

Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts*, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a “taking” of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting Systems Inc.*, 666 F.2d 364 (9th Cir. 1982). See also *Wright v. Jeep Corporation*, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976), the district court’s discretion in these matters should be informed by “the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify. . . .”

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d). This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5). Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The person claiming a privilege or protection cannot decide the limits of that party’s own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person’s claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e). This provision retains most of the language of the former subdivision (f).

“Adequate cause” for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g.*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party’s objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, §204; Neb.Comp.Stat. (1929) §20-1139; N.M.Stat. Ann. (Courtright, 1929) §105-830; 2 N.D.Comp.Laws Ann. (1913) §7653; Ohio Code Ann. (Throckmorton, 1936) §11560; 1 S.D.Comp.Laws (1929) §2542; Utah Rev.Stat. Ann. (1933) §§104-39-2, 104-24-18; Va.Rules of Court, Rule 22, 163 Va. v. xii (1935); Wis.Stat. (1935) §270.39. Compare N.Y.C.P.A. (1937) §§583, 445, and 446, all as amended by L. 1936, ch. 915. Rule 51 deals with objections to the court’s instructions to the jury.

U.S.C., Title 28, [former] §§776 (Bill of exceptions; authentication; signing of by judge) and [former] 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 47. Selection of Jurors

(a) EXAMINATION OF JURORS. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S.C. §1870.

(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, supp. 1936) Appendix, 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) §2330(a); Ohio Gen.Code Ann. (Page, Supp. 1926-1935) §11419-47; Pa.Stat. Ann. (Purdon, Supp. 1936) Title 17, §1153; compare U.S.C., Title 28, [former] §417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28:

- § 411 [now 1861] (Qualifications and exemptions)
- § 412 [now 1864] (Manner of drawing)
- § 413 [now 1865] (Apportioned in district)
- § 415 [see 1862] (Not disqualified because of race or color)
- § 416 [now 1867] (Venire; service and return)
- § 417 [now 1866] (Talesmen for petit jurors)
- § 418 [now 1866] (Special juries)
- § 423 [now 1869] (Jurors not to serve more than once a year)
- § 424 [now 1870] (Challenges)

and D.C. Code (1930) Title 18, §§ 341–360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number of a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

Subdivision (b). The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c). This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

Rule 48. Number of Jurors—Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

(As amended Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

For provisions in state codes, compare Utah Rev.Stat. Ann. (1933) § 48–0–5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. *Cf. Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party. *Ray v. Parkside Surgery Center*, 13 F.R. Serv. 585 (6th cir. 1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in *Ballew v. Georgia*, supra.

Rule 49. Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to