To: Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: December 6, 1996

Re: Report of the Advisory Committee on Civil Rules

## *I Introduction*

The Advisory Committee on Civil Rules met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. A brief summary of the topics considered at the meeting is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference changes to conform the Civil Rules to the repeal of the statutory provision that allowed parties that had agreed to trial before a magistrate judge to agree also that the first appeal would be taken to the district court. Part III(A) notes the developing events during the continuing comment period for the Civil Rule 23 proposals that were published in August. Part III(B) describes the progress made to implement the discovery study that was sketched in the May 17, 1996 Report of the Civil Rules Advisory Committee to this Committee.

Several committees of the Advisory Committee were appointed to help focus the work of the Advisory Committee. The committees appointed to address current projects include the Admiralty Committee, Discovery Committee, RAND Report Committee, and Technology Committee. An Agenda and Policy Committee also was appointed.

Early, nonfinal drafts of the RAND report on experience with local plans implementing the Civil Justice Reform Act were discussed. Judge Jerome Simandle, of the Court Administration and Case Management Committee, was present and made valuable contributions to the discussion of means of coordinating the work of the advisory committees and this Committee with the Court Administration and Case Management Committee. It is anticipated that close coordination will be possible during the very brief time that will be available for offering advice to the Judicial Conference. No concrete advice was offered or considered, however, because too many aspects of the enterprise remain work in progress. The Advisory Committee will not be able to consider the recommendations of the Court Administration and Case Management Committee in time for this Report. A supplemental report will be provided once the recommendations are known.

A variety of other topics were considered. Proposals to amend the Admiralty Rules, advanced by the Department of Justice and the Maritime Law Association, were referred to the Admiralty Committee for further review and drafting under the uniform style

conventions. The continuing problem of developing good advice about the Copyright Rules was discussed. Proposals to permit private carrier or electronic service of papers after the initial summons and complaint were referred to the Technology Committee. Note was taken of the Judicial Conference decision to fund a court-appointed panel of neutral experts in the consolidated MDL litigation involving silicone gel breast implants. The Evidence Rules Advisory Committee request for review of proposed Evidence Rule 103(e) was met by discussion and a report of the draft Minutes to the Evidence Rules Committee. Answers were prepared for the quinquennial questionnaire that asks the Advisory Committee to consider its own continuing role and function.

The draft Minutes of the October meeting are attached as an appendix.

## *II ACTION ITEMS*

### *Rules Transmitted for Judicial Conference Approval*

### *Rules 73, 74, 75, 76*

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, Act of October 19, 1996, reshapes the 28 U.S.C. § 636 provisions for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Appeal could be taken to the court of appeals, or, alternatively, the parties could agree at the time of consenting to trial before a magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. This second appeal path has been rescinded, leaving only the path of direct appeal to the court of appeals.

Portions of Civil Rule 73 refer to the former provision for appeal to the district court. Civil Rules 74, 75, and 76 establish the procedure for appeal to the district court. Rule 73 must be conformed to the statute as amended, and Rules 74, 75, and 76 must be abrogated. Portions of Forms 33 and 34 also must be changed to conform to the statutory and rules changes. To conform these rules to the statutory changes, the Advisory Committee recommends the changes shown below in the usual form.

The Advisory Committee also recommends that these changes be transmitted to the Judicial Conference without any period of public comment, with the recommendation that they be sent on to the Supreme Court for submission to Congress. Part I(4)(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure authorizes this Committee to "eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it

determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Parties no longer can consent to appeal from the judgment of a magistrate judge to the district court. Perpetuation of the Civil Rules describing such appeals serves no purpose and may mislead some parties to consent to trial before a magistrate judge for the purpose of also achieving a hoped-for speedy and inexpensive opportunity to appeal "at home." Even if the comment and hearing requirement is excused, conforming amendments can become effective only on December 1, 1997, more than a full year after the statutory change. With comment and hearing, the date would be pushed back to December 1, 1998. Once Congress has made the decision to abolish this means of appeal, the only question for the Enabling Act Process is the technical one of making the right conforming changes. The Advisory Committee believes that the conforming changes are sufficiently clear to justify prompt action.

It is possible that on December 1, 1997, some cases will remain pending before magistrate judges in which the parties have consented to appeal to the district court. There is no need to defer conforming changes for fear of the impact on these cases. The retroactive effect of the statutory change is not a matter to be resolved by court rule. The effect of the conforming rules changes will be governed by the Supreme Court order making the amendments; the usual provision in rules orders is that the changes take effect on December 1 and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 28 U.S.C.A. § 2074(a) provides that changes do not apply to pending proceedings "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies."

**Conforming Changes: Rules 73, 74, 75, 76; Forms 33, 34**

**Rule 73. Magistrate Judges; Trial by Consent and Appeal ~~Options~~**

**(a) Powers; Procedure.** * * * * * A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(~~7~~5).

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**(c) ~~Normal~~ Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(3), ~~unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule,~~ appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

~~**(d) Optional Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge~~

~~of the court and thereafter, by petition only, to the court of appeals.~~

**Committee Note**

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

~~**Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)**~~

~~**(a) When Taken.**~~ ~~When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.~~

~~The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.~~

~~An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.~~

~~Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.~~

~~**(b) Notice of Appeal; Service.**~~ ~~The notice of appeal shall specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the~~

~~appeal is to a judge of the district court. The clerk shall mail copies of the notice to all other parties and note the date of mailing in the civil docket.~~

~~(c) Stay Pending Appeal. Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.~~

~~(d) Dismissal. For failure to comply with these rules or any local rule or order, the district judge may take such action as is deemed appropriate, including dismissal of the appeal. The district judge also may dismiss the appeal upon the filing of a stipulation signed by all parties, or upon motion and notice by the appellant.~~

**Committee Note**

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

~~**Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)**~~

~~**(a) Applicability.** In proceedings under Title 28, U.S.C. § 636(c), when the parties have previously elected under Rule 73(d) to appeal to a district judge rather than to the court of appeals, this rule shall govern the proceedings on appeal.~~

~~**(b) Record on Appeal.**~~

~~*(1) Composition.* The original papers and exhibits filed with the clerk of the district court, the transcript of the proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.~~

~~*(2) Transcript.* Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, the appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall make arrangements for the inclusion of all such parts unless the magistrate judge, upon~~

~~motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.~~

~~*(3) Statement in Lieu of Transcript.* If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of the transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.~~

~~(c) Time for Filing Briefs.~~ ~~Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply.~~

~~(1) The appellant shall serve and file the appellant's brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.~~

~~(2) The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant.~~

~~(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee.~~

~~(4) If the appellee has filed a cross appeal, the appellee may file a reply brief limited to the issues on the cross-appeal within 10 days after service of the reply brief of the appellant.~~

~~(d) Length and Form of Briefs.~~ ~~Briefs may be typewritten. The length and form of briefs shall be governed by local rule.~~

~~(e) Oral Argument.~~ ~~The opportunity for the parties to be heard on oral argument shall be governed by local rule.~~

**Committee Note**

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

~~**Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs**~~

~~(a) Entry of Judgment.~~ ~~When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.~~

~~(b) Stay of Judgments.~~ ~~The decision of the district judge shall be stayed for 10 days during which time a party may petition the district judge for rehearing, and a timely petition shall stay the decision of the district judge pending disposition of a petition for rehearing. Upon the motion of a party, the decision of the district judge may be stayed in order to allow a party to petition the court of appeals for leave to appeal.~~

~~(c) Costs.~~ ~~Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as~~

~~ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.~~

**Committee Note**

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

**Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction ~~and Appeal Option~~**

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An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. ~~Alternatively, upon consent by all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.~~

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" ~~and "Election of Appeal to a District Judge"~~ are available from the clerk of the court.

**Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge~~, Election of Appeal to District Judge~~**

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~~ELECTION OF APPEAL TO DISTRICT JUDGE~~

~~[Do not execute this portion of the Consent Form if you desire that the appeal lie directly to the court of appeals.]~~

~~In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.~~

~~_____ _____~~

~~Date Signature~~

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

## *III Informational Items*

### *A. Rule 23 Hearings*

In August, 1996, proposed amendments to Civil Rule 23 were published for comment. Written comments are beginning to arrive. Three public hearings have been scheduled. The first hearing was held in Philadelphia on November 22, drawing nearly three dozen witnesses. Virtually every feature of the proposed amendments drew extensive comment. The comments ranged from full support for the proposals through suggestions for improvement to strong opposition. Although in one sense the comments reflected themes that had been made familiar during the lengthy process that led to proposal of these amendments, they also provided much ground for further reflection. The specific focus provided by specific proposals is doing much to enhance the process. Further hearings are scheduled for December 16 in Dallas and for January 17, 1997, in San Francisco.

One of the proposed amendments would add a new subdivision (b)(4) to Rule 23, resolving a difference among the circuits on the proper role of classes certified for purposes of settlement only, not for trial. More than two months after publication of the proposals, the Supreme Court granted certiorari in one of these cases, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.), *certiorari granted* ___ 117 S.Ct. ___ (No.96-270, November 1, 1996). It is not possible to anticipate the ways in which the Supreme Court's disposition of this case may affect the shape of any settlement class provision. That matter must await the event.

### *B. Discovery Project*

In reaction to the same forces that produced the Civil Justice Reform Act, Rule 26 was amended in 1993 to provide for the experimental local option of mandated initial disclosure in civil cases. The practices that were subsequently employed by the 94 districts vary widely and are now susceptible of study. From the beginning, it was understood that it would be necessary to analyze the experiences and adopt the best approach as a new national rule.

Also in response to the Civil Justice Reform Act's urging that procedures be discovered to reduce delay and cost in litigation and in response to similar demands of attorneys directed more specifically at the cost of discovery, the Advisory Committee decided to undertake a more comprehensive look at the discovery rules, principally to determine their cost to litigation and to discover paths to reduce the cost without reducing fairness in the resolution of disputes.

The Advisory Committee accordingly decided at its October meeting to address these discovery issues as part of a long-term and comprehensive discovery project that also will include long-standing projects of the Committee to review the grounds for

vacating or modifying Rule 26(c) protective orders, to review the scope of discovery provided by Rule 26(b)(1), and to review discovery abuse.

The Discovery Committee was appointed. A special Reporter, Professor Richard L. Marcus, has accepted appointment for work on the discovery study. The Federal Judicial Center has agreed to undertake a new empirical study of discovery, working in conjunction with the Discovery Committee to plan the proper scope of the study. A conference on discovery is being planned for September, 1997, to attempt to gather as many reform ideas as possible. If these efforts are successful, the October, 1997 meeting of the Advisory Committee will seek to identify promising approaches to be developed by the Discovery Committee for consideration by the Advisory Committee at the spring, 1998 meeting.

It is far too early to speculate on the directions that discovery reform may take. One possible combination, for example, would strengthen and nationalize initial disclosures; permit a limited area of party-directed discovery; and require a formal discovery plan, approved by the court, for more extensive discovery. Many variations on this three-layer, "neapolitan," approach can be imagined.

Because discovery is so important, the Advisory Committee hopes to find changes that are recognized as improvements by judges and by lawyers on all sides of the litigation process. Care must be taken to avoid changes that predictably and systematically work more to the advantage of defendants, or more to the advantage of plaintiffs. At the end of this project, it may be concluded that significant changes are not possible because there is good reason for the substantial controversy that surrounds any proposal. It may instead be concluded that there is no need to reform the discovery rules — that there are no problems that can be cured without incurring undue costs, or that whatever problems may exist can be cured by better use of the discovery rules we now have. Whatever the lessons may be, and whatever proposals for rules amendments may emerge, a thorough study of present experience may help put the broad discovery issues to rest.