MEMORANDUM

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure

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

Date: May 11, 1999

Re: Report of the Advisory Committee on Civil Rules

## I. INTRODUCTION

At its meeting on April 19 and 20, 1999, in Gleneden Beach, Oregon, the Civil Rules Advisory Committee approved recommendations for the adoption of the three rules packages that were published for comment in August 1998. The first package, involving Rules 4 and 12, would regulate service on the United States and the time to answer when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of public duties. The second package, involving Admiralty Rules B, C, and E, along with conforming changes to Civil Rule 14, would adjust these rules to reflect the growing use of admiralty procedure in civil forfeiture proceedings and also to reflect 1993 changes in Civil Rule 4. The third package would amend discovery Rules 5, 26, 30, 34, and 37 to reduce cost and increase the efficiency of discovery, while yet preserving the policy of full disclosure and judicial discretion in case management.

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Service Rules Package.

The first package, involving service on the United States, was initiated at the suggestion of the Department of Justice to provide service on the United States and 60 days to answer a complaint against an individual sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. This change would make the practice essentially the same as when a United States officer is sued in an official capacity. The Committee's recommendation was adopted without any substantial opposition.

Admiralty Rules Package.

The proposals to amend the Admiralty Rules grew from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been employed for civil forfeiture proceedings. With the dramatic growth in land-based civil forfeiture proceedings, the need to adopt changes making some distinctions between maritime and forfeiture procedures became apparent. The process of considering these changes also led to a number of other proposed changes, including some designed to reflect the 1993 reorganization of Rule 4.

These proposals were developed over a long period, beginning with groundwork done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Committee's Admiralty Rules Subcommittee. When the Committee finally discussed the proposals in October 1997, the chair of the Maritime Law Association Rules Committee and a representative of the Department of Justice attended and participated.

The Committee is pleased that lawyers using the Admiralty Rules seem satisfied with the proposed changes. Several comments received in response to publication indicated minor changes that the Committee has made. Through comment, the Federal Magistrate Judges Associations endorsed particularly the style changes as "a significant improvement" that "provide clarity."

Discovery Rules Package.

The discovery package has received the most attention from the public. The Committee received over 300 comments and heard testimony from over 70 witnesses during 3 hearings in December 1998 and January 1999. While the comments did not reveal much that was new to the Committee, the Committee did learn of minor deficiencies which have prompted some further changes that are described in more detail below. In substance, the package remains as published in August 1998.

Discovery Rules Process.

Before undertaking to present the specific proposals, I believe that it would be useful both to the Standing Committee and to those who may consider this package later to be given a brief background of the process because the Committee believes that the process pursued in connection with the discovery rules package created an unusually well-informed Committee that acted most selectively to adopt a modest, balanced package to address identified problems in a manner comfortable to the practicing bar and to the courts. While the Committee has received the usual criticisms about various of its decisions — often competing criticisms — it has also received an unusual amount of support. From past experience, the Committee usually hears mostly from those offering criticism and not those offering support.

The discovery project formally began in the fall of 1996. For many years before then, the Committee had received complaints from the bar and the public that discovery costs too much. During the same period, the American College of Trial Lawyers advanced a proposal that had been advanced earlier by the American Bar Association Section of Litigation and by other bar groups to limit the scope of discovery to meet these concerns. In addition, the Civil Justice Reform Act directed the Judicial Conference to examine discovery and initial disclosure issues as part of its response to Congress, and in its final report to Congress on the Civil Justice Reform Act, the Conference called on the Committee to examine whether local variations of disclosure should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be put into national rules. With all of these stirrings, the Committee determined to focus on the architecture of discovery rules and determine whether modest changes could be effected to reduce the costs of discovery, to increase its efficiency, to restore uniformity of practice, and to encourage the judiciary to participate more actively in case management. The Committee determined expressly not to review the question of discovery abuse, a matter that had been the subject of repeated rules activity over the years.

A discovery subcommittee was formed, and Judge David F. Levi was appointed chair and Professor Richard L. Marcus, special reporter. The subcommittee set to work immediately, establishing the framework for a conference that was held in January 1997 with a group of litigators drawn from a wide array of practice areas and locations. The views expressed at that conference helped shape the planning for a major conference held at Boston College Law School in September 1997.

The Boston College conference, to which the Committee invited a most distinguished group from the academic community, the bench, the bar, and representatives from various bar associations, was particularly successful. The Committee received formal responses not only from some academics, but also from the American Bar Association Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At the Committee's request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery and prepared a comprehensive report of its findings. The Committee also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice. The RAND Institute also prepared a report. Much of this material was printed in a symposium issue of the Boston College Law Review, and copies of this issue were provided to the members of the Standing Committee last year.

In all, the Committee received a wide range of information, including that which is summarized in connection with our formal request for comment when publishing the proposed rules package in August 1998. Important to the package, the Committee learned that in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs. In short, the discovery rules are relevant to only a limited portion of cases in which discovery is actively employed by the parties. In these cases, however,

discovery was often thought to be too expensive, and concerns about undue expense were expressed by both plaintiffs' and defendants' attorneys. The Committee learned that the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed. The attorneys responding to the FJC survey indicated overwhelmingly — 83% — that they wanted changes made to the discovery rules.

At the Boston conference in particular, the Committee heard a nearly universal demand from the bar for national uniformity in discovery rules and a profound wish that the judiciary could be encouraged to engage in discovery issues earlier in each case and more completely. Both anecdotal and survey data seem to demonstrate that early judicial supervision of discovery reduces the cost of discovery and increases the parties' satisfaction with it.

Finally, from the FJC study, the Committee learned that some form of mandatory disclosure is used in a majority of districts. Even in "opt-out districts," the courts or individual judges have often imposed some form of mandatory disclosure. The FJC survey revealed that attorneys who have practiced disclosure are highly satisfied with it. Moreover, the Committee learned that an earlier expressed fear of satellite litigation with respect to disclosure was unfounded.

The discovery subcommittee, drawing on the matters presented at the conferences, on the data generated by the Federal Judicial Center and the RAND Institute, and on published legal literature, developed over 40 possible revisions to discovery rules for consideration by the Committee. The Committee narrowed this list and instructed the subcommittee to draft proposed amendments to implement specific proposals. In considering the various proposals offered by the subcommittee, the Committee engaged in debate at the highest level. Proposals that were thought to risk damage to procedural foundations were discarded, and proposals that unnecessarily favored particular interests were discarded. A balanced approach was sought in which more focused discovery could be employed, preserving the underlying purpose of discovery to provide the parties with full disclosure of opposing parties' positions in the litigation. When the vote in Committee on a proposal was close, the Committee chose not to proceed with the proposed change but elected rather to discuss the proposal further until a substantial majority in one direction or the other could be achieved. In the end, every proposal adopted for presentation to the Standing Committee in June 1998 was passed by a substantial majority. Through this process, the Committee satisfied itself that its recommendations represented changes that were modest, balanced, and likely designed to improve the efficiency and fairness of the rules.

As important to the immediate concerns that faced the Committee, the Committee also kept its focus on long-range discovery issues that will confront it in the emerging information age. The Committee recognized that it will be faced with the task of devising mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation. While the tasks of designing discovery rules for an information age are formidable and still face the Committee, the mechanisms adopted in the current proposals begin the establishment of a framework in which to work.

Committee Response to Comments.

Following publication, public hearings, and the receipt of numerous comments, the discovery subcommittee proposed modest changes to the Committee to various of the rules to reflect deficiencies that had been discovered. At its April 1999 meeting in Oregon, the Committee again discussed each proposal and either approved or rejected it by unanimous vote or by a large majority.

In addition to a review of the changes proposed by the discovery subcommittee, the Committee independently debated motions made by members to review earlier substantive decisions of the Committee. While the debates on these motions uncovered again all of the policy considerations for and against, the Committee voted to remain with the proposals that it had submitted to the Standing Committee in June 1998. Nevertheless, in order to present fairly the views of the members making these motions, I am presenting the opposition views to give the Standing Committee a more complete background.

Professor Rowe's Motion.

Professor Rowe moved to abandon the proposed change to Rule 26(b)(1) relating to the scope of discovery. Rule 26(b)(1) now defines the scope of discovery to include any matter "relevant to the subject matter involved in the pending action." The Committee's proposal would limit the presumptive scope to include any "matter relevant to the claim or defense of any party." At the same time, the court would be given the power, for good cause shown, to authorize discovery to the present "subject matter" limit. The proposal would change the balance between attorney-controlled discovery and court-controlled discovery, but the overall scope of discovery authorized by Rule 26(b)(1) would not be altered.

Professor Rowe's motion to abandon this proposed change was presented to the Committee in written form, a copy of which is attached to the minutes prepared by the reporter. Professor Rowe noted that twenty years ago the Committee rejected a proposal to narrow the scope of discovery by amending Rule 26(b)(1) to authorize discovery of matters relevant to "the claim or defense." He noted that the Committee then felt that the change would substitute one general term for another and therefore would invite litigation. He urged that the Committee recognize this wisdom.

While he acknowledged that the proposed change was somewhat different, he concluded that it "makes no improvement in clarity." He argued that the change will lead to satellite litigation, "stonewall resistance," and overpleading. He observed that support for the change is spotty and that other means to curb discovery abuse are preferable, particularly by emphasizing the "burdensomeness limits" of Rule 26(b)(2) and the availability of protective orders under Rule 26(c).

Following debate on Professor Rowe's motion, four members voted in favor and nine against. Thus, the Committee, by a substantial majority, elected to continue with the original proposal presented to the Standing Committee in June 1998. The views of the various members, both for and against, are ably described in the minutes of the meeting prepared by the reporter.

After the vote was taken, Professor Rowe commended the Committee for the thoughtfulness and thoroughness of the debate.

Mr. Lynk's Motion.

In addition to Professor Rowe's motion, Mr. Lynk made a motion to delete the proposal that affirms the court's authority to require a party to pay for excessive discovery. In the Committee's proposal, which originally was contained in Rule 34(b) and now has been moved to Rule 26(b), the Committee makes explicit the court's implicit authority to condition discovery which exceeds the limitations of Rule 26(b)(2)(i), (ii), and (iii), on the payment of reasonable costs of the discovery. The limitations of Rule 26(b)(2)(i), (ii), and (iii) are against excessive discovery. The Committee acted on the assumption that even now the courts have the authority to refuse excessive discovery or implicitly to condition it on the payment of costs.

Mr. Lynk moved to delete the proposed change, arguing that there was no need to add an explicit provision to the rules because judges already have the authority. By making the authority explicit, he maintained, the change would encourage courts to permit excessive discovery on the condition that costs be paid, thus undermining the limitations of (i), (ii), and (iii). He also maintained that moving the cost-bearing provision from Rule 34(b) to Rule 26(b)(2) only heightened this encouragement by applying it more clearly to all discovery. In the end, he argued, the result would be differential justice: the party who cannot afford to pay will not get this discovery, while the one who can pay — who may be eager to pay — will get the discovery.

Again, the Committee debated the motion at length, reviewing the policy considerations for and against, and following debate, five members voted in favor and eight voted against the motion. Accordingly, the Committee again elected to remain with its original proposal to the Standing Committee, subject to the change of moving the provision from Rule 34(b) to Rule 26(b).

Committee Vote on Package.

After all of the recommendations of the subcommittee were debated and voted on and after the two additional motions were debated and voted on, the Advisory Committee voted unanimously to recommend the attached discovery package for adoption.

Personal Observations.

On a personal note, as chair of the Committee, I am particularly pleased with the thorough process that the Committee followed in making its recommendations, and I am proud of the sensitive judgment that it exercised. I do not recall Committee action ever having been taken with as much information as this Committee considered and with the depth of debate over the policy considerations. I would find it difficult to believe that this Committee — or another — could devise a significantly improved overall package. As I have already complimented the Committee, this was democratic action at its best.

I now proceed to summarize in detail the items requested for action by the Standing Committee. As already noted, Part II describes the rules proposed for Judicial Conference approval and Part III describes the rules proposed for possible publication.

*II Action Items: Rules Transmitted for Judicial Conference Approval*

**A. Individual-Capacity Actions Against Federal Employees: Rules 4, 12**

The proposed amendments to Rule 4 and Rule 12 were published in August 1998. The amendments are designed to do three things. Rule 4(i)(2) is amended to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Rule 4(i)(3) also is amended to ensure that an action is not dismissed for failure to serve all the persons required to be served under Rule 4(i)(2). Rule 12(a)(3) is amended to provide 60 days to answer in these individual-capacity actions, just as when a United States officer is sued in an official capacity.

The public comments and testimony suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap Report. Some of the comments also suggested that the dual-service requirement, and the extended time to answer, should be made available in individual-capacity actions against state employees. The Advisory Committee had considered this issue in drafting the published proposal. On reconsideration, the Advisory Committee concluded again that the time has not come to expand these provisions beyond the United States and its officers and employees.

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