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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **December 8, 1999**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 14 and 15, 1999, in Kennebunkport, Maine. The meeting did not lead to any proposals for action by the Standing Committee on Rules of Practice and Procedure at its January 2000 meeting. This Report is divided into four parts. The first recounts, very briefly, the Judicial Conference's action on the Civil Rules and Supplemental Admiralty Rules amendments that the Standing Committee recommended for adoption. The second addresses a discovery question that was submitted to the Advisory Committee by the Standing Committee for report. The third part summarizes the Advisory Committee's deliberations on two ongoing Standing Committee projects — the Federal Rules of Attorney Conduct proposal and corporate disclosure issues. The fourth summarizes the major ongoing projects that occupy center stage on the Advisory Committee agenda.

I Amendments Proposed to the Judicial Conference

At the June 1999 meeting, the Standing Committee approved several changes in the Civil Rules and Supplemental Admiralty Rules and recommended the changes to the Judicial Conference. The Judicial Conference sent all but one of these proposals on to the Supreme Court. The proposals were divided into three packages. There was no controversy as to two of the packages. The first involved changes to Civil Rules 4 and 12 for actions brought against an officer or employee of the United States in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. The second involved changes in the Admiralty Rules designed primarily to accommodate changes earlier made in Civil Rule 4 and to adjust for developments in civil forfeiture jurisdiction and practice.

The third Civil Rules package proposed changes for disclosure and discovery practice. National uniformity would be restored by eliminating the opportunity to adopt local rules opting out of some disclosure and discovery practices. The scope of initial disclosures would be narrowed to reach only witnesses and documents that a party "may use to support" its claims or defenses. The scope of discovery set by Civil Rule 26(b)(1) would be preserved, but divided between attorney-

managed discovery and court-controlled discovery. A presumptive time limit of one day of seven hours would be set for depositions. These changes were discussed at length and in detail. They, and less dramatic changes, were all approved. One final proposal, however, was not approved. This proposal would have added to Civil Rule 26(b)(2) an express recognition of the existing power to allow specified discovery only

on condition that the requesting party pay all or part of the costs of responding. This proposal was found to add too little to the present rules to justify the fears and controversies that is has stirred up.

II (Proposed) Amended Rule 5(d): Access and Privilege

At the June 1999 meeting the Standing Committee recommended approval by the Judicial Conference of amended Civil Rule 5(d) provisions that prohibit the filing of initial disclosures and discovery materials "until they are used in the proceeding or the court orders filing." At the same time, the Standing Committee asked the Advisory Committee to report on the effects of the amended rule on defamation privileges and on public access to discovery materials. The Judicial Conference has submitted the proposed amendment to the Supreme Court. The Advisory Committee considered the questions identified by the Standing Committee on the basis of a report prepared by the Special Reporter for discovery, Professor Richard L. Marcus. The discussion is reported at pages 17 to 19 of the draft October Minutes.

The defamation privilege question involves two separate privileges. One is a privilege for statements made in the course of litigating conduct, as in pleading, responding to discovery requests, making motions, and so on. This privilege does not appear to turn on filing. The other is a privilege to make public comment on matters occurring in litigation. It has proved difficult to find much useful information about this privilege with respect either to materials that have been filed or to materials that have not been filed. There is no indication that federal courts are prepared to create a federal common-law privilege for comments on matters occurring in federal litigation. The only apparent way to affect state privilege law through the rulemaking process would be to assume that filing makes a difference, and to require filing. An amendment that requires filing would undo not only the recently approved Rule 5(d) amendment, but also undo the current practice in most districts which — under the direction of many local district rules that probably are invalid as inconsistent with present Rule 5(d) — bars filing of discovery materials. This present practice has not generated any observable effects on whatever privileges may be created by the several state laws of defamation. The Advisory Committee concluded that there is no present need to consider these privilege questions further.

The public access question is one that has much occupied the Advisory Committee in recent years. Two proposals to amend protective order practice were published for comment. The proposals would have established procedures for nonparty review of protective orders. After extensive comment and consideration that went to the Judicial Conference, it was concluded that there is no need to undertake modification of current practices. Particularly in light of the lack of any indication of special public-access problems in the many districts that today bar the filing of discovery materials, the Advisory Committee concluded that there is no occasion to explore these issues again.

III Standing Committee Projects

Federal Rules of Attorney Conduct. The Advisory Committee discussion of the project to consider adoption of Federal Rules of Attorney Conduct is described at pages 8 to 17 of the draft October Minutes. The conclusion of the discussion was simple: the subcommittee process for considering these questions is working well, and should continue to work through the problems that have been identified.

Corporate Disclosure. The Advisory Committee discussion of corporate disclosure is summarized at pages 28 to 36 of the draft October Minutes.

Three basic alternative approaches were considered. One, which did not receive much discussion, would involve drafting a uniform federal rule that would require extensive disclosure of information bearing on recusal of a judge. A uniform national rule would provide substantial benefit to litigants who appear in federal courts with some frequency. The difficulty with this proposal is that substantial time and work will be required to craft a good rule. Unless special good fortune should smile on the project, moreover, the need to adapt an extensive-disclosure rule to the lessons of experience could prove difficult to accommodate in the protracted Enabling Act process.

A second alternative is to seek the advantages of national uniformity, detailed disclosure, and flexible response to the lessons of experience by delegating to some other body the responsibility of formulating and adjusting disclosure requirements. One obvious approach would be to adopt a national rule that requires all courts to utilize a disclosure form developed by the Judicial Conference. The Judicial Conference would draw from the experience of its several committees and the Administrative Office of the United States Courts to determine what information is important, what information can be utilized effectively in court computer systems, and how best to gather and use this information. Adjustments could be made quickly in response to developing experience with the kinds of information that are important and with the ability to utilize information.

A third alternative is to adopt a uniform national rule that establishes a very low base line of disclosure and that invites adoption of local rules that require additional disclosure. The likely starting point for this approach would be Appellate Rule 26.1, adapted to the district court circumstances that require variations with respect to such matters as the time for filing and the number of copies. The invitation to adopt local rules could be extended either in the text of the national rule or in the Committee Note. Hints might be given as to the provisions that might be included in local rules, but such suggestions should be approached with reserve. Extensive suggestions would encounter the difficulties that stand in the way of drafting an elaborate national disclosure rule. In addition, turning the matter over to local rulemaking may lead to a period of experimentation in which a wide variety of local rules — developing riffs on the extensive variations already found in local rules — may generate a better foundation for eventual adoption of a uniform national rule. (Of course the prospect of adopting a uniform national rule must encounter entrenched affections for the local rules, as demonstrated by the recent resistance to adoption of a uniform national discovery-disclosure rule.)

Faced with these possibilities, the Advisory Committee asked that a number of drafts be prepared to illustrate the various approaches that might be taken short of attempting a uniform national rule that would require sufficient disclosure. These drafts will, it is hoped, be considered

by the Reporters for the several advisory committees and by the Standing Committee, along with any other drafts that may be proposed.

IV Continuing Projects

The Advisory Committee has three major continuing projects that focus on class actions, discovery, and special masters. The jury-instruction provisions of Civil Rule 51 continue to await consideration. A new project has been launched to consider adoption of simplified procedure rules for some cases. These matters can be summarized briefly.

Class Actions. Civil Rule 23 has been considered since the Judicial Conference, reacting to the report of the ad hoc committee on asbestos litigation, requested the Standing Committee to study the role of class actions in mass-tort litigation. Advisory Committee deliberations have included a complete review of Rule 23, going so far as a draft that would dissolve the familiar categories of "(b)(1)," "(b)(2)," and "(b)(3)" classes. A number of the more modest proposals were published for comment in August 1996. The fruits of these efforts are preserved in the four-volume set of Working Papers published in May 1997. The only rule amendment that so far has emerged from this process is the interlocutory appeal provision, Rule 23(f), which took effect on December 1, 1998. Further work was deferred while the Ad Hoc Working Group on Mass Torts held conferences, considered proposals, and prepared its Report. The Report, delivered punctually on February 15, 1999, recommended creation of an ad hoc Judicial Conference committee that would draw together representatives of the several committees whose experience and competence would bear on development of integrated legislative and rulemaking approaches to mass tort litigation. Because no ad hoc committee has been created, the Advisory Committee plans to renew its consideration of Rule 23. A Rule 23 subcommittee has been formed, charged with considering all aspects of class-action practice that might be approached through rules amendments without complementary legislation. The landscape of class-action practice continues to change in some important respects, but the earlier work will provide a solid beginning.

Discovery. The Discovery Subcommittee continues to work on possible discovery proposals, recognizing that the extensive work that developed the amendments now transmitted to the Supreme Court has identified topics that merit further attention. Discussion of its report is summarized at pages 19 to 28 of the draft October Minutes. The Advisory Committee concluded that the Discovery Subcommittee need not consider further a proposal made during its earlier work that a presumptive age limit be set for production of documents. But the Advisory Committee recommended that the Subcommittee hold open the prospect of adopting a rule protecting against inadvertent waiver of privileges during discovery, in part because of the connection between this problem and the many questions raised by discovery of information preserved in electronic form. There was an extensive discussion of emerging experience with discovery of electronically preserved information. Representatives of the Federal Judicial Center described the development of a project in this area. That project may help to show whether the time has come to consider development of new rules for this area, or whether the most profitable course for the time being is to develop programs to educate judges and lawyers about the possibilities and problems of "electronic discovery." One of the reasons for exercising great caution is that software and hardware continue to evolve at a pace that far outstrips the capacity of the rulemaking process to generate court rules. There is an intimidating

prospect that any rule would be as obsolete at the time of taking effect as the hardware that would have been purchased as state-of-the-art at the time the rule was first developed.

Special Masters. Civil Rule 53 has been on the Advisory Committee agenda for several years. This project was sparked by suggestions from local Civil Justice Reform Act committees, who observed that special masters have come to be used for many purposes that are not contemplated by Rule 53. A detailed draft Rule 53 has been prepared, and served as one source of direction for a two-phase study being conducted by the Federal Judicial Center. A report was made on the first phase of the study. The Advisory Committee concluded that the Rule 53 subcommittee should continue its work, as it will be informed by completion of the FJC study. This discussion is summarized at pages 36 to 39 of the draft October Minutes.

Rule 51. The Criminal Rules Advisory Committee has published a proposal that would authorize a district court to require submission of proposed jury instructions before trial. Consideration of a parallel suggestion for Civil Rule 51 led to the question whether other changes should be made in Rule 51 to express clearly the practices that have grown up without finding any clear expression in the rule. This project has been deferred in the press of other business, but continues to hold a place on the discussion agenda.

Simplified Rules. The October meeting was the first occasion to discuss a new project to develop a set of simplified rules for some categories of cases. The motive for the project is simple. The Civil Rules seem to work well for a wide range of litigation. Great efforts have been made over the years to find ways to improve the rules for the unusually complex or contentious actions in which the many procedural opportunities created by the rules are utilized to impose enormous burdens on the parties and courts. Little attention has been paid to the question whether the rules provide "too much" procedure for simpler actions. The question is whether simplified rules can provide a better procedure for some of these actions.

The core questions posed by a simplified procedure project are daunting. Perhaps the central question is whether it is possible to identify categories of actions in which the simplified rules can be made mandatory. It would be easier — and perhaps much easier — to draft rules that are available only with the consent of all parties. If the rules are made mandatory for some categories of actions, the categories chosen are likely to affect the specific content of the rules. A related question is whether simplified rules would do no more than improve the disposition of actions that would be brought to federal court in any event, or whether they would draw new cases that otherwise would be filed in state court. If the rules would attract new work for the federal courts, an effort must be made to determine whether the new actions are better handled in federal courts than in state courts.

The package of draft rules prepared to illustrate the questions that must be addressed resolved the question of coverage by making application of the rules mandatory for actions seeking only money damages up to $50,000. A surprising number of federal actions would fit into this category. But the amount also would fence out diversity cases, an effect that occasioned extensive discussion.

The illustrative draft assumed that the most promising area for simplifying procedure is in a package of pleading, disclosure, and discovery amendments. The basic approach involves fact

pleading, expanded disclosure, and restricted discovery. Many different approaches might be taken. Many alternative questions were identified, and many more will be uncovered as the project unfolds.

The Advisory Committee discussion of the simplified rules project appears at pages 39 to 45 of the draft October Minutes. There was great enthusiasm for the undertaking, recognizing the difficulties that must be surmounted. Several members urged that many lawyers would find simplified procedures attractive for cases involving hundreds of thousands of dollars. Although the draft would apply the rules to cases demanding specific relief only with party consent, this question will deserve further consideration. It does not seem likely that a fully considered draft can be prepared in time for action at the April 2000 meeting, but the work will be pursued as vigorously as possible. One of the Federal Judicial Center participants suggested that because "we cannot research the future," it might be desirable to develop a pilot project to test such rules as might emerge. This possibility will be evaluated.