as third-party plaintiff, move the court to summon a nonparty who is or may be liable to the United States for the recovery of money paid by the United States in respect of the transaction or matter that constitutes the subject matter of the suit.
- (2) **Accompanying Complaint.** A motion for summons must be accompanied by a complaint setting forth the claim or contingent claim that the United States is asserting against the nonparty.
- (3) **Issuing the Summons.** If the court grants a motion for summons, the clerk must issue an original and one copy of the summons.
- (4) **Contents of the Summons.** A summons must:
 - (A) contain the name of the person summoned;
 - (B) state that the United States is asserting a claim against the person summoned as described in the

- (ii) forward the notice to the Attorney General for service in accordance with RCFC 14 (b)(4)(B) and (C).
- (6) ***Serving a Person Outside the United States.*** When serving a notice on a person in a foreign country, proof of service must be made in accordance with FRCP 4(f).
- (c) **Third Parties Pleadings.**
 - (1) ***In General.***
 - (A) A person served with a notice issued under this rule may file an appropriate pleading setting forth the person’s interest in the subject matter of the litigation.
 - (B) A third party’s pleading must comply with the requirements of RCFC 5, 5.2, 5.3, 5.5, 7, and 7.1, except that a third party need only file an original and 2 copies of its complaint instead of the 7 copies required by RCFC 5.5(d).
 - (2) ***Time.*** A third-party’s pleading must be filed within 42 days after service of the summons or notice issued pursuant to this rule.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 14 has been substantially revised. The order of the rule has been changed to distinguish more clearly between the two types of actions it permits with respect to entities that are not yet parties to the suit. New subdivision (a) deals exclusively with summons to persons whom the United States seeks to join formally as third parties. The procedures for such summons are now gathered under that subdivision. The same has been done with respect to motions for notice to inform non-parties of the pendency of the action and the opportunity to join as parties. In addition, language in the old rule with respect to service of notice by publication, as well as the consequences of failing to appear in response to such notice, have been stricken. The law in this area is unsettled;

hence, the possibility existed that the manner and method of notice prescribed by the rule might not be found constitutionally adequate in all potential situations.

It is important to note that RCFC 14's notice requirements do not apply to the procedures for notifying potential intervenors in procurement protest cases filed pursuant to 28 U.S.C. § 1491(b). RCFC 14 implements the authority set forth in 41 U.S.C. § 114. For service of third-party complaints, see RCFC 5.

2008 Amendment

The language of RCFC 14 has been amended to conform to the general restyling of the FRCP.

In addition, in RCFC 14(c)(1)(B), instead of directing that a third-party pleading “shall comply with the requirements of these rules with respect to the filing of original complaints and answers,” the rule specifies that a third-party pleading must comply with RCFC 5, 5.2, 5.3, 5.5, 7, and 7.1.

Rule 15. Amended and Supplemental Pleadings
(a) Amendments Before Trial.

- (1) ***Amending as a Matter of Course.*** A party may amend its pleadings once as a matter of course:
 - (A) before being served with a responsive pleading; or
 - (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.
- (2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.
- (3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

- (1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not

within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) **For Issues Tried by Consent.** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) **Relation Back of Amendments.**

(1) **When an Amendment Relates Back.** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if RCFC 15(c)(1)(B) is satisfied and if the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) **Notice to the United States.** [Not Used.]

(d) **Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Significant changes were made to FRCP 15 in 1991; minor changes were made in 1993. Most notable is the listing of criteria for relation back of amendments in subdivision (c). RCFC 15 was conformed to the comparable FRCP, with two exceptions: first, the language in FRCP subdivision (c)(3), relating to the timing of an amendment changing the name of a party, was omitted as inapplicable; and second, language in subdivision (c) of the FRCP, relating to faulty service on federal officers, also was omitted.

2008 Amendment

The language of RCFC 15 has been amended to conform to the general restyling of the FRCP.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating settlement; and

(6) assessing the utility of dispositive

motions.

(b) Scheduling.

(1) Scheduling Order. The court will issue a scheduling order:

(A) after receiving the parties' Joint Preliminary Status Report under Appendix A ¶ 3; or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The court will issue the scheduling order as soon as practicable after the filing of the Joint Preliminary Status Report, but in any event within 14 days after any preliminary scheduling conference.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under RCFC 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial;

(vi) direct that the parties file any of the submissions set out in Appendix A ¶¶ 14, 15, 16, or 17; and

(vii) include other appropriate matters.

(4) Modifying a Schedule. A schedule may

be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under RCFC 52.1 and 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under RCFC 26 and RCFC 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a master;

(I) settling the case and using special procedures to assist in resolving the

- dispute;
 - (J) determining the form and content of the pretrial order;
 - (K) disposing of pending motions;
 - (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
 - (M) ordering a separate trial under RCFC 42(b) of a claim, counterclaim, third-party claim, or particular issue;
 - (N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law or a judgment on partial findings under RCFC 52(c);
 - (O) establishing a reasonable time limit on the time allowed to present evidence; and
 - (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.
- (d) **Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.
- (e) **Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.
- (f) **Sanctions.**
- (1) **In General.** On motion or on its own, the court may issue any just orders, including those authorized by RCFC 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

- (A) fails to appear at a scheduling or other pretrial conference;
 - (B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or
 - (C) fails to obey a scheduling or other pretrial order.
- (2) **Imposing Fees and Costs.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney’s fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.
- (g) **Additional Pretrial Procedures.** See Appendix A to these rules (“Case Management Procedure”) for additional provisions controlling pretrial procedures.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

**Rules Committee Notes
2002 Revision**

RCFC 16 has been completely revised to parallel the structure and content of its counterpart in the FRCP. The limited number of changes to the current FRCP reflect those deemed necessary to accommodate procedural requirements particular to this court. Except for these changes, the rule shown conforms fully to the text of FRCP 16.

2007 Amendment

Subdivision (b) of RCFC 16 has been amended by the addition of subparagraphs 5 and 6 to reflect the corresponding changes to FRCP 16

2008 Amendment

The language of RCFC 16 has been amended to conform to the general restyling of the FRCP.

In addition, reference to RCFC 26(e)(1) (“Supplementing Disclosures and Responses”) was added to RCFC 16(b)(3)(B)(i) to conform to the FRCP.

TITLE IV. PARTIES

Rule 17. Plaintiff and Defendant; Capacity

(a) Real Party in Interest.

(1) **Designation in General.** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

- (A) an executor;
- (B) an administrator;
- (C) a guardian;
- (D) a bailee;
- (E) a trustee of an express trust;
- (F) a party with whom or in whose name a contract has been made for another's benefit; and
- (G) a party authorized by statute.

(2) **Action in the Name of the United States for Another's Use or Benefit.** [Not used.]

(3) **Joinder of the Real Party in Interest.** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) **Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows:

- (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;
- (2) for a corporation, by the law under which it was organized; and
- (3) for all other parties, by the law of the applicable state, except that:
 - (A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States

Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) **Minor or Incompetent Person.**

(1) **With a Representative.** The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) **Without a Representative.** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 17 has been modified in minor respects in order to achieve closer conformity with FRCP 17. A difference between the court's rule and the corresponding FRCP occurs in subdivision (b). Subdivision (b) of the FRCP, subtitled "Capacity to Sue or Be Sued," provides generally that in those cases for which no rule of decision is provided, "capacity to sue or be sued shall be determined by the law of the state in which the district court is held." In recognition of this court's nationwide jurisdiction, the quoted language was rewritten by substituting "by the law of the applicable state" for "by the law of the state in which the district court is held."

2008 Amendment

The language of RCFC 17 has been amended to conform to the general restyling of the FRCP.

Rule 18. Joinder of Claims

(a) **In General.** A party asserting a claim or

counterclaim may join, as independent or alternative claims, as many claims as it has against an opposing party. A third party may join, to the extent permitted by law, as many claims as it has against an opposing party.

- (b) **Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

The final sentence added to subdivision (a) was intended to recognize both the right of a third party to assert a claim and the limitations on that right as set forth in 41 U.S.C. § 114 and applicable case law.

2008 Amendment

The language of RCFC 18 has been amended to conform to the general restyling of the FRCP.

Rule 19. Required Joinder of Parties

(a) **Persons Required to Be Joined if Feasible.**

(1) **Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the

interest.

(2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) **Venue.** [Not used.]

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgement rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions.** This rule is subject to RCFC 23.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Reference to RCFC 14 was deleted from subdivision (a) and other minor changes have been made in order to more closely conform to

FRCP 19. Some differences, however, were retained—the most significant being the deletion of the last sentence of FRCP 19(a) from this court’s rule. The last sentence addresses objections to venue raised by a joined party. Such objections would not be assertable in this court.

2008 Amendment

The language of RCFC 19 has been amended to conform to the general restyling of the FRCP.

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) **Plaintiffs.** Persons may join in one action as plaintiffs if:

- (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all plaintiffs will arise in the action.

(2) **Defendants.** [Not used.]

(3) **Extent of Relief.** A plaintiff need not be interested in obtaining all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights.

(c) **Protective Measures.** The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

The authority previously contained in RCFC 20(a)(1)–(2), permitting unrestricted joinder of additional plaintiffs to a pending multi-party action, proved cumbersome in practice and an impediment to sound case management. The joinder of additional plaintiffs should proceed by appropriate motion under RCFC 15. Accordingly,

RCFC 20 was modified so as to more closely parallel the text of the corresponding FRCP.

2008 Amendment

The language of RCFC 20 has been amended to conform to the general restyling of the FRCP.

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

The last sentence of the former rule, “To add plaintiffs, see RCFC 20(a)(1)–(2),” was eliminated to more closely conform the rule to FRCP 21.

2008 Amendment

The language of RCFC 21 has been amended to conform to the general restyling of the FRCP.

Rule 22. Interpleader [Not used.]

Rules Committee Note

2002 Revision

The interpleader practice permitted under FRCP 22 is, for the most part, incompatible with the jurisdiction exercisable by this court. However, in those cases where the United States is in the position of a stakeholder facing the risks of double liability, RCFC 14 provides the means for summoning a third party.

Rule 23. Class Actions

(a) **Prerequisites.** One or more members of a class may sue as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

- (4) the representative parties will fairly and adequately protect the interests of the class.
- (b) **Class Actions Maintainable.** A class action may be maintained if RCFC 23(a) is satisfied and if:
 - (1) [not used];
 - (2) the United States has acted or refused to act on grounds generally applicable to the class; and
 - (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by class members;
 - (C) [not used]; and
 - (D) the likely difficulties in managing a class action.
- (c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**
 - (1) **Certification Order.**
 - (A) **Time to Issue.** At an early practicable time after a person sues as a class representative, the court must determine by order whether to certify the action as a class action.
 - (B) **Defining the Class; Appointing Class Counsel.** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under RCFC 23(g).
 - (C) **Altering or Amending the Order.** An order that grants or denies class certification may be altered or

amended before final judgment.

- (2) **Notice.**
 - (A) [Not used.]
 - (B) For any class certified under RCFC 23(b), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
 - (i) the nature of the action;
 - (ii) the definition of the class certified;
 - (iii) the class claims, issues, or defenses;
 - (iv) that a class member may enter an appearance through an attorney if the member so desires;
 - (v) that the court will include in the class any member who requests inclusion;
 - (vi) the time and manner for requesting inclusion;
 - (vii) the binding effect of a class judgment on members under RCFC 23(c)(3).
- (3) **Judgment.** Whether or not favorable to the class, the judgment in a class action must include and specify or describe those to whom the RCFC 23(c)(2) notice was directed, and whom the court finds to be class members.
- (4) **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
- (5) **Subclasses.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.
- (d) **Conducting the Action.**
 - (1) **In General.** In conducting an action under this rule, the court may issue orders that:
 - (A) determine the course of proceedings

- or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
- (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
- (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
- (C) impose conditions on the representative parties or on intervenors;
- (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
- (E) deal with similar procedural matters.
- (2) **Combining and Amending Orders.** An order under RCFC 23(d)(1) may be altered or amended from time to time and may be combined with an order under RCFC 16.
- (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
 - (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
 - (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) [Not used.]
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court’s approval.
- (f) **Appeals.** [Not used.]
- (g) **Class Counsel.**
- (1) **Appointing Class Counsel.** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
- (A) must consider:
 - (i) the work counsel has done in identifying or investigating potential claims in the action;
 - (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
 - (iii) counsel’s knowledge of the applicable law; and
 - (iv) the resources that counsel will commit to representing the class;
 - (B) may consider any other matter pertinent to counsel’s ability to fairly and accurately represent the interests of the class;
 - (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney’s fees and nontaxable costs;
 - (D) may include in the appointing order provisions about the award of attorney’s fees or nontaxable costs under RCFC 23(h); and
 - (E) may make further orders in connection with the appointment.
- (2) **Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under RCFC 23(g)(1) and (4).

If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

- (3) **Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
- (4) **Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.
- (h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
 - (1) A claim for an award must be made by motion under RCFC 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
 - (2) A class member, or party from whom payment is sought, may object to the motion.
 - (3) The court may hold a hearing and must find the facts and state its legal conclusions under RCFC 52(a).
 - (4) [Not used.]

(As revised and reissued May 1, 2002; as amended July 1, 2004, _____.)

Rules Committee Notes **2002 Revision**

RCFC 23 has been completely rewritten. Although the court's rule is modeled largely on the comparable FRCP, there are significant differences between the two rules. In the main, the court's rule adopts the criteria for certifying and maintaining a class action as set forth in *Quinault Allottee Ass'n v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

Because the relief available in this court is generally confined to individual money claims against the United States, the situations justifying

the use of a class action are correspondingly narrower than those addressed in FRCP 23. Thus, the court's rule does not accommodate, *inter alia*, the factual situations redressable through declaratory and injunctive relief contemplated under FRCP 23(b)(1) and (b)(2).

Additionally, unlike the FRCP, the court's rule contemplates only opt-in class certifications, not opt-out classes. The latter were viewed as inappropriate here because of the need for specificity in money judgments against the United States, and the fact that the court's injunctive powers—the typical focus of an opt-out class—are more limited than those of a district court.

Finally, the court's rule does not contain a provision comparable to FRCP 23(f). That subdivision, which provides that a “court of appeals may in its discretion permit an appeal from an order . . . granting or denying class certification,” has its origin in 28 U.S.C. § 1292(e), which authorizes the Supreme Court to promulgate rules that provide for an appeal of an interlocutory decision other than those set out in Section 1292. Because no comparable statutory authority exists for this court's promulgation of a similar rule, subdivision (f) has been omitted. It should be noted, however, that the Court of Federal Claims may certify questions to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. §§ 1292(b), 1295.

2004 Amendment

In addition to the rule changes introduced in 2002, the text of the current rule also incorporates the revisions to FRCP 23 effective December 1, 2003. These revisions, which appear as subdivisions (c), (e), (g), and (h) of the rule, adopt the text of the FRCP except where modification in wording was necessary to accommodate the “opt-in” character of this court's class action practice.

2008 Amendment

The language of RCFC 23 has been amended to conform to the general restyling of the FRCP.

In addition, subdivision (h) (“Attorney's Fees and Nontaxable Costs”) has been expanded to (i) recognize that an award of attorney's fees may be authorized either by law (as was previously recognized in the rule) or “by the parties’

agreement”; and (ii) include the procedural protections accorded class members under FRCP 23(h)(1)–(3) with respect to claims for an award of attorney’s fees.

Rule 23.1. Derivative Actions

- (a) **Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.
- (b) **Pleading Requirements.** The complaint must be verified and must:
- (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff’s share or membership later devolved on it by operation of law;
 - (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
 - (3) state with particularity:
 - (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
 - (B) the reasons for not obtaining the action or not making the effort.
- (c) **Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court’s approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

(As added May 1, 2002; as amended _____.)

Rules Committee Notes 2002 Adoption

This is a new rule. This version of RCFC 23.1 is in conformity with the corresponding FRCP. The Federal Circuit has ruled that under certain circumstances, this court has jurisdiction to hear shareholder derivative suits. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). *Cf. Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995); and *California Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992).

2008 Amendment

The language of RCFC 23.1 has been amended to conform to the general restyling of the FRCP.

Rule 23.2. Actions Relating to Unincorporated Associations [Not used.]

Rules Committee Note 2002 Revision

This rule is procedurally unnecessary in light of the opt-in class-action procedures of RCFC 23.

Rule 24. Intervention

- (a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
- (1) is given an unconditional right to intervene by a federal statute; or
 - (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.
- (b) **Permissive Intervention.**
- (1) **In General.** On timely motion, the court may permit anyone to intervene who:
 - (A) is given a conditional right to intervene by a federal statute; or
 - (B) has a claim or defense that shares with the main action a common question of law or fact.
 - (2) **By a Government Officer or Agency.** [Not used.]
 - (3) **Delay or Prejudice.** In exercising its discretion, the court must consider

whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

- (c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in RCFC 5. The motion must state the grounds for the intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

Minor changes have been made to subdivision (c) of this rule in order to more closely conform to FRCP 24.

2008 Amendment

The language of RCFC 24 has been amended to conform to the general restyling of the FRCP.

In addition, as pointed out in the 2007 Committee Note in the FRCP, the final sentence in subdivision (c)—specifying that the procedure called for under the rule “shall be followed when a statute of the United States gives a right to intervene”—was deleted as unnecessary.

Rule 25. Substitution of Parties

(a) Death.

- (1) **Substitution if the Claim is Not Extinguished.** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by the decedent must be dismissed.
- (2) **Continuation Among the Remaining Parties.** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) **Service.** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in RCFC 5. A statement noting death must be served in the same manner.

(b) **Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in RCFC 25(a)(3).

(c) **Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in RCFC 25(a)(3).

(d) **Public Officers; Death or Separation from Office.** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 25 omits the text of subdivision (d) of FRCP 25 which addresses the substitution of a successor in an action naming a public officer who dies or is separated from service while the action is pending.

2008 Amendment

The language of RCFC 25 has been amended to conform to the general restyling of the FRCP.

In addition, subdivision (d) (“Public Officers; Death or Separation from Office”), which is identical in text to FRCP 25(d) but was previously “not used,” was added in recognition of the

provision's potential applicability to claims for compensation filed in this court under the National Childhood Vaccine Injury Act. In such suits, a public officer (the Secretary of Health and Human Services) is always the named respondent.

TITLE V. DISCLOSURES AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by RCFC 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under RCFC 34 the documents or other evidentiary material,

unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) [not used].

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

- (i) an action for review on an administrative record, including procurement protest and military pay cases;
- (ii) [not used];
- (iii) [not used];
- (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
- (v) [not used];
- (vi) [not used];
- (vii) [not used];
- (viii) [not used];
- (ix) an action to enforce an arbitration award; and
- (x) an action under the National Childhood Vaccine Injury Act.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the Early Meeting of Counsel (see Appendix A ¶3) unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the Joint Preliminary Status Report. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or

otherwise joined after the Early Meeting of Counsel (see Appendix A ¶3) must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by RCFC 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i)** a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii)** the data or other information considered by the witness in forming them;
- (iii)** any exhibits that will be used to summarize or support them;
- (iv)** the witness's qualifications,

including a list of all publications authored in the previous 10 years;

- (v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi)** a statement of the compensation to be paid for the study and testimony in the case.

(C) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order (see Appendix A ¶¶ 5 and 8), the disclosures must be made:

- (i)** at least 70 days before the scheduled close of discovery; or
- (ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under RCFC 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under RCFC 26(e).

(3) *Pretrial Disclosures.* [Not used; see Appendix A ¶¶ 13, 15, and 16.]

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under RCFC 26(a) must be in writing, signed, and served.

(b) *Discovery Scope and Limits.*

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and

the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by RCFC 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under RCFC 30. By order, the court may also limit the number of requests under RCFC 36.

(B) Specific Limitations on Electronically Stored Information.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of RCFC 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparations: Materials.

(A) Documents and Tangible Things.

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to RCFC 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under RCFC 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its

subject matter. If the request is refused, the person may move for a court order, and RCFC 37(a)(5) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person’s oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If RCFC 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in RCFC 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under RCFC 26(b)(4)(A) or (B); and
- (ii) for discovery under (B), also

pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert’s facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an

effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** RCFC 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) **Timing.** A party may not seek discovery from any source before the parties have conferred as required by Appendix A ¶ 3, except in a proceeding exempted from initial disclosure under RCFC 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) **Sequence.** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

- (A) methods of discovery may be used in any sequence; and
- (B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) **In General.** A party who has made a disclosure under RCFC 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

- (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
- (B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under RCFC 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under RCFC 26(a)(3) are due.

(f) **Conference of the Parties; Planning for Discovery.** [Not used; see Appendix A ¶ 3.]

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) **Signature Required; Effect of Signature.** Every disclosure under RCFC 26(a)(1) or Appendix A ¶ 13, 15, and 16, and every discovery request, response, or objection must be signed by the attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an

attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

- (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
 - (B) with respect to a discovery request, response, or objection, it is:
 - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
 - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
 - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
- (2) **Failure to Sign.** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
- (3) **Sanction for Improper Certification.** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes 2002 Revision

RCFC 26 has been revised to parallel the structure and content of its counterpart in the FRCP. The limited number of changes to the current FRCP, as amended in 2000, reflect those deemed necessary to accommodate the nature and jurisdiction of this court. Except for these changes, the rule shown conforms fully to the text of FRCP 26. Because the Appendix A Early Meeting of Counsel substantially accomplishes the same purpose as the FRCP 26(f) Conference of Parties, the timing of initial disclosures was keyed to the former. Consequently, in lieu of the language of FRCP 26(f), cross reference is made to Appendix A ¶ 3.

2007 Amendment

Rule 26 has been amended to reflect the changes to subdivisions (a) and (b) of FRCP 26 that became effective December 1, 2006. The changes to subdivision (f) of FRCP 26 that became effective December 1, 2006, were also adopted by the court but appear as changes to Appendix A, ¶ 3.

2008 Amendment

The language of RCFC 26 has been amended to conform to the general restyling of the FRCP.

In addition, the references in former subparagraph (a)(1)(E) to the initial disclosure requirements after the filing of the Joint Preliminary Status Report have been changed in now-restyled subparagraphs (a)(1)(C) and (D) to "after the Early Meeting of Counsel" to reflect the corresponding event (the Rule 26(f) conference) identified in the federal rule.

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

- (1) **Petition.** A person who wants to perpetuate testimony about any matter cognizable in the court may file a verified petition. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a

party to an action cognizable in the court but cannot presently bring it or cause it to be brought;

- (B) the subject matter of the expected action and the petitioner's interest;
- (C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;
- (D) [not used]; and
- (E) the name, address, and expected substance of the testimony of each deponent.

(2) **Notice and Service.** The petitioner must serve the United States with a copy of the petition in the same manner as the complaint. See RCFC 4. The petitioner may thereafter request a hearing by motion served on counsel for the United States (see RCFC 5), or on its own, the court may order a hearing on the petition.

(3) **Order and Examination.** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by RCFC 34 and 35.

(4) **Using the Deposition.** A deposition to perpetuate testimony may be used under RCFC 32(a) in any later-filed action in this court involving the same subject matter if the deposition was taken under these rules.

(b) Pending Appeal.

(1) **In General.** If a judgment has been rendered and an appeal has been taken or may still be taken, the court may permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in the court.

(2) **Motion.** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same

notice and service as if the action were pending in this court. The motion must show:

- (A) the name, address, and expected substance of the testimony of each deponent; and
- (B) the reasons for perpetuating the testimony.

(3) **Court Order.** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by RCFC 34 and 35. The depositions may be taken and used as any other deposition taken in an action pending in this court.

(c) **Perpetuation by an Action.** [Not used.]

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 27 closely parallels FRCP 27, the only differences being those necessary for compatibility with the jurisdiction and other rules of the court.

2008 Amendment

The language of RCFC 27 has been amended to conform to the general restyling of the FRCP.

Rule 28. Persons Before Whom Depositions May Be Taken

(a) **Within the United States.**

(1) **In General.** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

- (A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or
- (B) a person appointed by the court to administer oaths and take testimony.

(2) **Definition of "Officer."** The term "officer" in RCFC 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under RCFC 29(a).

- (b) **In a Foreign Country.**
- (1) ***In General.*** A deposition may be taken in a foreign country:
- (A) under an applicable treaty or convention;
 - (B) under a letter of request, whether or not captioned a “letter rogatory”;
 - (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or
 - (D) before a person commissioned by the court to administer any necessary oath and take testimony.
- (2) ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued:
- (A) on appropriate terms after an application and notice of it; and
 - (B) without a showing that taking the deposition in another manner is impracticable or inconvenient.
- (3) ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed “To the Appropriate Authority in [name of country].” A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.
- (4) ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.
- (c) **Disqualification.** A deposition must not be taken before a person who is any party’s relative, employee, or attorney; who is related to or employed by any party’s attorney; or who is financially interested in the action.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 28 parallels in form and content FRCP 28. The single difference between the two rules occurs in subdivision (a): the court’s rule eliminates the reference to other courts by omitting the phrasing “in which the action is pending.”

2008 Amendment

The language of RCFC 28 has been amended to conform to the general restyling of the FRCP.

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

- (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and
- (b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 29 is identical to its FRCP counterpart.

2008 Amendment

The language of RCFC 29 has been amended to conform to the general restyling of the FRCP.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

- (1) ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in RCFC 30(a)(2). The deponent’s attendance may be compelled

by subpoena under RCFC 45.

- (2) **With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with RCFC 26(b)(2):
 - (A) if the parties have not stipulated to the deposition and:
 - (i) the deposition would result in more than 10 depositions being taken under this rule or RCFC 31 by the plaintiffs, or by the defendant, or by the third-party defendants;
 - (ii) the deponent has already been deposed in the case; or
 - (iii) the party seeks to take the deposition before the time specified in RCFC 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or
 - (B) if the deponent is confined in prison.
- (b) **Notice of the Deposition; Other Formal Requirements.**
 - (1) **Notice in General.** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.
 - (2) **Producing Documents.** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under RCFC 34 to produce documents and tangible things at the

deposition.

- (3) **Method of Recording.**
 - (A) **Method Stated in the Notice.** The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
 - (B) **Additional Method.** With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.
- (4) **By Remote Means.** The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and RCFC 28(a) and 37(b)(1), the deposition takes place where the deponent answers the questions.
- (5) **Officer's Duties.**
 - (A) **Before the Deposition.** Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under RCFC 28. The officer must begin the deposition with an on-the-record statement that includes:
 - (i) the officer's name and business address;
 - (ii) the date, time, and place of the deposition;
 - (iii) the deponent's name;
 - (iv) the officer's administration of the oath or affirmation to the deponent; and
 - (v) the identity of all persons present.
 - (B) **Conducting the Deposition;**

Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in RCFC 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent’s and attorneys’ appearance or demeanor must not be distorted through recording techniques.

(C) ***After the Deposition.*** At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) **Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.**

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or

affirmation, the officer must record the testimony by the method designated under RCFC 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) ***Objections.*** An objection at the time of the examination—whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under RCFC 30(d)(3).

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) **Duration; Sanction; Motion to Terminate or Limit.**

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with RCFC 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) ***Sanction.*** The court may impose an appropriate sanction—including the reasonable expenses and attorney’s fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

- (3) **Motion to Terminate or Limit.**
- (A) **Grounds.** At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.
- (B) **Order.** The court may order that the deposition be terminated or may limit its scope and manner as provided in RCFC 26(c). If terminated, the deposition may be resumed only by order of the court.
- (C) **Award of Expenses.** RCFC 37(a)(5) applies to the award of expenses.
- (e) **Review by the Witness; Changes.**
- (1) **Review; Statement of Changes.** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
- (A) to review the transcript or recording; and
- (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.
- (2) **Changes Indicated in the Officer's Certificate.** The officer must note in the certificate prescribed by RCFC 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.
- (f) **Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.**
- (1) **Certification and Delivery.** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition.

Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

- (2) **Documents and Tangible Things.**
- (A) **Originals and Copies.** Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:
- (i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or
- (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.
- (B) **Order Regarding the Originals.** Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.
- (3) **Copies of the Transcript or Recording.** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.
- (4) **Notice of Filing.** [Not used.]

- (g) **Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:
- (1) attend and proceed with the deposition; or
 - (2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 30 parallels the structure and content of its FRCP counterpart. The limited number of differences between the two rules reflects those necessary for compatibility with the jurisdiction and other rules of the court.

2008 Amendment

The language of RCFC 30 has been amended to conform to the general restyling of the FRCP.

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

- (1) **Without Leave.** A party may, by written questions, depose any person, including a party, without leave of court except as provided in RCFC 31(a)(2). The deponent's attendance may be compelled by subpoena under RCFC 45.
- (2) **With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with RCFC 26(b)(2):
 - (A) if the parties have not stipulated to the deposition and:
 - (i) the deposition would result in more than 10 depositions being taken under this rule or RCFC 30 by the plaintiffs, or by the defendant, or by the third-party defendants;
 - (ii) the deponent has already been deposed in the case; or

- (iii) the party seeks to take a deposition before the time specified in RCFC 26(d); or
- (B) if the deponent is confined in prison.

- (3) **Service; Required Notice.** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.
- (4) **Questions Directed to an Organization.** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with RCFC 30(b)(6).
- (5) **Questions from Other Parties.** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.
- (b) **Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all questions served and of the notice. The officer must promptly proceed in the manner provided in RCFC 30(c), (e), and (f) to:
 - (1) take the deponent's testimony in response to the questions;
 - (2) prepare and certify the deposition; and
 - (3) send it to the party, attaching a copy of the questions and of the notice.
- (c) **Notice of Completion or Filing.**
 - (1) **Completion.** The party who noticed the

deposition must notify all other parties when it is completed.

(2) **Filing.** [Not used.]

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 31 closely parallels the text of FRCP 31. Subdivision (a) is identical in wording to the current FRCP. Subdivisions (b) and (c) are nearly identical, the only differences being those necessary to reflect the court's practice of not requiring depositions to be filed.

2008 Amendment

The language of RCFC 31 has been amended to conform to the general restyling of the FRCP.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) **In General.** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by RCFC 32(a)(2) through (8).

(2) **Impeachment and Other Uses.** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) **Deposition of Party, Agent, or Designee.** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under RCFC 30(b)(6) or 31(a)(4).

(4) **Unavailable Witness.** A party may use

for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) on motion and notice, that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless the court also finds:

(i) that the witness's absence was procured by the party offering the deposition; or

(ii) that it is not desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) **Limitations on Use.**

(A) **Deposition Taken on Short Notice.** A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under RCFC 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) **Unavailable Deponent; Party Could Not Obtain an Attorney.** A deposition taken without leave of court under the unavailability provision of RCFC 30(a)(2)(A)(iii)

must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

- (6) **Using Part of a Deposition.** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.
- (7) **Substituting a Party.** Substituting a party under RCFC 25 does not affect the right to use a deposition previously taken.
- (8) **Deposition Taken in an Earlier Action.** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.
- (b) **Objections to Admissibility.** Subject to RCFC 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.
- (c) **Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well.
- (d) **Waiver of Objections.**
 - (1) **To the Notice.** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.
 - (2) **To the Officer's Qualification.** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:
 - (A) before the deposition begins; or
 - (B) promptly after the basis for

disqualification becomes known or, with reasonable diligence, could have been known.

- (3) **To the Taking of the Deposition.**
 - (A) **Objection to Competence, Relevance, or Materiality.** An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.
 - (B) **Objection to an Error or Irregularity.** An objection to an error or irregularity at an oral examination is waived if:
 - (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
 - (ii) it is not timely made during the deposition.
 - (C) **Objection to a Written Question.** An objection to the form of a written question under RCFC 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.
- (4) **To Completing and Returning the Deposition.** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(As revised and reissued May 1, 2002; as amended

_____.)

Rules Committee Notes
2002 Revision

RCFC 32 is identical to its FRCP counterpart, except for (1) omission of the last sentence in subdivision (c), applicable only in jury trials, (2) deletion of the word "filed" in subdivision (d)(4), because this court does not require that depositions routinely be filed, and (3) revision of subparagraphs (a)(3)(B) and (E) to require application and notice for the use of depositions of a witness who is at a greater distance than 100 miles from the place of trial or hearing.

2008 Amendment

The language of RCFC 32 has been amended to conform to the general restyling of the FRCP.

In addition, in the interest of structural clarity, the text of former subparagraph (a)(3)(E) (relating to the requirement governing the use at trial of the deposition of a witness located more than 100 miles from the place of trial or hearing) has been incorporated into restyled subparagraph (a)(4)(B).

Rule 33. Interrogatories to Parties

(a) In General.

(1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with RCFC 26(b)(2).

(2) **Scope.** An interrogatory may relate to any matter that may be inquired into under RCFC 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) **Responding Party.** The interrogatories must be answered:

(A) by the party to whom they are

directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under RCFC 29 or be ordered by the court.

(3) **Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) **Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) **Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) **Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

(As revised and reissued May 1, 2002; as amended

Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

RCFC 33 is identical to FRCP 33.

2007 Amendment

RCFC 33 has been amended to reflect the corresponding changes to FRCP 33 that became effective December 1, 2006.

2008 Amendment

The language of RCFC 33 has been amended to conform to the general restyling of the FRCP.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) **In General.** A party may serve on any other party a request within the scope of RCFC 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) **Procedure.**

(1) **Contents of the Request.** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) **Responses and Objections.**

(A) **Time to Respond.** The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under RCFC 29 or be ordered by the court.

(B) **Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) **Objections.** An objection to part of a request must specify the part and permit inspection of the rest.

(D) **Responding to a Request for Production of Electronically Stored Information.** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) **Producing the Documents or Electronically Stored Information.** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them

to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) **Nonparties.** As provided in RCFC 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

RCFC 34 is identical to FRCP 34.

2007 Amendment

RCFC 34 has been amended to reflect the corresponding changes to FRCP 34 that became effective December 1, 2006.

2008 Amendment

The language of RCFC 34 has been amended to conform to the general restyling of the FRCP.

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) **In General.** The court may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) **Motion and Notice; Contents of the Order.** The order:

(A) may be made only on motion for

good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) **Request by the Party or Person Examined.** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) **Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) **Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the

examiner's testimony at trial.

- (6) **Scope.** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

(As revised and reissued May 1, 2002; as amended
_____.)

Rules Committee Notes

2002 Revision

RCFC 35 is identical to FRCP 35, except for the omission of the words "in which the action is pending" in subdivision (a).

2008 Amendment

The language of RCFC 35 has been amended to conform to the general restyling of the FRCP.

Rule 36. Requests for Admission

(a) Scope and Procedure.

- (1) **Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of RCFC 26(b)(1) relating to:
- (A) facts, the application of law to fact, or opinions about either; and
 - (B) the genuineness of any described documents.
- (2) **Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.
- (3) **Time to Respond; Effect of Not Responding.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under

RCFC 29 or be ordered by the court.

- (4) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
- (5) **Objections.** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.
- (6) **Motion Regarding the Sufficiency of an Answer or Objection.** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. RCFC 37(a)(5) applies to an award of expenses.
- (b) **Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to RCFC 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used

against the party in any other proceeding.

(As revised and reissued May 1, 2002; as amended
_____.)

**Rules Committee Notes
2002 Revision**

RCFC 36 is identical to FRCP 36.

2008 Amendment

The language of RCFC 36 has been amended to conform to the general restyling of the FRCP.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** [Not used.]

(3) ***Specific Motions.***

(A) ***To Compel Disclosure.*** If a party fails to make a disclosure required by RCFC 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) ***To Compel a Discovery Response.*** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under RCFC 30 or 31;

(ii) a corporation or other entity fails to make a designation under RCFC 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under RCFC 33; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under RCFC 34.

(C) ***Related to a Deposition.*** When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) ***If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).*** If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) ***If the Motion Is Denied.*** If the motion is denied, the court may issue any protective order authorized under RCFC 26(c) and

must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under RCFC 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions Concerning Deponents.* If the court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions Concerning Parties.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under RCFC 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under RCFC 16(b), 35, or 37(a), the court may issue further just orders. They may include the following:

- (i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii)** striking pleadings in whole or

in part;

- (iv)** staying further proceedings until the order is obeyed;
- (v)** dismissing the action or proceeding in whole or in part;
- (vi)** rendering a default judgment against the disobedient party; or
- (vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under RCFC 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in RCFC 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by RCFC 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

- (A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

- (B) [not used]; and
 - (C) may impose other appropriate sanctions, including any of the orders listed in RCFC 37(b)(2)(A)(i)–(vi).
- (2) **Failure to Admit.** If a party fails to admit what is requested under RCFC 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney’s fees, incurred in making that proof. The court must so order unless:
- (A) the request was held objectionable under RCFC 36(a);
 - (B) the admission sought was of no substantial importance;
 - (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
 - (D) there was other good reason for the failure to admit.
- (d) **Party’s Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.**
- (1) **In General.**
- (A) **Motion; Grounds for Sanctions.** The court may, on motion, order sanctions if:
 - (i) a party or a party’s officer, director, or managing agent—or a person designated under RCFC 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person’s deposition; or
 - (ii) a party, after being properly served with interrogatories under RCFC 33 or a request for inspection under RCFC 34, fails to serve its answers, objections, or written response.
 - (B) **Certification.** A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith

conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

- (2) **Unacceptable Excuse for Failing to Act.** A failure described in RCFC 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under RCFC 26(c).
- (3) **Types of Sanctions.** Sanctions may include any of the orders listed in RCFC 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- (e) **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
- (f) **Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Appendix A ¶ 3, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney’s fees, caused by the failure.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

**Rules Committee Notes
2002 Revision**

RCFC 37 parallels the structure and content of FRCP 37. The limited number of differences between the two rules reflects those necessary for compatibility with the jurisdiction and other rules

of the court.

2007 Amendment

RCFC 37 has been amended to reflect the corresponding changes to FRCP 37 that became effective December 1, 2006.

2008 Amendment

The language of RCFC 37 has been amended to conform to the general restyling of the FRCP.

TITLE VI. TRIALS

Rule 38. Right to a Jury Trial; Demand [Not used.]

Rule 39. Trial by Jury or by the Court [Not used.]

Rule 40. Scheduling Cases for Trial

The judge to whom a case is assigned is responsible for setting the case for trial by filing an order with the clerk. The court must give priority to actions entitled to priority by a federal statute.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 40 parallels, but is not identical to, FRCP 40. Like its FRCP counterpart, however, the purpose of the rule is to identify the responsibility of the judge in scheduling a matter for trial. The changes made to the text of the rule are minor and intended to clarify the rule's essential purpose, i.e., that it is the judge's responsibility to determine the date and place of trial in accordance with 28 U.S.C. §§ 173, 798(a), and 2503(c).

2008 Amendment

The language of RCFC 40 has been amended to conform to the general restyling of the FRCP.

Rule 40.1. Assigning and Transferring Cases

(a) **Random Assignment.** After a complaint is served on the United States, or after recusal or

disqualification of a judge to whom the case is assigned, the case will be assigned (or reassigned) to a judge at random.

- (b) **Transfer.** To promote docket efficiency, to conform to the requirements of any case management plan, or for the efficient administration of justice, the assigned judge, either on a party's motion or on the court's own initiative, may order the transfer of a case to another judge upon the agreement of both judges.
- (c) **Transfer by the Chief Judge.** The chief judge may reassign any case upon a finding that the transfer is necessary for the efficient administration of justice.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 40.1 has no FRCP counterpart. The substance of the rule formerly appeared in these rules as part of paragraph (1) of RCFC 77(f). The renumbering of RCFC 77(f) reflects its more logical placement in the structure of the court's rules.

The new language introduced by the rule—subdivision (b)—represents a codification of internal procedures.

2008 Amendment

The language of RCFC 40.1 has been amended to conform to the general restyling of the FRCP.

Rule 40.2. Related Cases

(a) Directly Related Cases.

- (1) **In General.** If a party is aware of the existence of any directly related case(s), the party must file a Notice of Directly Related Case(s).
- (2) **Definition.** For the purpose of this rule, cases are directly related when:
- (A) they involve the same parties and are based on the same or similar claims; or
 - (B) they involve the same contract, property, or patent.

(3) Notice.

(A) Contents. The Notice of Directly Related Case(s):

- (i)** must identify the title and docket number of all directly related cases;
- (ii)** must explain why the cases qualify for treatment as directly related cases under RCFC 40.2(a)(2);
- (iii)** must state whether assigning the cases to a single judge can be expected to conserve judicial resources and promote the efficient administration of justice; and
- (iv)** if filed after the case has been assigned, may be accompanied by a motion to transfer pursuant to RCFC 40.1 or for consolidation pursuant to RCFC 42.1.

(B) Filing. A party must file the Notice of Directly Related Case(s):

- (i)** along with the complaint in a newly filed case; or
- (ii)** in the earliest-filed related case if the existence of directly related cases becomes apparent only after initial assignment. Counsel may appear in the earliest-filed case solely for purposes of filing the notice.

The clerk must file copies of the notice in all of the directly related cases

(C) Service. A party must serve the Notice of Directly Related Case(s) on all parties in the related cases.

(4) Treatment of Directly Related Cases.

- (A)** When a Notice of Directly Related Case(s) is filed with a complaint, the clerk will assign the case to the judge to whom the earliest-filed case is assigned. If the judge determines that the case is not in fact directly related to the earliest-filed case, the judge will return the

case to the clerk for random reassignment.

- (B)** When a Notice of Directly Related Case(s) is filed after a case has been assigned and is accompanied by a motion to transfer or for consolidation, the judge in the earliest-filed case, after consultation with the judge(s) in the later-filed case(s), will grant or deny the motion to transfer or for consolidation.

(b) Indirectly Related Cases.

- (1) In General.** If a party is aware of the existence of any indirectly related case(s), the party may file a Notice of Indirectly Related Case(s).

- (2) Definition.** For the purpose of this rule, cases are indirectly related when:

(A) they present common issues of fact; and

(B) their consolidation for purposes of coordinated discovery can be expected significantly to promote the efficient administration of justice.

(3) Notice.

(A) Contents. The Notice of Indirectly Related Case(s):

- (i)** must identify the title and docket number of all indirectly related cases; and
- (ii)** must explain why the cases qualify for treatment as indirectly related cases under RCFC 40.2(b)(2).

(B) Filing. A party must file the Notice of Indirectly Related Case(s) in the earliest-filed related case. Counsel may appear in the earliest-filed case solely for purposes of filing the notice or responding to the notice under RCFC 40.2 (b)(3)(C). The clerk must file copies of the notice in all of the indirectly related cases and must provide a courtesy copy of the notice to the chief judge.

(C) Service. A party must serve the

Notice of Indirectly Related Case(s) on all parties in the related cases.

- (D) **Responding.** Any response to the notice must be filed in the earliest-filed case within 21 days after service of the notice and must be served on all parties in the related cases. The clerk must file copies of the response in all of the related cases and must provide a courtesy copy of the response to the chief judge.

- (4) **Treatment of Indirectly Related Cases.** When a Notice of Indirectly Related Case(s) is filed, the judge in the earliest-filed case will call a meeting of all of the assigned judges to determine what action, if any, is appropriate. All parties in the related cases will be notified of the determination reached.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

RCFC 40.2 has no FRCP counterpart. The subject of the rule—Related Cases—previously appeared in these rules as RCFC 77(f) (as revised by General Order No. 36). The renumbering of the rule reflects its more logical placement in the structure of the court’s rules.

Unlike the predecessor rule, RCFC 40.2 recognizes two types of related cases: directly related cases and indirectly related cases. Directly related cases retain the definition that applied under former RCFC 77(f). Thus, cases that “involve the same parties and are based on the same or similar claims” or “involve the same contract, property, or patent” are deemed to be directly related. Cases that are directly related share an identity of parties and/or subject matter that, for the sake of consistency in outcome, warrant their assignment to a single judge. Indirectly related cases, by contrast, share only “common issues of fact.” In the interests of efficiency and the conservation of resources, such cases may warrant consolidated management during the pretrial stage.

In addition to recognizing two forms of related cases, RCFC 40.2 also prescribes the notice procedures that are to be followed for the identification of such cases to the court and interested counsel.

2008 Amendment

The language of RCFC 40.2 has been amended to conform to the general restyling of the FRCP.

In addition, the text of subdivision (a) has been modified to clarify that it is the clerk’s responsibility to file a notice of directly related cases in all related cases. The change thus adopts the same notice procedure that is prescribed for indirectly related cases under subdivision (b) of this rule.

Rule 40.3. Complaints Against Judges

- (a) **In General.** A written complaint may be filed with the clerk against any judge of the court who has:

- (1) engaged in conduct prejudicial to the effective and expeditious administration of the business of the court; or
- (2) is unable to discharge all duties of the office by reason of mental or physical disability.

- (b) **Rules Governing Complaints.** A copy of the applicable rules, titled “Rules for Judicial-Conduct and Judicial-Disability Proceedings,” is available on the court’s website at www.uscfc.uscourts.gov or may be obtained by contacting the Office of the Clerk of the United States Court of Federal Claims, 717 Madison Place, NW, Washington, DC 20005.

(As revised and reissued May 1, 2002; as amended Aug. 1, 2004, Apr. 10, 2008, _____.)

Rules Committee Notes
2002 Revision

RCFC 40.3 has no FRCP counterpart. However, the notice provided by the rule is in accordance with the recommendations of the Judicial Conference of the United States, urging that such notice be made part of the court’s rules.

The rule replaces former Appendix B (“Procedures for Processing Complaints of Judicial

Misconduct”) and its supplementing order, General Order No. 34 dated June 3, 1993. Inclusion of the rule as a subpart of RCFC 40 is intended to further a more coherent organizational structure of the court’s rules.

2004 Amendment

Pursuant to the Judicial Improvements Act of 2002, Pub. L. No. 107-203, 116 Stat. 1758, the statutory directive requiring the court’s issuance of rules for the filing of complaints of judicial misconduct, originally set forth in the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c)(1)–(18), was amended and recodified as 28 U.S.C. §§ 351–364. This change is reflected in the 2004 amendment to RCFC 40.3 in the opening sentence of subdivision (a) by the deletion of the former statutory reference and the substitution of the new statutory reference.

Additionally, the rule has been amended to include notice of the availability on the court’s website of the Rules of the United States Court of Federal Claims Governing Complaints of Judicial Misconduct and Disability.

2008 Amendments

RCFC 40.3(b) has been amended to reflect the change in the title of the rules establishing standards and procedures for addressing complaints against judges, as revised and promulgated by the Judicial Conference of the United States pursuant to 28 U.S.C. §§ 351–364 on March 11, 2008.

The language of RCFC 40.3 has been amended to conform to the general restyling of the FRCP.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) *Without a Court Order.* Subject to RCFC 23(e) and 23.1(c) and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
- (ii) a stipulation of dismissal

signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in RCFC 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. If the defendant has pleaded a counterclaim before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) *Involuntary Dismissal; Effect.* If the plaintiff fails to prosecute or to comply with these rules or a court order, the court may dismiss on its own motion or the defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction or failure to join a party under RCFC 19—operates as an adjudication on the merits.

(c) *Dismissing a Counterclaim or Third-Party Claim.* This rule applies to a dismissal of any counterclaim or third-party claim. A claimant’s voluntary dismissal under RCFC 41(a)(1)(A)(i) must be made:

- (1) before a responsive pleading is served; or
- (2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) *Costs of a Previously Dismissed Action.* If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the defendant, the court:

- (1) may order the plaintiff to pay all or part of the costs of that previous action; and
- (2) may stay the proceedings until the plaintiff has complied

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

Minor changes have been made to more closely conform to FRCP 41. Substantively, however, the rule remains unchanged.

2008 Amendment

The language of RCFC 41 has been amended to conform to the general restyling of the FRCP.

Rule 42. Consolidation; Separate Trials

- (a) **Consolidation.** If actions before the court involve a common question of law or fact, the court may:
 - (1) join for hearing or trial any or all matters at issue in the actions;
 - (2) consolidate the actions; or
 - (3) issue any other orders to avoid unnecessary cost or delay.
- (b) **Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, counterclaims, or third-party claims.
- (c) **Separate Determinations of Liability and Damages.**
 - (1) *In General.* On stipulation of the parties or on its own, the court may at any time order that issues of liability and issues of damages be addressed in separate proceedings.
 - (2) *Motion for Reconsideration.* The parties may file a motion for reconsideration within 10 days after a separate determination of liability.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

RCFC 42 remains unchanged. Thus, as before, the rule parallels in part FRCP 42 and, in addition, includes subdivision (c) (“Separate Determination of Liability”) permitting the liability phase of a lawsuit to be separated from, and decided independently of, the quantum phase.

2008 Amendment

The language of RCFC 42 has been amended to conform to the general restyling of the FRCP.

Rule 42.1. Motion to Consolidate

- (a) **Consolidating Cases Assigned to the Same Judge.** If a party seeks to consolidate cases assigned to the same judge, the party must file a motion to consolidate in each of the relevant cases.
- (b) **Consolidating Cases Assigned to Different Judges.** If a party seeks to consolidate cases assigned to different judges, the party must file a motion to transfer pursuant to RCFC 40.1, suggesting the appropriateness of consolidation.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

RCFC 42.1 has no FRCP counterpart. It identifies the procedure applicable to motions for the consolidation of actions pending before different judges.

2008 Amendment

The language of RCFC 38 has been amended to conform to the general restyling of the FRCP.

Rule 43. Taking Testimony

- (a) **In Open Court.** At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

- (b) **Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices.
- (c) **Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.
- (d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 43 is identical to FRCP 43.

2008 Amendment

The language of RCFC 43 has been amended to conform to the general restyling of the FRCP.

Rule 44. Proving an Official Record

(a) Means of Proving.

- (1) **Domestic Record.** Each of the following evidences an official record—or an entry in it—that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:
 - (A) an official publication of the record; or
 - (B) a copy attested by the officer with legal custody of the record—or by the officer’s deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal:
 - (i) by a judge of a court of record in the district or political subdivision where the record is kept; or
 - (ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is

kept.

(2) Foreign Record.

- (A) **In General.** Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible:
 - (i) an official publication of the record; or
 - (ii) the record—or a copy—that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.
- (B) **Final Certification of Genuineness.** A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.
- (C) **Other Means of Proof.** If all parties have had a reasonable opportunity to investigate a foreign record’s authenticity and accuracy, the court may, for good cause, either:
 - (i) admit an attested copy without final certification; or
 - (ii) permit the record to be evidenced by an attested summary with or without a final certification.
- (b) **Lack of a Record.** A written statement that a diligent search of designated records

revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under RCFC 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

- (c) **Other Proof.** A party may prove an official record—or an entry or lack of an entry in it—by any other method authorized by law.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 44 is identical to FRCP 44.

2008 Amendment

The language of RCFC 44 has been amended to conform to the general restyling of the FRCP.

Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 44.1 is identical to FRCP 44.1.

2008 Amendment

The language of RCFC 44.1 has been amended to conform to the general restyling of the FRCP.

Rule 45. Subpoena

(a) In General.

- (1) *Form (See Appendix of Forms, Forms 6 and 7A) and Contents.*

- (A) **Requirements—In General.** Every subpoena must:

- (i) state the name of the court;
- (ii) state the title of the action and its docket number;
- (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control; or permit the inspection of premises; and
- (iv) set out the text of RCFC 45(c) and (d).

- (B) **Command to Attend a Deposition—Notice of the Recording Method.** A subpoena commanding attendance at a deposition must state the method for recording the testimony.

- (C) **Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.** A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

- (D) **Command to Produce; Included Obligations.** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

- (2) **Issued from Which Court.** [Not used.]
(3) **Issued by Whom.** The clerk must issue

a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney authorized to sign filings under RCFC 83.1 also may issue and sign a subpoena as an officer of the court.

(b) Service.

- (1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.
- (2) *Service in the United States.*** Subject to RCFC 45(c)(3)(A)(ii), a subpoena may be served at any place:
 - (A)** [not used];
 - (B)** within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
 - (C)** [not used];
 - (D)** that the court authorizes on motion and for good cause.
- (3) *Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.
- (4) *Proof of Service.*** Proving service, when necessary, requires filing with the court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

- (c) Protecting a Person Subject to a Subpoena.**
 - (1) *Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.
 - (2) *Command to Produce Materials or Permit Inspection.***
 - (A) *Appearance Not Required.*** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
 - (B) *Objections.*** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
 - (i)** At any time, on notice to the commanded person, the serving party may move the court for an order compelling production or inspection.
 - (ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from

significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court must quash or modify a subpoena that:

- (i)** fails to allow a reasonable time to comply;
- (ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to RCFC 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place;
- (iii)** requires disclosure of privileged or other protected matter, if no exception of waiver applies; or
- (iv)** subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court may, on motion, quash or modify the subpoena if it requires:

- (i)** disclosing a trade secret or other confidential research, development, or commercial information;
- (ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
- (iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in RCFC 45(c)(3)(B), the

court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii)** ensures that the subpoenaed person will be reasonably compensated.

(d) *Duties in Responding to a Subpoena.*

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not

reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of RCFC 26(b)(2)(C). The court may specify conditions for discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i)** expressly make the claim; and
- (ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The court may hold in contempt

a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of RCFC 45(c)(3)(A)(ii).

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

RCFC 45 conforms to FRCP 45 to the extent feasible given the court's nationwide jurisdiction.

2007 Amendment

RCFC 45 has been amended to reflect the corresponding changes to FRCP 45 that became effective December 1, 2006.

2008 Amendment

The language of RCFC 45 has been amended to conform to the general restyling of the FRCP.

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 46 is identical to FRCP 46.

2008 Amendment

The language of RCFC 46 has been amended to conform to the general restyling of the FRCP.

Rule 47. Selecting Jurors [Not used.]

Rule 48. Number of Jurors; Verdict [Not used.]

Rule 49. Special Verdict; General Verdict and Questions [Not used.]

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling [Not used.]

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error [Not used.]

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) *In General.* In an action tried on the facts, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under RCFC 58.

(2) *For an Interlocutory Injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion.* The court is not required to state findings or conclusions when ruling on a motion under RCFC 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings.* [Not used.]

(5) *Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under RCFC 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by RCFC 52(a).

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

The principal change in RCFC 52 relates to the enlargement of subdivision (c) to include, among issues subject to judgment on partial findings, the adjudication of issues critical to the legal sufficiency of a “defense.” The amendment makes clear that judgments as a matter of law may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

2008 Amendment

The language of RCFC 52 has been amended to conform to the general restyling of the FRCP.

Rule 52.1. Administrative Record

(a) In General. When proceedings before an agency are relevant to a decision in a case, the administrative record of those proceedings must be certified by the agency and filed with the court.

(b) Time for Filing. The court may establish a time for filing the administrative record by order.

(c) Motions for Judgment on the

Administrative Record.

- (1) **Initial Motion.** Absent an order by the court establishing a different procedure, a party may move for partial or other judgment on the administrative record and must include in its motion or supporting memorandum a statement of facts that draws upon and cites to the portions of the administrative record that bear on the issues presented to the court.
- (2) **Response.** A party opposing a motion based on the administrative record must include in any response a counter-statement of facts that similarly draws upon and cites to the administrative record.

(As added June 20, 2006; as amended _____.)

Rules Committee Notes

2006 Adoption

RCFC 52.1 has no FRCP counterpart. The rule replaces an earlier rule, RCFC 56.1, that applied certain standards borrowed from the procedure for summary judgment to review of an agency decision on the basis of an administrative record. That incorporation proved to be confusing in practice because only a portion of the summary judgment standards were borrowed. Summary judgment standards are not pertinent to judicial review upon an administrative record. See *Bannum, Inc. v. United States*, 404 F.3d 1346, 1355–57 (Fed. Cir. 2005). Specifically, the now-repealed Rule 56.1 did *not* adopt the overall standard that summary judgment might be appropriate where there were no genuine issues of material fact. See RCFC 56(c). Nonetheless, despite this omission, parties, in moving for judgment on the administrative record under the prior rule, frequently would contest whether the administrative record showed the existence of a genuine dispute of material fact. To avoid this confusion, the new rule omits any reference to summary judgment or to the standards applicable to summary judgment.

Cases filed in this court frequently turn only in part on action taken by an administrative agency. In such cases, the administrative record may

provide a factual and procedural predicate for a portion of the court’s decision, while other elements might be derived from a trial, an evidentiary hearing, or summary judgment or other judicial proceedings. This rule applies whether the court’s decision is derived in whole or in part from the agency action reflected in the administrative record.

The standards and criteria governing the court’s review of agency decisions vary depending upon the specific law to be applied in particular cases. The rule does not address those standards or criteria. Correspondingly, any motion for correction or supplementation of the administrative record should be made on the basis of either the specific law to be applied in the particular case or generally applicable principles of administrative law.

2008 Amendment

The language of RCFC 52.1 has been amended to conform to the general restyling of the FRCP.

Rule 52.2. Remanding a Case

- (a) **In General.** In any case within its jurisdiction, the court, on motion or on its own, may order the remand of appropriate matters to an administrative or executive body or official.
- (b) **Remand Order.**
 - (1) **Contents.** An order remanding a case must:
 - (A) include such direction as the court deems proper and just;
 - (B) establish the duration of the remand period, not to exceed 6 months;
 - (C) specify the extent to which court proceedings will be stayed during the remand period; and
 - (D) designate a party to report to the court, every 90 days or less, on the status of the remand proceedings.
 - (2) **Service.** A certified copy of the remand order must be served by the clerk in accordance with RCFC 5 on:
 - (A) each party; and
 - (B) the administrative or executive body or official to whom the order is

directed.

- (c) **Administrative Record.** After serving the remand order, the clerk must transmit the administrative record, if any, to the Department of Justice for return to the administrative or executive body or official to whom the order is directed.
- (d) **Extending or Terminating the Stay of Proceedings.** If the administrative or executive body or official to whom the remand order is directed does not act on the remand within the period of stay specified in the remand order, a party may move for:
 - (1) an extension of the stay under RCFC 6; or
 - (2) termination of the stay and the initiation of other proceedings under RCFC 7 to dispose of the case.
- (e) **Completing Administrative Proceedings.** When the action directed under a remand order is completed, the administrative or executive body or official to whom the order was directed must forward to the clerk for filing 4 copies of the final decision or other action taken. The clerk must serve each party with a copy of the final decision or other action. If the case is resolved at the administrative level, the plaintiff must file a motion to dismiss the case with prejudice.
- (f) **Post-Remand Proceedings.**
 - (1) **Notice.** Within 30 days after the filing of the final decision or other action on remand, each party must file with the clerk and serve on each adverse party a notice stating:
 - (A) whether the final decision or other action on remand affords a satisfactory basis for disposition of the case; or
 - (B) whether further proceedings before the court are required and, if so, the nature of such proceedings.
 - (2) **Issuing an Order.** After service of the notice, the court will enter an order prescribing the procedure to be followed or directing any other action deemed appropriate.

(As revised and reissued May 1, 2002; as

renumbered June 20, 2006; as amended _____.)

Rules Committee Notes

2002 Revision and 2006 Amendment

RCFC 52.2 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 60.1 and, following the court's May 1, 2002, revision of its rules, as RCFC 56.2. The first renumbering of the rule (from RCFC 60.1 to RCFC 56.2) was intended to reflect a more logical placement in the organizational structure of the court's rules; the second renumbering (from RCFC 56.2 to RCFC 52.2) was attributable to a further change in the organizational structure of the court's rules as reflected in the abrogation of related RCFC 56.1 and its replacement by new RCFC 52.1.

2008 Amendment

The language of RCFC 52.2 has been amended to conform to the general restyling of the FRCP.

Rule 53. Masters

(a) Appointment.

- (1) **Scope.** Unless a statute provides otherwise, the chief judge, at the request of the assigned judge, may appoint a master only to:
 - (A) perform duties consented to by the parties;
 - (B) hold trial proceedings and make or recommend findings of fact if appointment is warranted by:
 - (i) some exceptional condition; or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
 - (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by the assigned judge.
- (2) **Disqualification.** A master must not have a relationship to the parties, attorneys, action, or assigned judge that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the assigned judge's approval, consent to the appointment after the master discloses any potential grounds

for disqualification.

- (3) **Possible Expense or Delay.** In requesting the appointment of a master, the assigned judge must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.
- (b) **Order Appointing a Master.**
 - (1) **Notice.** Before requesting the appointment of a master, the assigned judge must give the parties notice and an opportunity to be heard. Any party may suggest to the assigned judge candidates for appointment.
 - (2) **Contents.** The appointing order must direct the master to proceed with all reasonable diligence and must state:
 - (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under RCFC 53(c);
 - (B) the circumstances, if any, in which the master may communicate ex parte with the assigned judge or a party;
 - (C) the nature of the materials to be preserved and filed as the record of the master's activities;
 - (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
 - (E) the basis, terms, and procedure for fixing the master's compensation under RCFC 53(g).
 - (3) **Issuing.** The assigned judge may request an order appointing a master only after:
 - (A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and
 - (B) if a ground is disclosed, the parties, with the assigned judge's approval, waive the disqualification.
 - (4) **Amending.** The order appointing a master may be amended by the chief judge at any time upon recommendation

of the assigned judge after the assigned judge has given the parties notice and an opportunity to be heard.

- (c) **Master's Authority.**
 - (1) **In General.** Unless the appointing order directs otherwise, a master may:
 - (A) regulate all proceedings;
 - (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and
 - (C) if conducting an evidentiary hearing, exercise the assigned judge's power to compel, take, and record evidence.
 - (2) **Sanctions.** The master may by order impose on a party any noncontempt sanction provided by RCFC 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
- (d) **Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.
- (e) **Master's Reports.** A master must report to the assigned judge as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the assigned judge orders otherwise.
- (f) **Action on the Master's Order, Report, or Recommendations.**
 - (1) **Opportunity for a Hearing; Action in General.** In acting on a master's order, report, or recommendations, the assigned judge must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.
 - (2) **Time to Object or Move to Adopt or Modify.** A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days after a copy is served, unless the assigned judge sets a different time.
 - (3) **Reviewing Factual Findings.** The

assigned judge must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the assigned judge's approval, stipulate that:

- (A) the findings will be reviewed for clear error; or
 - (B) the findings of a master appointed under RCFC 53(a)(1)(A) or (C) will be final
- (4) **Reviewing Legal Conclusions.** The assigned judge must decide de novo all objections to conclusions of law made or recommended by a master.
- (5) **Reviewing Procedural Matters.** Unless the appointing order establishes a different standard of review, the assigned judge may set aside a master's ruling on a procedural matter only for an abuse of discretion.
- (g) **Compensation.**
- (1) **Fixing Compensation.** Before or after judgment, the assigned judge must fix the master's compensation on the basis and terms stated in the appointing order, but a new basis and terms may be set by the chief judge upon recommendation of the assigned judge after the assigned judge has given the parties notice and an opportunity to be heard.
 - (2) **Payment.** The compensation must be paid either:
 - (A) by a party or parties; or
 - (B) from a fund or subject matter of the action within the assigned judge's control.
 - (3) **Allocating Payment.** The assigned judge must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.
- (h) **Appointing a Magistrate Judge.** [Not used.]

(As revised and reissued May 1, 2002; as amended July 1, 2004, _____.)

Rules Committee Notes 2002 Revision

The text of RCFC 53 as revised on May 1, 2002, and its accompanying Rules Committee Note, may be found at 51 Fed. Cl. LXXXV (2002) or in Westlaw, database USCA03, search CI(RCFC & 53).

2004 Amendment

RCFC 53 adopts the significantly revised text of FRCP 53, effective December 1, 2003, with minor adjustments in language reflecting differences in jurisdiction between this court and the district courts. The principal adjustments in language occur in the introductory text of subdivision (a) which adds the words "the chief judge, at the request of the assigned judge" as an additional qualification to the appointment of a master and in the related text of subdivisions (b)(4) and (h)(1). The distinction between the roles of chief judge and assigned judge is carried through into the subdivisions of the rule where the words "assigned judge" are substituted for the word "court." The added language addresses the fact that pursuant to 28 U.S.C. § 798(c), the court's authority to appoint special masters to assist the court in carrying out its functions rests exclusively with the chief judge.

2008 Amendment

The language of RCFC 53 has been amended to conform to the general restyling of the FRCP.

This rule does not apply to special masters appointed by the court to resolve Vaccine Act cases covered in Appendix B to these rules.

TITLE VII. JUDGMENT

Rule 54. Judgment; Costs

- (a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.
- (b) **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief—whether as a

claim, counterclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) **Costs; Attorney's Fees.**

(1) **Costs Other Than Attorney's Fees.** Costs—other than attorney's fees—should be allowed to the prevailing party to the extent permitted by law. See 28 U.S.C. § 2412(a).

(A) **Filing a Bill of Costs.** A claim for allowable costs must be made by filing a Bill of Costs with the clerk. See Appendix of Forms, Form 4.

(B) **Timing and Contents of a Bill of Costs.** A Bill of Costs must:

- (i) be filed within 30 days after the date of final judgment, as defined in 28 U.S.C. § 2412(d)(2)(G);
- (ii) be accompanied by an affidavit and a memorandum setting forth the grounds and authorities supporting all costs other than the filing fee; and
- (iii) include as exhibits any vouchers, receipts, or invoices supporting the requested costs.

(C) **Procedures Applicable to a Bill of Costs.**

(i) **Objection.** An objection to some or all of the requested

costs may be filed within 28 days after service of the Bill of Costs.

(ii) **Reply.** A reply to an objection may be filed within 7 days after service of the objection.

(iii) **Action by the Clerk.** Unless a conference is scheduled by the clerk, the taxation or disallowance of costs will be made by the clerk on the existing record.

(iv) **Court Review.** A motion for review of the clerk's action may be filed with the court within 14 days after action by the clerk. Unless the court orders otherwise, the review will be made on the existing record.

(v) **Time Extensions.** No extensions of time will be permitted under this rule and the failure of the prevailing party to file a Bill of Costs in a timely manner will constitute a waiver of any claim for costs.

(D) **Settlement Agreement.** A settlement agreement should, by its own terms, resolve any issue relating to costs and in the absence of special agreement, each party must bear its own costs. The clerk may not tax costs on any action terminated by settlement.

(2) **Attorney's Fees.**

(A) **Claim to Be by Motion.** A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. See Appendix of Forms, Form 5.

(B) **Timing and Contents of the Motion.** Unless a statute or a court order provides otherwise, the motion must:

(i) be filed within 30 days after the date of final judgment, as

defined in 28 U.S.C. § 2412(d)(2)(G);

- (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
 - (iii) state the amount sought; and
 - (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.
- (C) **Proceedings.** The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in RCFC 52(a).
- (D) **Procedures Applicable to a Motion for Attorney's Fees.**
- (i) **Response.** A response to a motion for attorney's fees may be filed within 14 days after service of the motion.
 - (ii) **Reply.** A reply to a response may be filed within 14 days after service of the response.
 - (iii) **Subsequent Procedures.** After the filing of a response and a reply to a motion for attorney's fees, the court will enter an order prescribing the procedures to be followed.
- (E) **Exceptions.** Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

(As revised and reissued May 1, 2002; as amended July 1, 2004, _____.)

Rules Committee Notes 2002 Revision

RCFC 54(d) was revised in several respects. The subdivision was modified to conform its structure to FRCP 54(d). In addition, the subdivision, as rewritten departs from its FRCP counterpart in several respects:

First, because the allowance of attorneys' fees

and costs in this court is almost always determined under the provisions of 28 U.S.C. § 2412(a), (d) (the Equal Access to Justice Act), it was deemed advisable to reflect this fact in subdivision (d)(2) rather than to retain the broader, but potentially misleading, language that appears in FRCP 54(d)(1). *See Neal & Co. v. United States*, 121 F.3d 683 (Fed. Cir. 1997).

Second, subdivision (d)(1) was enlarged beyond the scope of its FRCP counterpart by the incorporation of RCFC 77.4 ("Taxation of Costs").

Third, subdivision (d)(2) brings together relevant sections of its FRCP counterpart and former RCFC 81(e) ("Application for Attorneys' Fees").

Finally, the time periods for objecting to a Bill of Costs and for requesting review of the clerk's action were enlarged.

2004 Amendment

The final sentence of RCFC 54(d)(2)(D) was deleted in conformance with RCFC 53(a)(1).

2008 Amendment

The language of RCFC 54 has been amended to conform to the general restyling of the FRCP.

Rule 55. Default; Default Judgment

(a) **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) **Entering a Default Judgment.**

(1) **By the Clerk.** [Not used.]

(2) **By the Court.** The party must apply to the court for a default judgment. A default judgment may be entered only if the claimant establishes a claim or right to relief by evidence that satisfies the court. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its

representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
 - (B) determine the amount of damages;
 - (C) establish the truth of any allegation by evidence; or
 - (D) investigate any other matter.
- (c) **Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under RCFC 60(b).
- (d) **Judgment Against the United States.** [Not used.]

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 55 recognizes the distinction between entry of default and entry of judgment for default. Substantial changes were made. The language in former subdivision (b)(1), permitting entry of default judgment by the clerk, is omitted. Additionally, the protection previously afforded only to the United States—prohibiting entry of default judgments absent a showing by the claimant of a right to relief by evidence satisfactory to the court—is expanded to include all parties. Judgment requires proof and involvement of the court.

2008 Amendment

The language of RCFC 55 has been amended to conform to the general restyling of the FRCP.

In addition, in further conformance with FRCP 55, former subdivision (d) (“Plaintiffs; Counterclaimants”) has been omitted as incomplete and unnecessary.

Rule 56. Summary Judgment

(a) **By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at

any time after:

- (1) 60 days have passed from commencement of the action; or
 - (2) the opposing party serves a motion for summary judgment.
- (b) **By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
- (c) **Proceedings on a Motion.**
- (1) **In General.** A motion for summary judgment should be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. In considering such a motion, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are controverted by affidavit or other written or oral evidence.
 - (2) **Contents of a Motion.** In addition to its motion, the moving or cross-moving party must file Proposed Findings of Uncontroverted Fact which should contain:
 - (A) concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute; and
 - (B) citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record before the court.
 - (3) **Contents of a Response.** In addition to its opposition, the opposing party must file a response to the proposed findings which should contain, immediately below each finding:
 - (A) a statement indicating whether the opposing party agrees or disagrees

- with the finding as written;
 - (B) the basis for any objection to the finding;
 - (C) a proposed revision of the finding; and
 - (D) any proposed findings of uncontroverted fact as to any relevant matters not covered by the moving party.
- (4) **Stipulation in Lieu of Proposed Findings of Uncontroverted Fact.** The parties need not file the documents identified in RCFC 56(c)(2) and (3) if they file, no later than the time of the initial motion, a comprehensive stipulation of all the material facts upon which they intend to rely.
- (d) **Case Not Fully Adjudicated on the Motion.**
- (1) **Establishing Facts.** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue. The facts so specified must be treated as established in the action.
 - (2) **Establishing Liability.** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
- (e) **Affidavits; Further Testimony.**
- (1) **In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

- (2) **Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.
- (f) **When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
 - (1) deny the motion;
 - (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
 - (3) issue any other just order.
- (g) **Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

(As revised and reissued May 1, 2002; as amended June 20, 2006, _____.)

**Rules Committee Notes
2002 Revision**

The subdivision structure of RCFC 56 was re-ordered to more closely conform to FRCP 56. In addition, the subdivision outlining the procedures for filing a RCFC 56 motion was changed to eliminate the Statement of Genuine Issues and to require the parties to express their views on any particular fact by noting them on a single page, which may include a redraft of the challenged finding.

2006 Amendment

A clause was deleted from the opening portion of subdivision (h) to accord with the abrogation of

RCFC 56.1.

2008 Amendment

The language of RCFC 56 has been amended to conform to the general restyling of the FRCP.

Rule 56.1 Review of a Decision on the Basis of the Administrative Record
[Abrogated (eff. June 20, 2006).]

Rules Committee Notes

2002 Revision

RCFC 56.1 has no FRCP counterpart. In the interests of procedural clarity, the text of subdivision (a) was modified to reflect current practice with respect to supplementation of the administrative record, and subdivision (b)(2) was modified to make explicit an opposing party's right to file an opposition as well as a cross-motion. In addition, the rule was conformed to RCFC 56 practice, in that the statement of facts and counter-statement of facts are incorporated into a single document. In all other respects, RCFC 56.1 remains unchanged.

2006 Abrogation

RCFC 56.1 has been abrogated for the reasons described in the Rules Committee Note to RCFC 52.1.

Rule 56.2 Remanding a Case [Renumbered as RCFC 52.2 (eff. June 20, 2006).]

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §§ 1491(b)(2) and 1507. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

The former reference to 28 U.S.C. §1491(a) has been changed to reflect that the court's

authority to render declaratory judgments in the context of procurement protests is now found in 28 U.S.C. §1491(b)(2).

2008 Amendment

The language of RCFC 57 has been amended to conform to the general restyling of the FRCP.

Rule 58. Entering Judgment

(a) **Separate Document.** Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

- (1) [not used];
- (2) to amend or make additional findings under RCFC 52(b);
- (3) for attorney's fees under RCFC 54;
- (4) for a new trial, or to alter or amend the judgment, under RCFC 59; or
- (5) for relief under RCFC 60.

(b) **Entering Judgment.**

(1) **Without the Court's Direction.** Subject to RCFC 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

- (A) [not used];
- (B) the court awards only costs or a sum certain; or
- (C) the court denies all relief.

(2) **Court's Approval Required.** Subject to RCFC 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

- (A) [not used]; or
- (B) the court grants other relief not described in this subdivision (b).

(c) **Time of Entry.** For purposes of these rules, judgement is entered at the following times:

- (1) if a separate document is not required, when the judgment is entered in the civil docket under RCFC 79(a); or
- (2) if a separate document is required, when the judgment is entered in the civil docket under RCFC 79(a) and the earlier of these events occurs:

- (A) it is set out in a separate document; or
 - (B) 150 days have run from the entry in the civil docket.
- (d) **Request for Entry.** A party may request that judgment be set out in a separate document as required by RCFC 58(a).
- (e) **Cost or Fee Awards.** Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney’s fees is made under RCFC 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under RCFC 59.

(As revised and reissued May 1, 2002; as amended Sept. 15, 2003, Nov. 15, 2007, _____.)

**Rules Committee Notes
2002 Revision**

RCFC 58 is essentially identical to the text that was proposed in August 2000 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, with the exception of any references to trial by jury.

2003 Amendment

The text of RCFC 58 has been amended in minor respects to conform to FRCP 58 as adopted December 1, 2002.

2007 Amendment

The time for the entry of judgment under RCFC 58(b)(2)(B) has been extended from 60 days to 150 days to correspond to the time period set forth in FRCP 58(b)(2)(B).

2008 Amendment

The language of RCFC 58 has been amended to conform to the general restyling of the FRCP.

Rule 58.1. Notice of Appeal

To appeal a decision of this court, a party must:

- (a) file an original and no fewer than four copies of the notice of appeal with the clerk within

- the time and in the manner prescribed for appeals in Rule 3 of the Federal Rules of Appellate Procedure; and
- (b) pay the fee in accordance with RCFC 77.1(c).

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

Although the rule has no FRCP counterpart, it is a necessary component of the court’s rules because it prescribes the time and manner for the filing of an appeal from a decision of this court.

2008 Amendment

The language of RCFC 58.1 has been amended to conform to the general restyling of the FRCP.

Rule 59. New Trial; Reconsideration; Altering or Amending a Judgment

(a) **In General.**

- (1) **Grounds for New Trial or Reconsideration.** The court may, on motion, grant a new trial or a motion for reconsideration on all or some of the issues—and to any party—as follows:

- (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;
- (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or
- (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

- (2) **Further Action After a Trial.** The court may, on motion under this rule, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) **Time to File a Motion for a New Trial and a Response.**

- (1) A motion for a new trial under RCFC 59(a)(1)(A) or (B) must be filed no later

than 10 days after the entry of judgment.

- (2) A motion for a new trial under RCFC 59(a)(1)(C) may be filed—and the payment of judgment stayed—at any time while the suit is pending, after review proceedings have been initiated, or within 2 years after the final disposition of the suit.
- (3) A response to any motion under this rule may be filed only at the court’s request and within the time specified by the court. The court may not rule in favor of a motion under this rule without first requesting a response to the motion.
- (c) **Relying on Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion.
- (d) **New Trial on the Court’s Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party’s motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
- (e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Minor changes in wording have been made to more closely conform to FRCP 59. Subdivision (c) was deleted to reflect the difference in Court of Federal Claims practice, set out in subdivision (b), which directs that a response to a RCFC 59 motion is required only when directed by the court, even if the motion is accompanied by an affidavit. Other differences were retained, including the distinction between final and non-final orders, which can be the subject of motions for reconsideration at any time before final judgment.

2008 Amendment

The language of RCFC 59 has been amended to conform to the general restyling of the FRCP.

Rule 60. Relief From a Judgment or Order

- (a) **Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court’s leave.
- (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
 - (1) mistake, inadvertence, surprise, or excusable neglect;
 - (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b);
 - (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
 - (4) the judgment is void;
 - (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
 - (6) any other reason that justifies relief.
- (c) **Timing and Effect of the Motion.**
 - (1) **Timing.** A motion under RCFC 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
 - (2) **Effect on Finality.** The motion does not affect the judgment’s finality or suspend its operation.
- (d) **Other Powers to Grant Relief.** This rule

does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
 - (2) [not used]; or
 - (3) set aside a judgment for fraud on the court.
- (e) **Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Minor changes in wording have been made to more closely conform to FRCP 60. Necessary differences were retained.

2008 Amendment

The language of RCFC 60 has been amended to conform to the general restyling of the FRCP.

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 61 is identical to FRCP 61.

2008 Amendment

The language of RCFC 61 has been amended to conform to the general restyling of the FRCP.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) **Automatic Stay; Exceptions for Injunctions and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction; or
- (2) a judgment or order that directs an accounting in an action for patent infringement.

(b) **Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions:

- (1) [not used];
- (2) under RCFC 52(b), to amend the findings or for additional findings;
- (3) under RCFC 59, for a new trial or to alter or amend a judgment; or
- (4) under RCFC 60, for relief from a judgment or order.

(c) **Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(d) **Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in RCFC 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) **Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

- (f) **Stay in Favor of a Judgment Debtor Under State Law.** [Not used.]
- (g) **Appellate Court’s Power Not Limited.** This rule does not limit the power of the appellate court or one of its judges or justices:
 - (1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or
 - (2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.
- (h) **Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under RCFC 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

Minor changes have been made to subdivision (a) to more closely conform to FRCP 62. Necessary differences were retained.

2008 Amendment

The language of RCFC 62 has been amended to conform to the general restyling of the FRCP.

Rule 63. Judge’s Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a trial, the successor judge must, at a party’s request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

Subdivisions (b) and (c) of the court’s prior rule were deleted as unnecessary. The substance of each of these former subdivisions is covered in 28 U.S.C. § 455 and in the Codes of Conduct for Judges and Judicial Employees. RCFC 63 as rewritten is essentially identical to FRCP 63.

2008 Amendment

The language of RCFC 63 has been amended to conform to the general restyling of the FRCP.

TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizing a Person or Property [Not used.]

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

- (1) **Notice.** The court may issue a preliminary injunction only on notice to the adverse party.
- (2) **Consolidating the Hearing with the Trial on the Merits.** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial.

(b) Temporary Restraining Order.

- (1) **Issuing Without Notice.** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
 - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
 - (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

- (2) **Contents; Expiration.** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk’s office and entered in the record. The order expires at the time after entry—not to exceed 10 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
- (3) **Expediting the Preliminary-Injunction Hearing.** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.
- (4) **Motion to Dissolve.** On 2 days’ notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.
- (c) **Security.** The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.
- (d) **Contents and Scope of Every Injunction and Restraining Order.**
- (1) **Contents.** Every order granting an injunction and every restraining order must:
- (A) state the reasons why it issued;
 - (B) state its terms specifically; and
 - (C) describe in reasonable detail—and not by referring to the complaint or

other document—the act or acts restrained or required.

- (2) **Persons Bound.** The order binds only the following who receive actual notice of it by personal service or otherwise:
- (A) the parties;
 - (B) the parties’ officers, agents, servants, employees, and attorneys; and
 - (C) other persons who are in active concert or participation with anyone described in RCFC 65(d)(2)(A) or (B).
- (e) **Other Laws Not Modified.** These rules do not modify the following:
- (1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;
 - (2) [not used]; or
 - (3) [not used].
- (f) **Copyright Impoundment.** [Not used.]

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

Minor changes have been made to subdivision (b) to more closely conform to its FRCP counterpart. Additionally, former subdivision (f), titled “Procedures,” has been relocated to Appendix C. (Appendix C supersedes former General Order No. 38, dated May 7, 1998, which described the court’s standard practices in procurement protest cases filed pursuant to 28 U.S.C. § 1491(b).)

2008 Amendment

The language of RCFC 65 has been amended to conform to the general restyling of the FRCP.

Rule 65.1. Proceedings Against a Surety

- (a) **Proceedings.** Whenever these rules require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court’s jurisdiction and irrevocably appoints the court clerk as its agent for

receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

- (b) Acceptable Sureties.** Acceptable sureties on bonds are those bonding companies holding certificates of authority from the Secretary of the Treasury. (See the latest U.S. Dep't of Treasury Circular 570.) When a court decision provides for the giving of security, the clerk will furnish counsel with the appropriate bond form.

As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision***

Subdivision (a) is identical to FRCP 65.1 except for the omission of language extending the rule's coverage to "the Supplemental Rules for Certain Admiralty and Maritime Claims." Subdivision (b), titled "Sureties," although unique to this court, provides information useful to the court's practitioners and therefore was retained.

*As corrected November 15, 2007.

2008 Amendment

The language of RCFC 65.1 has been amended to conform to the general restyling of the FRCP.

Rule 66. Receivers [Not used.]

Rule 67. Deposit into Court [Not used.]

Rule 68. Offer of Judgment

- (a) Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves

written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

- (b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
- (c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.
- (d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

A minor change in wording has been made to more closely conform to FRCP 68.

2008 Amendment

The language of RCFC 68 has been amended to conform to the general restyling of the FRCP.

Rule 69. Execution [Not used.]

Rule 70. Enforcing a Judgment for a Specific Act [Not used.]

Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

(Added _____.)

Rules Committee Note

2008 Adoption

RCFC 71 has been adopted to conform to the FRCP and to confirm the court's authority to issue orders enforceable for or against a nonparty, a circumstance that typically arises in conjunction with the issuance of a subpoena.

TITLE IX. SPECIAL PROCEEDINGS

Rule 71.1. Condemning Real or Personal Property [Not used.]

Rule 72. Magistrate Judges: Pretrial Order [Not used.]

Rule 73. Magistrate Judges: Trial by Consent; Appeal [Not used.]

Rules Committee Note 2002 Revision

Chapter IX of the FRCP, titled "Special Proceedings," (comprising FRCP 71A–73) has not been included in the main body of the court's rules. Instead, rules relating to the court's special proceedings appear in the appendices to the rules.

2008 Amendment

Former RCFC 71A has been redesignated as RCFC 71.1 in accordance with the FRCP.

Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28 U.S.C. § 636(c)(4) and Rule 73(d) [Abrogated in FRCP.]

Rule 75. Proceedings On Appeal From Magistrate Judge to District Judge Under Rule 73(d) [Abrogated in FRCP.]

Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs [Abrogated in FRCP.]

TITLE X. COURT AND CLERK: CONDUCTING BUSINESS; ISSUING ORDERS

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) **When Court Is Open.** The court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) **Place for Trial and Other Proceedings.**

(1) **In General.** Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, or at any other place designated by order.

(2) **A Trial or Hearing in a Foreign Country.** On motion or on the judge's own initiative, and upon a determination by the judge to whom the case is assigned that the interests of economy, efficiency, and justice will be served, the chief judge may issue an order authorizing the judge to conduct proceedings, including evidentiary hearings and trials, in a foreign country whose laws do not prohibit such proceedings.

(c) **Clerk's Office Hours; Clerk's Orders.**

(1) **Hours.** The clerk's office—with a clerk or deputy on duty—must be open during business hours every day except Saturdays, Sundays, and legal holidays as defined in RCFC 6(a)(4).

(2) **Orders.** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under RCFC 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) **Serving Notice of an Order or Judgment.**

(1) **Service.** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in RCFC 5(b), on each party who is not in default for failing to appear. The clerk must

record the service on the docket. A party also may serve notice of the entry as provided in RCFC 5(b).

- (2) **Time to Appeal Not Affected by Lack of Notice.** Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure 4(a).

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

To more closely parallel the structure and content of FRCP 77, RCFC 77 has been modified as follows:

Former subdivisions (a) (referring to the court’s “Name”), (b) (referring to the court’s “Seal”), (d) (captioned “Citations”), and (e) (identifying the court’s judicial power as being exercisable by a single judge, except in congressional reference cases), have been deleted as unnecessary.

Subdivision (b) (formerly subdivision (h) of this rule) has been changed in two respects. First, in order better to reflect its content, the subdivision has been retitled to read “Trials and Hearings; Proceedings in Chambers” (in lieu of “Trials and Hearings; Orders in Chambers”). Second, the subdivision has been divided into paragraphs (1) and (2). Paragraph (1), captioned “Proceedings Generally,” retains the rule’s earlier language; paragraph (2), captioned “Trials or Hearings in Foreign Countries,” has been added to recognize the court’s authority under 28 U.S.C. § 798(b) to conduct trials or hearings in foreign countries.

Former subdivision (f), titled “Assignment of Cases,” was renumbered as RCFC 40.1.

Former subdivision (g), titled “Signing of Orders for Absent Judges,” was renumbered as RCFC 77.2(b).

Former subdivisions (l) and (k), titled, respectively, “Scheduling Courtrooms” and “Fee Schedule,” were renumbered as RCFC 77.1.

Finally, former subdivision (m) was deleted in

order to recognize the right of certain court employees to participate in *pro bono* legal work under the guidelines prescribed for that purpose by the Codes of Conduct for Judicial Employees.

2008 Amendment

The language of RCFC 77 has been amended to conform to the general restyling of the FRCP.

Rule 77.1. Business Hours, Scheduling, and Court Fees

- (a) **Business Hours.** The clerk’s office is open from 8:45 a.m. to 5:15 p.m. on business days. A night box is provided for filing with the clerk’s office between 5:15 p.m. and 12:00 midnight on any business day for any paper due that day. The night box is located inside the gate at the garage entrance on H Street. Counsel are advised to telephone the clerk’s office, (202) 357-6400, by 9:30 a.m. the following business day to confirm receipt.
- (b) **Scheduling.** The clerk will schedule the use of courtrooms in Washington, DC, and will be responsible for all arrangements for courtrooms and other facilities required by the court at locations outside Washington, DC. All conferences, oral arguments, trials, and other recorded court proceedings will be scheduled by the assigned judge by filing an order with the clerk.
- (c) **Court Fees.**
- (1) **In General.** Court fees are prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1926(a), as adjusted in the case of the fee for admission in accordance with RCFC 83.1(b)(4).
- (2) **Fee Schedule.** A copy of the applicable schedule of fees is available on the court’s website at www.uscfc.uscourts.gov or may be obtained by contacting the office of the Clerk of the United States Court of Federal Claims, 717 Madison Place, NW, Washington, DC 20005.
- (3) **Method of Payment.** Fees for services rendered by the clerk must be paid in advance; all checks should be made payable to “Clerk, United States Court of

Federal Claims.”

(As revised and reissued May 1, 2002; as amended Mar. 15, 2005, Aug. 2, 2005, _____.)

Rules Committee Notes
2002 Revision

Former RCFC 77.1 was deleted in its entirety. Current RCFC 77.1 reflects portions of the text of former subdivision (c) as well as subdivisions (h) and (i) of RCFC 77.

2005 Amendments

Subdivision (c)(2) has been revised to conform more precisely to 28 U.S.C. § 1926(a) which provides that “[t]he Judicial Conference of the United States shall prescribe from time to time the fees and costs to be charged and collected in the United States Court of Federal Claims.” This authorization for the Judicial Conference to prescribe fees for the court has a counterpart in 28 U.S.C. § 1914 which pertains to fees for district courts. Ordinarily, the Judicial Conference amends the fee schedules for both district courts and this court at the same time. In addition, subdivision (c)(2) recognizes the court’s authority to include as an additional admission fee the amount provided for in RCFC 83.1(b)(4). Currently applicable fee schedules are obtainable on the court’s website and through a variety of other published sources.

2008 Amendment

The language of RCFC 77.1 has been amended to conform to the general restyling of the FRCP.

Rule 77.2. Authorization to Act on Certain Motions

(a) Authority of the Clerk. The clerk may act on any motion for an enlargement of time to answer or respond to a complaint or for substitution of counsel if:

- (1)** the motion states that opposing counsel has no objection;
- (2)** no opposition to the motion has been timely filed; or
- (3)** opposing counsel files a consent.

The clerk may not allow enlargements that exceed 60 days in total.

(b) Signing an Order for an Absent Judge. If an order is required and the assigned judge is unavailable, an order may be presented to the chief judge or to another judge designated by the assigned judge for signature.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes
2002 Revision

RCFC 77.2 has no FRCP counterpart. The rule has been changed in several respects. First, former subdivisions (a) and (b) were combined into a new subdivision (a). Second, language in former subdivision (a) relating to the “permanent withdrawal of papers” was deleted to reflect corresponding changes in RCFC 77.3 that abolish the practice of permitting the withdrawal of papers from the clerk’s office. Third, former subdivisions (c) and (d) were deleted as unnecessary. Finally, new subdivision (b) reflects text transferred from former subdivision (g) of RCFC 77.

2008 Amendment

The language of RCFC 77.2 has been amended to conform to the general restyling of the FRCP.

Rule 77.3. Withdrawing, Disposing of, and Unsealing Papers and Exhibits

(a) Withdrawing Papers and Exhibits.

(1) In General. A paper or exhibit filed with the court may not be withdrawn from the office or custody of the clerk except by order of the court, but such an order should be entered only in extraordinary circumstances. In the event of such withdrawal, the clerk must preserve a record of the paper or exhibit and the order of withdrawal.

(2) During Trial. The court reporter engaged to transcribe a trial proceeding may temporarily withdraw any paper or exhibit for use during that proceeding. All papers and exhibits admitted into evidence or designated to accompany the transcript of the proceeding must remain in the reporter’s custody until the

transcript is filed with the clerk.

(b) Disposing of Physical Exhibits. All trial exhibits, including models, diagrams, depositions, transcripts, briefs, tables, and charts, will be destroyed or otherwise disposed of by the clerk unless they are removed from the clerk's custody by the party who produced them either:

- (1) within 60 days after the entry of final judgment by this court; or
- (2) in the event of an appeal, within 90 days after the receipt and filing of a mandate or other process or certificate showing the disposition of the case by the appellate court.

(c) Unsealing Papers and Exhibits. Unless otherwise required by statute or order and absent a timely objection by any party, the clerk, upon notice to the parties, may unseal any paper or exhibit filed under seal either:

- (1) 5 years after the entry of final judgment by this court; or
- (2) in the event of an appeal, 5 years after the receipt and filing of a mandate or other process or certificate showing disposition of the case by the appellate court.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

RCFC 77.3 has no FRCP counterpart. The rule has been amended in several respects:

First, former subdivision (a) was deleted, thereby eliminating the practice of permitting temporary withdrawal of exhibits and papers by the parties. The need to accommodate the copying of extensive parts of a record shall be addressed directly through arrangements made by the clerk.

Subdivision (a), formerly subdivision (b), was amended to clarify that the reporter is to retain custody of the transcript and exhibits until they are filed with the clerk.

New subdivision (b), formerly subdivision (c), clarifies that no withdrawal of papers or exhibits from the clerk's office may occur in the absence of a court order, and then only in extraordinary

circumstances. The fact of withdrawal shall be preserved in the court's docketing entries.

New subdivision (c), formerly subdivision (d), was rewritten to clarify the practice with respect to the disposition of physical exhibits and to make clear the parties' obligation to retrieve such exhibits, to avoid their loss through routine disposal. The reference to *in camera* materials was omitted, because such materials are not filed with the clerk's office.

New subdivision (d) establishes a procedure for handling materials filed under seal, requiring the parties affirmatively to indicate a desire to maintain filings in closed cases under seal.

2007 Amendment

Subdivision (d) of RCFC 77.3 has been amended by substituting the introductory words "unless otherwise required by statute or order" in place of the former text "unless otherwise specified by order." The amendment is intended to recognize that under certain statutes, materials originally filed under seal must be maintained under seal in perpetuity. *See, e.g.,* National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-12(d)(4)(A).

2008 Amendment

The language of RCFC 77.3 has been amended to conform to the general restyling of the FRCP.

Rule 78. Hearing Motions; Submission on Briefs [Not used.]

Rule 79. Records Kept by the Clerk

(a) Civil Docket.

- (1) ***In General.*** The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

- (2) ***Items to be Entered.*** The following

items must be marked with the file number and entered chronologically in the docket:

- (A) papers filed with the clerk;
 - (B) process issued, and proofs of service or other returns showing execution; and
 - (C) appearances, orders, verdicts, and judgments.
- (3) **Contents of Entries.** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment.
- (b) **Civil Judgments and Orders.** The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.
- (c) **Indexes; Calendars.** Under the court's direction, the clerk must:
- (1) keep indexes of the docket and of the judgments and orders described in RCFC 79(b); and
 - (2) prepare calendars of all actions ready for trial.
- (d) **Other Records.** The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

The word "civil" has been added to subdivision (a) to more closely conform to FRCP 79. RCFC 79 as it now reads is essentially identical to FRCP 79.

2008 Amendment

The language of RCFC 79 has been amended

to conform to the general restyling of the FRCP.

Rule 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it or by any other method authorized by the court.

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, _____.)

Rules Committee Notes

2002 Revision

Former subdivisions (a), (b), and (c) were deleted and minor changes have been made to former subdivision (d) in order to more closely conform to FRCP 80.

2007 Amendment

RCFC 80, which previously limited certification of a trial record to "the person who reported the testimony," has been expanded to include certification "by any other method authorized by the court." This expansion addresses the certification requirement in cases where testimony at a trial or hearing is recorded electronically under court supervision without reporter assistance.

2008 Amendment

The language of RCFC 80 has been amended to conform to the general restyling of the FRCP.

Rule 80.1. Court Reporters

(a) **In General.** Trial proceedings will be transcribed by a court reporter provided by the court who will be under the jurisdiction and control of the assigned judge.

(b) **Preparing a Transcript.**

- (1) **Form.** A transcript should be produced on nontransparent white paper not exceeding 8½ by 11 inches and bound along the left margin. The pages should be numbered consecutively, with a minimum of 25 lines per page. It is unnecessary for witnesses to sign the transcript volume(s) containing their testimony.

- (2) **Contents.**
- (A) **Caption Page.** Each transcript volume must include a caption page located at the beginning of the volume setting forth:
- (i) the title of the case;
 - (ii) the place and date of the proceeding;
 - (iii) the name of the judge; and
 - (iv) the appearances of counsel.
- (B) **Witness Identification.** Each time a witness is called to testify, the reporter must identify:
- (i) the name of the witness and the nature of the examination (such as direct, cross, redirect, and recross); and
 - (ii) the name of counsel conducting the examination.
- (C) **Index.** Each transcript volume must include an index located at the beginning of the volume listing:
- (i) the name of each witness testifying, citing the page of the transcript where direct, cross, redirect, or recross begins; and
 - (ii) each exhibit offered and received into evidence, first for the plaintiff, then for the defendant, and then for any other party, with a brief statement of the nature of the exhibit and the page of the transcript where the exhibit was offered and received.
- (D) **Master Index.** Where the number of pages in the final transcript exceeds 500, the court reporter must provide a separately bound master index containing a complete list of the information set forth in RCFC 80.1(b)(2)(C).
- (c) **Labeling Exhibits.** Unless the court otherwise directs the parties to designate their exhibits, the court reporter must label each exhibit with:
- (1) the title and docket number of the case;
 - (2) the exhibit number;
 - (3) the party offering the exhibit, whether plaintiff, defendant, or any other party; and
 - (4) the number of pages in each exhibit.
- (d) **Filing a Transcript and Exhibits.**
- (1) **In General.** Unless otherwise ordered by the court, the court reporter must file the transcript of the trial proceedings, including the exhibits admitted into evidence or designated to accompany the transcript, with the clerk within 30 days after the conclusion of the proceeding.
 - (2) **How Filing Is Made.** A transcript is filed by delivering the transcript and exhibits to the clerk's office or by enclosing them in a packet and transmitting them to the Office of the Clerk of the United States Court of Federal Claims, 717 Madison Place, NW, Washington, DC 20005. The obligation for filing the transcript and exhibits within the period prescribed in RCFC 80.1(d)(1) rests on the reporter.
- (e) **Certificate of Reporter.** The reporter must sign and append to the transcript a certificate certifying that the record is a correct transcript of the proceeding. See Appendix of Forms, Form 3.

(As revised and reissued May 1, 2002; as amended Aug. 2, 2005, _____.)

Rules Committee Notes 2002 Revision

RCFC 80.1 has no FRCP counterpart. The rule's principal text formerly appeared in these rules as Appendix A. The incorporation of former Appendix A into the main body of the rules reflects a more logical placement of its subject matter in the organizational structure of the court's rules. Additionally, as part of this rule's relocation, Forms A and B of former Appendix A (pertaining to reporter certifications) were assigned to the new Appendix of Forms. They appear there as Forms 3A and 3B.

Other changes introduced in this rule include the following:

Subdivision (a) formerly appeared in these

rules as paragraph (b)(1) of RCFC 39. The changes introduced in new subdivision (a) were deemed necessary in order to eliminate uncertainty as to the court's authority to furnish a reporter for trials scheduled outside of the United States.

Subdivision (b) formerly appeared as paragraph (b)(2) of RCFC 39.

Subdivision (i) formerly appeared as paragraph (b)(3) of RCFC 39. Additionally, subdivision (i) reflects the change in the court's name.

2005 Amendment

Subdivision (d) has been amended to specify that the reporter shall show on each page of a trial transcript the name of the witness being questioned and the name of the examining counsel. This change is intended to aid both counsel and the court in working with transcripts during post-trial proceedings, especially

2008 Amendment

The language of RCFC 80.1 has been amended to conform to the general restyling of the FRCP.

TITLE XI. GENERAL PROVISIONS

Rule 81. Applicability of the Rules in General; Removed Actions [Not used.]

Rule 82. Jurisdiction and Venue Unaffected [Not used.]

Rule 83. Rules by Court of Federal Claims; Judge's Directives

(a) **In General.** After giving public notice and an opportunity for comment, the United States Court of Federal Claims, acting by a majority of its judges, may adopt and amend rules governing its practice. Such rules, to the extent permitted by this court's jurisdiction, must be consistent with the Federal Rules of Civil Procedure and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A rule takes effect on the date specified by the

court and remains in effect unless amended by the court. Copies of rules and amendments must, on their adoption, be furnished to the Administrative Office of the United States Courts and be made available to the public.

(b) **Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law or rules adopted under 28 U.S.C. § 2072 or 2503(b). No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or these rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

RCFC 83 is modeled after FRCP 83. The rule recognizes the court's rule-making authority as set forth at 28 U.S.C. § 2503, as well as the assigned judge's authority to regulate practice in an individual case, so long as that practice is consistent with federal law and rules.

2008 Amendment

The language of RCFC 83 has been amended to conform to the general restyling of the FRCP.

Rule 83.1. Attorneys

(a) Eligibility to Practice.

(1) **In General.** An attorney is eligible to practice before this court if the attorney:

(A) is a member in good standing of the bar of this court; or

(B) was a member in good standing of the bar of this court's predecessor, the United States Court of Claims.

(2) **Pro Hac Vice.** An attorney may participate *pro hac vice* in any proceeding before this court if:

(A) the attorney is admitted to practice before the highest court of any U.S. state, territory, or possession or the District of Columbia; and

(B) the attorney of record for any party

has requested and is present for such participation and has received the court's approval.

(3) **Pro Se Litigants.** An individual who is not an attorney may represent oneself or a member of one's immediate family, but may not represent a corporation, an entity, or any other person in any proceeding before this court. The terms counsel, attorney, and attorney of record include such individuals appearing *pro se*.

(b) **Admission to Practice.**

(1) **Qualifications.** Any person of good moral character who is a member in good standing of the bar of the Supreme Court of the United States, the United States Court of Appeals for the Federal Circuit, or the highest court of any U.S. state, territory, or possession or the District of Columbia may be admitted to practice before this court.

(2) **Procedures.**

(A) **In General.** An attorney may be admitted to practice before this court by oral motion or by verified application.

(i) **By Oral Motion in an Admissions Proceeding.** A member of the bar of this court may make an oral motion to admit an applicant to the bar during the monthly attorney admissions proceeding held at the Howard T. Markey National Courts Building, 717 Madison Place, NW, Washington, DC 20005, at the times posted on the court's website at www.uscfc.uscourts.gov (generally 10:00 a.m. on Thursday of the first full week in every month). Motions will be heard in a courtroom posted in the lobby of the courthouse on the day of the proceeding. Applicants for admission must appear in the clerk's office no later than

9:30 a.m. to pay the admission fee set forth in RCFC 83.1(b)(4) and to fill out the necessary form. Applicants who for special reasons are unable to appear for admission on one of the posted dates should contact the clerk's office to make alternate arrangements.

(ii) **By Oral Motion in a Proceeding Outside Washington, DC.** A member of the bar of this court may make an oral motion to admit an applicant to the bar during a court proceeding before any judge of this court so long as the applicant:

(I) provides the judge with a completed copy of a verified application for admission (see Appendix of Forms, Form 1); or

(II) advises the judge of the applicant's qualifications as set forth in RCFC 83.1(b)(1), and represents that the applicant will promptly apply to the clerk for admission by verified application as provided in RCFC 83.1(b)(2)(C).

(iii) **By Verified Application.** An attorney may seek admission to practice before this court without appearing in person by presenting the clerk with a verified application for admission (see Appendix of Forms, Form 1) along with the following documentation:

(I) a certificate of a judge or of the clerk of any of the courts specified in RCFC 83.1(b)(1)

indicating that the applicant is a member in good standing of the bar of such court;

- (II) two letters or signed statements of members of the bar of this court or of the Supreme Court of the United States, not related to the applicant, affirming that the applicant is personally known to them, that the applicant possesses all of the qualifications required for admission to the bar of this court, that they have examined the application, and that the applicant's personal and professional character and standing are good; and
 - (III) an oath in the form prescribed in RCFC 83.1(b)(3) signed by the applicant and administered by an officer authorized to administer oaths in the U.S. state, territory, or possession or the District of Columbia where the oath is given, or as permitted by 28 U.S.C. § 1746.
- (3) **Oath.** An applicant for admission to practice before this court must take the following oath, to be administered by the presiding judge or by the clerk:
- I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and that I will conduct myself in an upright manner as an attorney of this court.
- (4) **Fee.** Unless the applicant is employed by this court or is an attorney representing the United States before

this court, the applicant must pay the admission fee in accordance with the fee schedule posted on the court's website at www.uscfc.uscourts.gov. The admission fee includes \$100.00 above the amount prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1926(a). The clerk will deposit this additional sum in a fund to be used by the court for the benefit of the members of the bench and the bar in the administration of justice.

(5) **Foreign Attorneys.**

(A) **In General.** Any person qualified to practice in the highest court of any foreign state may be specially admitted to practice before this court but only for purposes limited to a particular case; such person may not serve as the attorney of record.

(B) **Procedures.** A member of the bar of this court must file with the clerk a written motion to admit the applicant at least 3 days prior to the court's consideration of the motion. In the case of such an admission, an oath and fee are not required.

(c) **Attorney of Record.**

(1) **In General.** A party may have only one attorney of record in a case at any one time and, with the exception of a *pro se* litigant appearing under RCFC 83.1(a)(3), must be represented by an attorney (not a firm) admitted to practice before this court. Any attorney assisting the attorney of record must be designated "of counsel."

(2) **Signing Filings.** All filings must be signed in the attorney of record's name. Any attorney who is admitted to practice before this court may sign a filing in the attorney of record's name by adding the following after the name of the attorney of record: "by [the signing attorney's full name]." Such authorization to sign filings does not relieve the attorney of record from the provisions of RCFC 11.

(3) **Entering an Appearance.**

- (A) ***By Parties Other Than the United States.*** The attorney of record for any party other than the United States must include on the initial pleading or paper the attorney's name, address, telephone number, and facsimile number.
- (B) ***By the United States.*** After service of the complaint, the attorney of record for the United States must promptly file with the clerk and serve on all other parties a notice of appearance setting forth the attorney's name, address, telephone number, and facsimile number.
- (C) ***Changes in Contact Information.*** An attorney of record must promptly file with the clerk and serve on all other parties a notice of any change in the attorney's contact information.
- (4) ***Substituting Counsel.***
- (A) ***By Parties Other Than the United States.***
- (i) ***In General.*** Any party other than the United States may seek leave of the court to substitute its attorney of record at any time by filing a motion signed by the party or by the newly designated attorney along with an affidavit of appointment by such attorney.
- (I) ***With the Consent of the Previous Attorney.*** If the previous attorney's consent is annexed to or indicated in the motion, the clerk will automatically enter the substitution on the docket.
- (II) ***Without the Consent of the Previous Attorney.*** If the motion is filed without the consent of the previous attorney, the previous attorney must be served with the motion and will have 14 days to show cause why the motion should not be allowed.
- (ii) ***Death of the Previous Attorney.*** In the event of the death of the attorney of record, the party must promptly notify the court and move to substitute another attorney admitted to practice before this court.
- (B) ***By the United States.*** The United States may substitute its attorney of record at any time by filing with the clerk and serving on all other parties a notice of appearance of the new attorney.
- (5) ***Withdrawing Counsel.*** An attorney of record for a party other than the United States may not withdraw the attorney's appearance except by leave of the court on motion and after notice is served on the attorney's client.
- (d) ***Honorary Bar Membership.*** Upon nomination by the chief judge and with the approval of the other judges, the court may present an honorary membership in the bar of this court to a distinguished professional of the United States or of another nation who is knowledgeable in the affairs of law and government in his or her respective country. The candidate for honorary membership will be presented at the bar in person and will receive a certificate of honorary bar membership.

(As revised and reissued May 1, 2002; as amended Aug. 2, 2005, June 20, 2006, _____.)

**Rules Committee Notes
2002 Revision**

RCFC 83.1 has no FRCP counterpart. Former RCFC 83.1, titled "Content of Briefs or Memoranda; Length of Briefs or Memoranda," has been renumbered as RCFC 5.2. The renumbering of RCFC 83.1 was intended to reflect its more logical placement in the organizational structure of

this court's rules.

The substance of the rule reflects the text of former RCFC 81, as modified. Paragraph (2) of subdivision (c) (formerly paragraph (d)(2) of RCFC 81) was amended to formalize the court's practice of allowing joint filings to be signed by one counsel, on behalf of both counsel, when authorized to do so by opposing counsel. Also, subdivision (e) of former RCFC 81 (relating to attorneys' fees and expenses) was not retained as part of this rule but was, instead, incorporated into RCFC 54(d)(2).

In addition, former General Order No. 15, titled "Honorary Bar Membership," was slightly modified and moved to new subdivision 83.1(d).

2005 Amendment

RCFC 83.1(b)(4) (Fee for Admission) has been amended to set forth the practice, under guidelines approved by the Judicial Conference of the United States, of adding an amount to the admission fee set pursuant to 28 U.S.C. § 1926(a) for deposit into a fund to be used by the court for the benefit of the members of the bench and the bar in the administration of justice.

2006 Amendment

Subdivision 83.1(b)(2)(A) (Admission to Practice Upon Oral Motion) has been amended to provide some flexibility respecting when motions for admission to practice will be heard upon oral motion.

2008 Amendment

The language of RCFC 83.1 has been amended to conform to the general restyling of the FRCP.

Rule 83.2. Attorney Misconduct

(a) In General. Upon a showing of misconduct and after notice and an opportunity to be heard, an attorney admitted to practice before this court, including an attorney admitted for the purpose of a particular proceeding pursuant to RCFC 83.1(a)(2) and (b)(5), may be disbarred, suspended from practice before the court, publicly reprimanded, or subjected to other such disciplinary action as the circumstances may warrant.

(b) Misconduct Defined. The following misconduct by an attorney may serve as the basis for a disciplinary action under this rule:

- (1)** an act or omission which violates the American Bar Association Model Rules of Professional Conduct, whether or not the act or omission occurred in the course of an attorney-client relationship;
- (2)** a conviction in any court of the United States, the District of Columbia, or any U.S. state, territory, commonwealth, or possession of a serious crime, defined for purposes of this rule as:
 - (A)** a felony; or
 - (B)** any lesser crime whose elements include false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt, a conspiracy, or a solicitation of another to commit a serious crime;
- (3)** a conviction in any court of the United States, the District of Columbia, or any U.S. state, territory, commonwealth, or possession of a crime that does not constitute a serious crime, other than a minor traffic offense; or
- (4)** disbarment, suspension, or other public discipline in another jurisdiction.

(c) Disclosure of Misconduct.

- (1) By an Attorney.** An attorney must promptly notify the clerk if the attorney:
 - (A)** is convicted of any crime other than a minor traffic offense in any court of the United States, the District of Columbia, or any U.S. state, territory, commonwealth, or possession, giving the name of the court in which the attorney was convicted, the date of the conviction, the docket number, the offense for which the attorney was convicted, and the sentence received;
 - (B)** is subjected to disbarment, suspension, or other public discipline in any court of the

- United States, the District of Columbia, or any U.S. state, territory, commonwealth, or possession, giving the name of the court in which the attorney was disciplined, the date of the disciplinary action, the docket number, the offense committed, and the discipline imposed; or
- (C) is disbarred on consent or resigns from the bar of any court of the United States, the District of Columbia, or any U.S. state, territory, commonwealth, or possession while an investigation into allegations of misconduct is pending.
- (2) **By the Clerk of the Court.** The clerk of the court must:
- (A) upon being informed that an attorney has been convicted of any crime or has been subjected to discipline by another court, ensure that a certificate of conviction or a certified copy of the disciplinary judgment or order has been filed with this court;
- (B) within 10 days after any disciplinary action taken in this court, notify any other court to which an attorney is admitted that the attorney has been disbarred, suspended, censured, or disbarred on consent, including transmitting a certified copy of the order of disbarment, suspension, censure, or disbarment on consent, as well as the last known address of the attorney; and
- (C) notify the National Discipline Data Bank operated by the American Bar Association of any order by this court imposing public discipline upon an attorney.
- (d) **Disciplinary Proceedings.**
- (1) **Procedures in General.**
- (A) **Appointing Counsel.** The chief judge may appoint one or more members of the bar of this court as

counsel to investigate allegations of misconduct or to prosecute disciplinary proceedings under this rule, provided that the respondent-attorney may move to disqualify an attorney who is or has been engaged as an adversary of the respondent-attorney in any matter. Counsel, once appointed, may not resign unless permission to do so is given by the chief judge.

- (B) **Service.**
- (i) **An Order Initiating a Formal Disciplinary Proceeding.** An order initiating a formal disciplinary proceeding must be served in person or by registered or certified mail addressed to the respondent-attorney at the attorney's last known address. If service by registered or certified mail is ineffective, the court must enter an order as appropriate to effect service.
- (ii) **All Other Papers and Notices.** Any other paper or notice required under this rule is served by mailing the paper or notice to the respondent-attorney's last known address.
- (2) **A Violation of the Model Rules of Professional Conduct.**
- (A) **Referring a Matter to a Disciplinary Judge.** When an allegation of misconduct which, if substantiated, would warrant discipline of an attorney comes to the attention of a judge or special master, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by this rule, the judge or special master must refer the matter to the chief judge for a determination of whether the matter should be assigned to a

disciplinary judge for a formal disciplinary proceeding or for the formulation of such other recommendation as may be appropriate.

(B) *Initiating a Formal Disciplinary Proceeding.* If the assigned disciplinary judge concludes that a formal disciplinary proceeding should be initiated, the disciplinary judge must file an order directing the respondent-attorney to show cause, within 30 days after service of the order, why the attorney should not be disciplined. If any issue of fact is raised in the respondent-attorney's answer or the respondent-attorney wishes to be heard in mitigation, the disciplinary judge must set the matter for a prompt hearing.

(C) *Disposing of a Matter Without a Formal Disciplinary Proceeding.* If the disciplinary judge concludes that a formal disciplinary proceeding should not be initiated because the evidence is insufficient, because further proceedings should await the resolution of a disciplinary action pending in another court, or for any other valid reason, the disciplinary judge must file a recommendation with the chief judge explaining the reasons supporting disposition of the matter, whether by dismissal, admonition, deferral, or otherwise.

(3) *A Conviction of a Serious Crime.*

(A) *Suspending an Attorney and Initiating a Formal Disciplinary Proceeding.* Upon the filing with the court of a certified copy of a judgment demonstrating that an attorney has been convicted of a serious crime as defined in RCFC 83.2(b)(2), whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, the chief judge must:

- (i)** enter an order immediately suspending the attorney from practicing before this court;
- (ii)** serve the order on the attorney in compliance with RCFC 83.2(d)(1)(B); and
- (iii)** refer the matter to counsel pursuant to RCFC 83.2(d)(1)(A) to initiate a disciplinary proceeding before the court for the sole purpose of determining the final discipline to be imposed. The certified copy of the judgment of conviction should be treated as conclusive evidence of the commission of the crime but a final hearing should not be conducted until all appeals from the conviction are concluded.

(B) *Reinstating an Attorney After a Reversal of Conviction.* An attorney suspended under RCFC 83.2(d)(3)(A) automatically will be reinstated upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed. The reinstatement will not terminate any disciplinary proceeding pending before this court; such termination will be determined by the chief judge on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

(4) *A Conviction of a Nonserious Crime.* Upon the filing of a certified copy of a judgment demonstrating that an attorney has been convicted of a crime not constituting a serious crime as defined in RCFC 83.2(b)(2), the chief judge may refer the matter to counsel pursuant to RCFC 83.2(d)(1)(A) for whatever action counsel may deem appropriate, including the institution of a formal disciplinary proceeding before the court. If the attorney has been convicted of a

minor offense, however, the chief judge may exercise discretion in declining to refer the matter to counsel.

(5) *Disbarment, Suspension, or Other Public Discipline in Another Jurisdiction.*

(A) *Order to Show Cause.* Upon receipt of either the notification required by RCFC 83.2(c)(1), or a judgment or order from another court indicating disbarment on consent or resignation, suspension, or some other form of public discipline, the chief judge must issue a notice to the attorney containing:

- (i)** a copy of the judgment or order from the other court or a copy of the communication indicating disbarment on consent or resignation, suspension, or some other form of public discipline; and
- (ii)** an order to show cause, served pursuant to RCFC 83.2(d)(1)(B), directing that the attorney inform the court within 30 days after service of the order of any reason why the imposition of reciprocal discipline would not be warranted under RCFC 83.2(d)(5)(B).

(B) *Imposing Reciprocal Discipline.*

Upon the expiration of 30 days from the date of service of the order to show cause, the chief judge will treat a final adjudication in another court as conclusively establishing the misconduct of which the respondent-attorney is accused and will impose the identical discipline unless the respondent-attorney demonstrates, or the chief judge finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears that:

- (i)** the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (ii)** there was such an infirmity of proof establishing the misconduct that this court could not, consistent with its duty, accept as final the conclusion on that subject;
- (iii)** the imposition of the same discipline by this court would result in grave injustice; or
- (iv)** the misconduct established is deemed by this court to warrant substantially different discipline.

Having determined that any of these elements exists, the chief judge will enter such other order as may be appropriate.

(C) *Staying Reciprocal Discipline.* In the event that the discipline imposed in the other jurisdiction has been stayed, any reciprocal discipline imposed in this court must be deferred until such stay is lifted.

(6) *Disbarment on Consent While Under Disciplinary Investigation or Prosecution.*

(A) *In General.* At the respondent-attorney's request and upon receipt of the affidavit required under RCFC 83.2(d)(6)(B), the chief judge may cease any investigation or prosecution being conducted under this rule and may enter an order disbarring the attorney on consent.

(B) *Required Affidavit.* To initiate a disbarment on consent, the respondent-attorney must file an affidavit with the court stating that:

- (i)** the attorney consents to disbarment;
- (ii)** the attorney's consent is freely and voluntarily rendered, the attorney is not

being subjected to coercion or duress, and the attorney is fully aware of the implications of such consent;

- (iii) the attorney is aware that an investigation or prosecution involving allegations of the attorney's misconduct is currently pending, along with a statement setting forth the specifics of those allegations;
- (iv) the attorney acknowledges that the material facts so alleged are true; and
- (v) the attorney consents to disbarment because the attorney knows that if charges were brought upon the matters under investigation, or if the proceeding were prosecuted, the attorney could not present a successful defense.

(C) **Public Disclosure.** An order disbaring an attorney on consent must be made part of the public record, but the affidavit required under RCFC 82.3(d)(6)(B) should not be publicly disclosed or made available for use in any other proceeding except upon order of the chief judge.

(e) **Reinstating an Attorney After Suspension or Disbarment.**

(1) **Suspension of 3 Months or Less.** An attorney suspended for 3 months or less will be reinstated automatically at the end of the period of suspension upon the filing of an affidavit with the court confirming compliance with the provisions of the order of suspension.

(2) **Suspension in Excess of 3 Months or Disbarment.**

(A) **In General.** Except as provided in RCFC 83.2(d)(3)(B), an attorney suspended for more than 3 months or disbarred may be reinstated only by order of the court after the court concludes, upon a showing of good cause, that it would be in the

interest of justice to do so.

(B) **Procedures for Reinstatement.**

(i) **Filing a Petition.** A petition for reinstatement must be filed with the clerk and directed to the chief judge. The petition must demonstrate by clear and convincing evidence that the petitioner has the necessary moral qualifications, competency, and learning in the law to practice before the court and that the petitioner's resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or be subversive of the public interest.

(ii) **Time for Filing.**

(I) **After a Suspension.**

An attorney may file a petition for reinstatement any time after the period of suspension has expired.

(II) **After Disbarment.** An attorney may not file a petition for reinstatement until the expiration of at least one year from the effective date of the disbarment after hearing or by consent.

(III) **Successive Petitions.**

An attorney may not file a successive petition for reinstatement until the expiration of at least one year from the date of an adverse judgment on the earlier petition.

(iii) **Review by the Court.** Upon receipt of a petition for reinstatement, the chief judge

will promptly assign the petition to one or more judges of the court who, within 30 days after referral, must issue an order of reinstatement based upon the petition or must schedule a hearing at which the petitioner will have the burden of demonstrating the elements listed in RCFC 83.2(e)(2)(B)(i).

(C) **Conditions for Reinstatement.** If the petitioner is found fit to resume the practice of law, the judge or judges before whom the matter is heard will reinstate the petitioner, but may condition reinstatement upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to any parties harmed by the conduct that led to the petitioner's suspension or disbarment. If the petitioner has been suspended or disbarred for 5 or more years, reinstatement may, in the discretion of the judge or judges before whom the matter is heard, additionally be conditioned upon the furnishing of proof of competency and learning in law, including certification by the bar examiners of a state or other jurisdiction of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(f) **Fees and Costs.**

(1) **For a Disciplinary Investigation or Prosecution.** At the conclusion of any disciplinary investigation or prosecution under this rule, counsel appointed under RCFC 83.2(d)(1)(A) may apply to the court for an order awarding reasonable fees and costs incurred in the course of such an investigation or prosecution. Any such order must be submitted to the clerk, who will pay the amount required thereunder, as well as any other costs incurred by the administration of this rule, from the funds collected pursuant to RCFC 83.1(b)(4).

(2) **For a Reinstatement Proceeding.** The court may direct that an attorney seeking to be reinstated include with the petition for reinstatement an advance cost deposit in an amount set by the court to cover anticipated costs of the reinstatement proceeding.

(g) **Retention of Authority.** Nothing contained in this rule should be construed to deny the court the authority it possesses to maintain control over proceedings conducted before it, such as proceedings for contempt, issuance of public reprimands, or the imposition of fines of not more than \$1,000.00.

(As revised and reissued May 1, 2002; as amended _____.)

Rules Committee Notes

2002 Revision

Former RCFC 83.2 has been renumbered as RCFC 7.1. New RCFC 83.2 formerly appeared in these rules as Appendix F. The incorporation of former Appendix F into the main body of the court's rules reflects a more logical placement of its subject matter in the organizational structure of the court's rules.

2008 Amendment

The language of RCFC 83.2 has been amended to conform to the general restyling of the FRCP.

Rule 83.3. Legal Assistance by a Law Student

(a) **In General.** A law student qualified under RCFC 83.3(b) may enter an appearance in this court on behalf of any party in a case provided that:

- (1) the party on whose behalf the student appears has consented in writing;
- (2) a supervising attorney, as defined in RCFC 83.3(d), has indicated approval in writing; and
- (3) the written consent and approval have been filed with the clerk.

(b) **Eligibility.** To make an appearance under this rule, a law student must:

- (1) be a student in good standing at a law

school approved by the American Bar Association;

- (2) have completed legal studies amounting to at least two semesters, or the equivalent thereof if the school operates on some basis other than a semester basis;
- (3) have knowledge of the Rules of the United States Court of Federal Claims, the Federal Rules of Evidence, and the American Bar Association Model Rules of Professional Conduct;
- (4) be enrolled for credit in a clinical program at an accredited law school that maintains malpractice insurance for its activities and conducts its activities under the direction of a faculty member of the law school;
- (5) be certified by the dean of the law school as being of good character and of sufficient legal ability, and as being adequately trained in accordance with RCFC 83.3(b)(1)–(4) to fulfill the responsibilities of a legal intern to both the client and the court. Such certification must be filed with the clerk and may be withdrawn at any time by the dean upon written notice to the clerk;
- (6) be certified by the chief judge to practice pursuant to this rule. Such certification may be withdrawn at any time by the chief judge or, in a given case, by the judge or special master before whom the law student has entered an appearance, without notice of hearing and without any showing of cause; and
- (7) neither ask for nor receive any fee or compensation of any kind from the client on whose behalf service is rendered. This rule does not, however, prevent a lawyer, a legal aid bureau, a law school, or the government from paying compensation to an eligible law student or from making such charges for their services as may otherwise be proper, nor does it prevent any clinical program from receiving otherwise proper fees and expenses under RCFC 54(d)(2).

(c) **Scope of Appearance.** A law student who

has entered an appearance in a case may:

- (1) appear on the brief(s) and other written pleadings filed with the court, provided that the supervising attorney has read, approved, and co-signed all such documents;
 - (2) participate in all proceedings ordered by a judge or special master, including the taking of depositions, provided that the supervising attorney is present at all such proceedings;
 - (3) engage in all other activities on behalf of the client in all ways that a licensed attorney may, subject to the general direction of the supervising attorney; and
 - (4) make a binding commitment on behalf of the client provided that both the client and the supervising attorney have approved of such commitment.
- (d) **Supervising Attorney.** A supervising attorney under this rule will be deemed the attorney of record pursuant to RCFC 83.1(c) and must:
- (1) be a member in good standing of the bar of this court;
 - (2) be approved for such service by the dean of the law school at which the law student is enrolled;
 - (3) be certified by this court as a student supervisor;
 - (4) assist and counsel the student in activities allowed under this rule and review such activities with the student, to the extent appropriate under the circumstances, for the proper practical training of the student and the protection of the client;
 - (5) assist the student in the preparation of the case to the extent the supervising attorney considers necessary and be available for consultation with the client;
 - (6) be present with the student in all proceedings before a judge or special master;
 - (7) co-sign all pleadings and other documents filed with the court;
 - (8) supplement oral or written work of the student as necessary to ensure proper

representation of the client;

- (9) assume full professional responsibility for any guidance relating to any work undertaken by the student and for the quality of the student's work; and
 - (10) notify the dean of the law school at which the student is enrolled of any alleged failure on the part of the student to abide by the letter and spirit of this rule.
- (e) **Retention of Authority.** Nothing in this rule should be construed to prevent a judge from establishing exceptions to the activities set forth in RCFC 83.3(c), or from limiting a student's participation in a particular case.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

RCFC 83.3 replaces former General Order No. 35, adopted on September 3, 1993. The only changes are stylistic or correct cross-references.

2008 Amendment

The language of RCFC 83.3 has been amended to conform to the general restyling of the FRCP.

Rule 83.4. Advisory Council

- (a) **In General.** The United States Court of Federal Claims Advisory Council will advise the court on matters referred to it by the court or deemed relevant by the council's members pertaining to the administration of the court and the court's relationship to the bar and to the public.
- (b) **Membership.** The council will consist of no fewer than 20 members of the bar of the court, appointed by the chief judge to three-year terms, and must include representatives of all of the court's practice areas. The chief judge will designate one of these members as the chairperson and will additionally appoint one or more of the judges of the court as a liaison between the court and the council.
- (c) **Organization.** The council will meet at such times and places as agreed to by its members.

(The chief judge will provide facilities at the court to accommodate such meetings if necessary.) All members of the council, including the chief judge and the court's liaison judge[s], may attend meetings and participate in discussions, but only council members may vote on matters before the council. Council members may designate officers and committees and take any other steps appropriate to conduct the council's business.

- (d) **Recommendations.** The council may transmit its recommendations to the court informally or formally by letter to the chief judge. The court may consider any recommendation of the council and take such action as the court deems appropriate.

(As revised and reissued May 1, 2002; as amended _____.)

**Rules Committee Notes
2002 Revision**

New RCFC 83.4 replaces General Order No. 7, which established the Advisory Council on April 5, 1983. In addition to minor stylistic and formatting changes, the new rule has increased the number of members allowed on the Council and makes the chief judge responsible for designating the chairperson.

2008 Revision

The language of RCFC 83.4 has been amended to conform to the general restyling of the FRCP.

Rule 84. Forms

Forms referenced in these rules are set forth in the Appendix of Forms.

(As revised and reissued May 1, 2002.)

**Rules Committee Note
2002 Revision**

RCFC 84 parallels in content its FRCP counterpart.

Rule 85. Title

These rules may be cited as the Rules of the United

States Court of Federal Claims.

(As revised and reissued May 1, 2002, as amended
_____.)

Rules Committee Notes
2002 Revision

RCFC 85 has been changed to reflect the change in the court's name.

2008 Amendment

The language of RCFC 85 has been amended to conform to the general restyling of the FRCP.

Rule 86. Effective Date

These rules and any subsequent amendments are applicable to all proceedings pending at the time of the adoption of the revision or amendment or thereafter filed, except to the extent that the court determines that their application to a pending action would not be feasible or would work injustice, in which event the former procedure applies.

(As revised and reissued May 1, 2002; as amended June 20, 2006, _____.)

Rules Committee Notes
2002 Revision

RCFC 86 reflects the effective date of the most recent revision to the court's rules. In addition, the rule adopts the practice of the FRCP to presume application of rule changes to pending cases.

Future revisions to these rules will be posted on the court's website at www.uscfc.uscourts.gov.

2006 Amendment

The second sentence of RCFC 86 has been rewritten to clarify the rule's essential purpose: that amendments to the court's rules apply to all pending proceedings unless the application of such amendments would not be feasible or would work injustice.

2008 Amendment

The language of RCFC 86 has been amended to conform to the general restyling of the FRCP.