June 10, 1965

To the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States:

STATEMENT ON BEHALF OF THE
ADVISORY COMMITTEE ON CIVIL RULES

I. The Advisory Committee Recommends Adoption of the Amendments Appearing as Part II of "Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts" (March 1964), as Revised

The Standing Committee on Rules of Practice and Procedure in March 1964 published and circulated to the bench and bar a Preliminary Draft of various Civil Rules amendments, inviting comments and criticisms which were to be submitted by April 1, 1965. Part II of the Preliminary Draft set forth amendments originated by the Advisory Committee on Civil Rules. At its meeting on May 14, 15, and 17, 1965, the Advisory Committee considered the communications received from the bench and bar and also reexamined various points at the suggestion of members of the Committee. After full discussion, the Advisory Committee voted a number of changes of text and notes.

The Advisory Committee now recommends to the Standing Committee the adoption of Part II of the March 1964 Preliminary Draft, as revised. This material appears as Exhibit "A" annexed hereto.

For the further information of the Standing Committee, circular letters from the reporters to the Advisory Committee, dated April 21 and April 28, 1965 (with enclosures), commenting on communications received,[1] are also presented. These are annexed hereto as Exhibits "B" and "C." Also annexed, marked Exhibit "D," is a statement by Mr. John P. Frank, a member of the Committee, dissenting from the proposal on Rule 19, and from part of the proposal on Rule 23.

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[1] Additional communications were received after April 28, 1965.

Summary Statement of the Civil Rules Amendments Recommended for Adoption[2]

(A) Amendments Regarding Joinder of Parties and Claims

Conscious of the increased frequency and importance of multi-party, multiclaim litigation, the Advisory Committee shortly after its organization in 1960 commenced a review of the relevant Rules. The proposals set forth below are the result of extended consideration by the Committee.

1. Joinder of Persons Needed for Just Adjudication [Rule 19; also Rule 4(f), 12(b), 13(h), 41]. Present Rule 19 (necessary joinder) is improved to meet two major criticisms, namely, that the Rule has a number of textual deficiencies or traps, and that it is cast in an abstract style not expressive of the functional problems encountered. The revision eliminates the textual difficulties, and approaches the problems more realistically.

New subdivision (a) describes by reference to stated criteria the persons who ought to be brought into the action if they are subject to service of process and their joinder will not destroy subject-matter jurisdiction. If a person whose joinder would otherwise be required under (a) cannot be made a party because he is not amenable to service or his joinder would deprive the court of subject-matter jurisdiction or would make the venue improper (assuming objection on that ground), then the court is to consider the factors set forth in new subdivision (b) as a basis for determining whether the action can fairly be retained, or should rather be dismissed. The criteria of (a) and the factors mentioned in (b) are drawn from the better-reasoned decisions.

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[2]The summary omits various particulars and matters of detail.

The revision has taken advantage of an important scholarly literature running back for almost a decade. The substance of the revision has already been adopted in New York and Michigan. It has been accepted as the correct approach in the recent work of the ALI study of the division of jurisdiction between State and Federal courts.

The draft circulated to the public caused some misunderstanding because of the introduction of a new term, "contingently necessary." That term has been eliminated in the interest of greater clarity. The term "indispensable" now appears in the revision in a conclusory sense: a person is regarded as indispensable when he cannot be made a party and, upon consideration of the factors listed in (b), it is determined that in his absence the action should be dismissed.

Comment: The dissenting view objects to the revised Rule on the ground that there is no abundance of cases which have been wrongly decided under the present Rule. As the present Rule does not pose the cogent questions, it is hard by reference to the Rule to judge of the correctness of the decisions under it. When the proper questions are addressed to the cases, a number appear presumptively erroneous or questionable, as the analytical writing shows at length -- we say "presumptively" because the opinions often do not come forward with the crucial facts. There is every reason to believe that litigants as well as courts will do a more efficient job when the Rule puts the proper questions and establishes standards for their decision.

As above noted, "indispensability" is not discarded in the revised Rule but is expressly recognized. Under the better-reasoned decisions, the holding that a person is "indispensable" is a conclusion reached upon an assessment of the factors which are referred to in subdivision (b) of the revised Rule.

The problem of joinder could be made less troublesome by increasing the territorial range of service, and by relaxation of requirements

of subject-matter jurisdiction and venue, for then more persons would become amenable to joinder in an action. But it is not known when, if ever, such changes (which must in part be made legislatively) will come; and even under a relaxed system, such as that advocated by the ALI, a Rule on the lines proposed remains essential -- as indeed the ALI proposal itself indicates.

2. Class Actions; Derivative Actions; Actions Relating to Unincorporated Associations. -- (a) Class actions [Rule 23]. The present provision on class actions relies on such terms as "joint" right, "common," etc. to define its component categories. These terms have been found increasingly unsatisfactory. The revision uses a more practical set of definitions. It also pays more attention to problems of management and procedural fairness, including questions of notice to the class.

Subdivision (a) states the requisites of any class action, including the requirement that the representative parties will fairly and adequately protect the interests of the class.

Subdivision (b) goes on to describe three categories of class actions.

Illustrative of the first category [(b)(1)(A) and (B)] is an action against a municipality to declare a bond issue invalid or to condition or limit it (where separate actions by individuals would create a risk of inconsistent adjudications establishing incompatible standards for the defendant); or an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society (where in case of individual litigation it would be impractical, and perhaps impossible, to confine the effects of an adjudication to the particular plaintiff).

Illustrative of the second category [(b)(2)] is the typical civil-rights litigation (where the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive, or corresponding declaratory relief with respect to the class).

The third category [(b)(3)] is a relatively flexible one. It envisages numerous persons who have been affected in a more or less similar way by the acts of another; typically these persons have less cohesiveness as a group than the persons constituting the classes in the prior categories. Under the revised Rule, it depends on the particular facts whether a class action promises such advantages, on balance, that it ought to be maintained -- advantages of achieving economies of money, time, and effort, of promoting uniformity of decision, and, in some instances, of enabling small people with small claims to vindicate their rights when they could not otherwise do so.

The stated requirements of the (b)(3) category are that the court shall find that the questions common to the members of the class predominate over questions affecting only individual members, and that a class action is superior to other available devices for the adjudication of the controversy. Matters pertinent to the findings are then listed including the interest of members of the class in controlling their own litigations, and the desirability or undesirability of concentrating the litigation of the claims in the particular forum.

Illustrative of the (b)(3) class action would be some (but not all) cases of fraud perpetrated on a group; some (but not all) cases of anti-trust violations injuring a group. As the Note states, "mass" personal injury situations would ordinarily not be appropriate for handling by class action.

If the court determines that a (b)(3) class action is to be maintained, it is still required under subdivision (c)(2) to direct to members of the class the best practicable notice, including individual notice to all members who can be identified through reasonable effort, advising them of their right to be excluded from the scope of the action upon request, and, if they should not request exclusion, of their right to enter an appearance through counsel and of the fact that the judgment will embrace them.

The judgement in a class action in any of the categories, whether or not favorable to the class, embraces the membership as defined pursuant to subdivision (c)(3). In a (b)(3) action the judgment includes those to whom the notice was directed, excepting those who requested exclusion or who are ultimately found not to be members of the class. The present "spurious" category is eliminated and with it the anomaly of a so-called "class" action in which the judgment theoretically includes only the specific parties and intervenors.

Although the new Rule regulates the content of the judgment to be entered in the action, it does not attempt to predetermine the res judicata effect of the judgment, which, according to established principle, can be tested only in a subsequent action.

Subdivision (d) provides for various orders in the conduct and management of a class action including discretionary orders for notice to the class during the proceedings. Subdivision (e) covers mandatory notice and court approval upon dismissal or compromise of a class action.

The more significant changes of the published draft voted by the Advisory Committee at its May meeting improve and tighten the (b)(3) provision, and clarify the notice procedure in initiating a

class action of that type. Members of such a class are now given an unqualified right to "opt out" of the action, in contrast to the qualified right given them in the published draft.

Comment: The proposed (b)(3) class action is located at a growing point in the law. It is intended as one possible means of dealing effectively with litigation involving large numbers of persons. Apart from the standard cases covered by (b)(1) and (b)(2), is this kind of litigation always to be carried out in separate units, or can it in some instances and under appropriate safeguards be carried out under the umbrella of a single action? If separate litigations are always required, then access to the courts may be put out of reach for those whose individual stakes are low or who by reason of poverty or ignorance will not go it alone.

At this moment, the response to this whole problem is the "spurious" class action which is objectionable because it does not distinguish cases suitable for class treatment from those unsuitable, and because it has the anomalous feature of the confinement of the judgment mentioned above. The Committee has tried to use the experience with the "spurious" action to develop something better.

The dissenting view would accept (b)(1) and (b)(2) and leave it at that, eliminating (b)(3). This would destroy altogether the growing point in the law. It would be a step backward from the existing position. It would be a retreat, in the face of an insistent demand and need for going forward to develop improved methods of handling disputes affecting groups.

This retrogressive view goes on the mistaken assumption that (b)(3) is merely the "spurious" action by another name with the judgment extending more broadly. Thus it is assumed that mass

accident and other personal injury cases would automatically qualify under (b)(3).[3] But (b)(3) is far more restrictive than the present "spurious" provision; as already indicated, the accident and like cases in all likelihood would not qualify -- among other reasons, the individuals' interests in controlling their own litigations and in pressing their claims in forums of their own choice would be found dominant. A case of "fraud by prospectus" might be quite another thing, as would a case of small individual interests where there could be little concern for separate control of lawsuits. Subdivision (b)(3) directs attention to the question, Is the class action device superior to other procedural possibilities for this particular state of facts?, and only when the court makes findings in the affirmative does a class action lie.

The dissenting view acknowledges that the revision "greatly improves the devices to protect the class from abuse," but suggests that somehow this will not apply to (b)(3) cases. But major protective devices in the Rule (see subdivision (d)) apply to all categories, and there are further protective devices applicable to the (b)(3) class (see subdivision (c)(2)). The alleged "corruption potential" and possibilities for improper solicitation under (b)(3) are not materially different from the abuses that can arise in standard class actions, shareholders' derivative actions, and today's "spurious" actions; the Committee believes that such abuses could be checked if they should occur, and that fear of them should not stand in the way of the reform.

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[3]Reference is also made to "wage'hour" cases but these are covered by special legislation having a special history. See 52 Stat. 1060, 1069 (1938); 61 Stat. 84, 87-88 (1947); 29 U.S.C. §216(b); Sen. Rep. No. 48, 80th Cong., 1st Sess. (1947), pp. 49-51.

Finally it is claimed that the liberties of class members are being invaded. Consider the case which is supposed of a class member who receives the initial notice that action has been brought on behalf of the class. If he requests exclusion for the purpose of bringing his own action or otherwise, he will be excluded. He may, if he chooses, appear in the class suit by counsel. If he does nothing, having been advised by the notice of the consequences, he will still fare better than he does today when he does not act -- he will get fair representation in the action. Throughout he has a better range of choices than class members in the standard, well-accepted class actions. As to the possibility that notice will not be received, (c)(2) requires the best practicable notice, and in the end constitutional standards of due process must be complied with or the member will not be bound by the judgment. Again we are dealing with a member who has not acted on his own, and who today might be left entirely in the cold without any representation.

(b) Derivative actions [Rule 23.1]. The published draft carried forward the present provisions of Rule 23(b) with certain additional material. The correspondence showed the need for corrections in this material. Instead of stating as the published draft did, that the derivative plaintiff must adequately represent the corporation (inapposite because the corporation is represented separately in the action), the improved draft says that the plaintiff must adequately represent the interests of shareholders similarly situated. The reference back to new Rule 23(d) (class actions: orders in conduct of action) has been eliminated because much of 23(d) is not relevant and the rest is subject to misconstruction as applied to a derivative action. Instead the Note calls attention to the court's inherent power to provide for the conduct of the proceedings and to require any appropriate notice to shareholders.

(c) Actions relating to unincorporated associations are covered by Rule 23.2.

3. Intervention of Right [Rule 24]. The main purpose of this amendment is to correct a paradoxical situation created by reading "is or may be bound" appearing in present Rule 24(a)(2) as referring to res judicata in the strict sense. On this reading, if a member of the class demanded intervention in a class action on the ground of inadequacy of representation, he might be met with the argument that if the representation was in fact inadequate, he would not be technically "bound" by the class judgment, whereas, if the representation was adequate, there was no basis at all for intervention. But if the class member could establish inadequacy of representation with sufficient probability, he should not be put to the risk of a judgment which included him by its terms, and be obliged to test the judgment by collateral attack. The effect of the amendment is to provide that if a person who would be affected in a practical sense by the disposition of an action is not joined as a party, he has a right to intervene unless he is adequately represented by an existing party.

4. Joinder of Claims in Multiparty Cases [Rule 18(a); also Rule 20(a)]. Present Rule 18(a) governing joinder of claims contains a confusing internal reference to other Rules dealing with joinder of parties. The amendment restores the principle of pleading that -- whether or not there are multiple parties in the action -- a party asserting a claim may join with it any claim, legal, equitable, or maritime, that he may have against the opposed party. (The amendment treats only of pleading: claims properly joined as a matter of pleading may still be separated for purposes of trial. Also, the amendment is without prejudice to the problems of subject-matter jurisdiction or venue which may arise as to particular claims.)

(B) "Foreign" Amendments[4]

1. Proof of Official Record [Rule 44]. The chief purpose of this revision is to set up a procedure for qualifying foreign official records for admission in evidence which will accommodate to the practical and legal situations found in the foreign countries from which the records emanate. For example, the present rule assumes that the foreign official having custody of the record is empowered to attest it: in some foreign countries that is not so. The present rule assumes that U.S. consular officials have data available from which they can easily certify the authority of the foreign attesting official: sometimes that is not the case. The revised rule takes better account of the actual conditions. It parallels Article V of the Uniform Interstate and International Procedure Act adopted by the Commissioners on Uniform State Laws.

2. Determination of Foreign-Country Law [Rule 44.1]. This new rule, which is similar to Article IV of the Uniform Act, clarifies and codifies in brief compass the pleading, proof, and determination of foreign-country law.

(C) Miscellaneous Amendments

1. Trial Court's Power to Grant New Trial Motion on Ground Not Stated in Motion [Rule 59(d)]. There is authority construing Rule 59(b) and (d) narrowly and holding that the trial court may not grant a new trial motion, timely served, on a ground not stated in the motion but believed to be sound by the court, if the court's order is

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[4]Developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure.

made more than ten days after entry of judgment. These authorities are overruled by the amendment, and the court's power is confirmed. The amendment supplements present subdivision (d) which empowers the court to grant a new trial on its own initiative within the ten days.

As published, the proposal would also have permitted the moving party to apply to the court for permission to amend a pending new-trial motion after the tenth day to include new or different grounds. The need for this change in the Rule is minimized by the change described in the preceding paragraph. (See also the proposal of the Advisory Committee on Appellate Rules to amend Rule 73(a), second sentence, to codify recent Supreme Court cases and prevent "entrapment" of a party who relies on the trial court's assurance that he has made a timely post-verdict motion which would terminate the running of the time for taking an appeal.)

2. Waiver of Dilatory Defenses Omitted from Pre-Answer Motion, etc. [Rule 12(g), (h)]. This amendment resolves a doubt in the interpretation of the Rule. Where a defendant prior to answer makes a Rule 12 motion (e.g., to dismiss for failure to state a claim) and fails to join any "dilatory" defense (improper venue, lack of personal jurisdiction, insufficiency of process or of service thereof) which is then available to him, it is now made clear that the omitted dilatory defense is waived and out of the case; it cannot be raised anew in the answer. Consonant with this is the further provision that if a dilatory defense is not waived in the manner just indicated, it is nevertheless waived if not made by motion, or in the answer, or in an amendment of the answer allowed as a matter of course under Rule 15(a). The amendment thus aims at consolidated, early assertion and consideration of defenses not going to the merits.

3. Practice on Preliminary Injunctions and Temporary Restraining Orders [Rule 65(a), (b)]. In line with sound equity practice, it is provided that the court may order the trial on the merits to be advanced and consolidated with the hearing of an application for a preliminary injunction; even apart from consolidation, evidence received on the preliminary injunction becomes part of the trial record and need not be repeated at the trial. With regard to temporary restraining orders, it is indicated that informal notice is preferable to none; and that such an order is not to be granted without some notice unless it appears that irreparable injury will result before a hearing can be held and counsel for the applicant certifies the efforts he has made to give notice and the reasons why notice should not be required.

4. Relation Back of Amendment Changing Party Defendant [Rule 15(c)]. Injustice has arisen in cases where a plaintiff names the wrong party defendant and the mistake is not discovered until the limitations period has run, for it has been held that an amendment introducing the proper defendant does not relate back. Under carefully guarded conditions of fairness to the party introduced by amendment, relation-back is now provided for. There is a special paragraph dealing with situations in which mistakes are made in naming Government agencies as defendants.

5. Interpreters [Rule 43(f)]. The amendment authorizes the court to appoint interpreters (including interpreters for the deaf), to fix the compensation, and to direct its payment and ultimate taxation as costs.

6. Alternate Jurors [Rule 47(b)]. In harmony with a proposed change in the Criminal Rules, this amendment would authorize as many as six alternate jurors in civil cases.

It is understood that the Advisory Committee on Criminal Rules is suggesting that the Government and defendant shall be permitted to agree on a jury of less than twelve. This possibility already exists in civil cases under Civil Rule 48.

Further, the Advisory Committee on Criminal Rules suggests that, by agreement, alternate jurors be permitted to replace jurors who are disabled or disqualified after the jury retires. The feeling in the Civil Committee is that such a provision will be availed of so infrequently in civil cases as not to warrant inclusion in the Civil Rules.

7. Application of Rules in U.S. District Court for District of Columbia [Rule 81(a)(1)]. Extension of the application of the Rules to probate proceedings in the U.S.D.C.D.C. is proposed by the Advisory Committee in response to a request by the judges of that court. Other changes reflect the fact that adoption proceedings are no longer within the court's jurisdiction, and "lunacy" proceedings are now called "mental health."

8. Rescission of Special Copyright Rules [Rule 65(f), 81(a)(1); Proposed Order of Court]. Under the Copyright Law of 1909, the Supreme Court was given a special rulemaking power regarding actions for copyright infringement. This statutory provision was repealed in 1948, in the light of the general rulemaking power conferred on the Court by the Rules Enabling Act of 1934.

The Special Copyright Rules as promulgaged by the Court in 1909 (with an amendment of 1939) still exist, although in all other respects the practice in copyright cases is governed by the Civil Rules. The Special Rules contain, first, a peculiar pleading requirement about annexing the works in suit to the pleadings. This, it is agreed, is unnecessary; the Civil Rules cover the matter of exhibits adequately. Second, the Special Rules set forth a procedure implementing the provision of the Copyright Law which permits

impounding of allegedly infringing works and other things as an interlocutory remedy. The procedure laid down is objectionable: it is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity for hearing could feasibly be provided.

Accordingly it is proposed to rescind the Special Copyright Rules, and to treat impounding under the Copyright Law as a form of provisional injunctive relief under Rule 65 with the discretion and safeguards there provided. The copyright bar is insistent that the procedure for impounding be uniform throughout the country and that a way be open to deal with fly-by-night defendants who may disappear if given advance notice. Rule 65 is a uniform national regulation and in appropriate cases permits temporary relief without advance notice to the defendant.

Note. A bill for the general revision of the Copyright Law has been introduced in the present session of Congress and hearings on it have begun.

II. The Advisory Committee is Continuing Work on Revision of the Discovery Rules

The most important piece of business now engaging the attention of the Advisory Committee is revision of the Rules on discovery including the Rule governing the pretrial conference. One meeting of the Committee was wholly devoted to this subject, and part of the last meeting was also given over to it. It will be recalled that in aid of the Committee's work an extensive empirical study has been carried out by the Columbia Law School's Project for Effective Justice.

B. K.

A. M. S.