COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

June 14, 1979

To: Judge Roszel C. Thomsen, Chairman, and
Members of the Committee on Rules
of Practice and Procedure

From: Walter R. Mansfield, Chairman, Advisory
Committee on Civil Rules

On June 6, 1979, Joseph F. Spaniol sent you a copy of our Committee's Final Draft of Proposed Amendments to the Federal Rules of Civil Procedure, dealing principally with discovery. Except for a few proposals unrelated to discovery, the Draft represents the end-product of our rather extensive review of the subject of discovery abuse. Judge Thomsen and Professor Ward are fully familiar with the nature and extent of our study.

In the course of our deliberations we considered but eventually withdrew various other proposals, some after they were submitted to yourselves and circulated to the bench and bar for comment. Since the Final Draft does not contain any comment or discussion with respect to these other proposals our Committee believes that it would be helpful to members of the Standing Committee to have this informal summary of the background of our final recommendations and the reasons for withdrawing or limiting some of the earlier proposals. That is the purpose of this memorandum. Of course, some members of the Advisory Committee may have relied on different reasons

or combinations of reasons from those relied upon by others for each position taken. However, we thought it would perhaps be useful to the Standing Committee to mention some of the reasons considered in reference to each specific rule, sometimes with brief attribution to commentators, in view of the excellent response we received from bar and bench.

By way of background, in March, 1978, our Committee submitted a Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure. The Preliminary Draft had an unusual background. It was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by a Special Committee for the Study of Discovery Abuse of the Section of Litigation of the American Bar Association [the ABA Special Committee]. In October, 1977, the ABA Special Committee published and circulated to the bench and bar its recommendations for amendments to Rules 5, 26, 28, 29, 30, 31, 33, 34, and 37 in a document entitled Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation American Bar Association [ABA Report].

The Advisory Committee considered the recommendations of the ABA Report at its meetings in December, 1977, and January, 1978, at the latter of which the recommendations were explained by the late Paul R. Connolly, Esq., of the ABA Special Committee. We concluded that the recommendations of the ABA Report were worthy of submission to the bench and bar for comment, with two exceptions:

(1) The ABA Report proposed to amend Rule 26(b)(1) [Scope of Discovery; In General] by eliminating the term "relevant to the subject matter" and substituting therefor "relevant to the issues raised by the claims or defenses of any party." The Advisory Committee proposed instead to eliminate

"subject matter," which had been criticized by the ABA Special Committee as encouraging "sweeping and abusive discovery," and to have Rule 26(b)(1) read "relevant to the claim or defense...." A Committee Note in the Preliminary Draft explained its disagreement with the ABA Special Committee and invited the views of the bench and bar.

(2) The ABA Report proposed to amend Rule 33(a) by limiting to 30 the number of questions that could be asked by written interrogatories without leave of court. The Advisory Committee proposed instead to amend Rule 33(a) to allow each district court to decide by local rule what, if any, limitations to impose on the number of questions. The Committee again noted its disagreement with the ABA Special Committee and invited the views of the bench and bar.

In addition to the proposed amendments suggested by the ABA Special Committee, the Advisory Committee proposed amendments to Rules 4, 32 and 45 that were unrelated to the concerns of the ABA Special Committee.

The Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure was circulated under date of March 31, 1978, with a request for responses not later than July 1, 1978. A substantial number of individuals and organizations asked for added time for comment, and the date was extended to November 30, 1978. Voluminous comments, reports and suggestions, some very extensive and thorough, were received from judges, bar associations, lawyers, professors of law and others. Public hearings were held for two days in Washington and Los Angeles in October and November, 1978, at which approximately 25 representatives, some appearing on behalf of bar associations or other groups, expressed their views with respect to the proposals. In the meantime the Advisory Committee

also had the benefit of an empirical analysis made by the Federal Judicial Center, entitled Judicial Controls and The Civil Litigative Process: Discovery, based on a detailed study of more than 3,000 cases selected in six federal district courts.

The Advisory Committee met in December, 1978, and January, 1979, to consider the public response. The result of its further deliberation was the complete withdrawal of a number of the amendments proposed in the Preliminary Draft. A Revised Draft was published and circulated in February, 1979. During the ensuing months more voluminous comments were received from bench and bar by members of the Advisory Committee and discussed at a meeting on May 31, 1979, resulting in a few further revisions that are reflected in the Final Draft. Neither the Revised Draft nor the Final Draft, however, explain the reasons for withdrawal of some of the amendments proposed in the original Preliminary Draft, since comments are usually deemed appropriate only when a rule is amended.

The amendments proposed in the Preliminary Draft that have been withdrawn and the reasons for withdrawal are as follows:

Rule 4(d)(8)

The Preliminary Draft proposed the addition of this rule authorizing service by mail, a change that had been suggested by the Director, United States Marshals Service. But the Committee qualified its approval by providing that service by mail would not support entry of a default judgment. A number of commentators were of the view that the qualification rendered the rule useless. It should be noted that service by mail is authorized by the terms of Rule 4(d)(7) in districts in which state law permits service by mail.

Rule 5(d)

The Preliminary Draft suggested that this rule be amended to exclude discovery materials from the requirement that all papers required to be served upon a party must be filed with the court. The amendment was in the interest of avoiding the cost of file copies and relieving clerks' offices of storage problems. Provision was made for filing of discovery materials upon order of the court. Otherwise, the materials were not to be filed unless they were actually used in the proceeding.

Critical comment following circulation of the Preliminary Draft was generally adverse. It was pointed out that unless the products of discovery were filed in multi-party litigation, those parties who did not attend a deposition would often have difficulty gaining access to a copy. Representatives of the press complained about the "unconscionable burden" of obliging them to secure a court order for access. Various organizations complained about the limitation on public access. Public interest lawyers argued that the lack of a file copy would increase their expense. It was objected that discovery materials form a part of the official record and should be on file with the court. The fear was expressed that the lack of records would impede research about discovery, that papers would be lost or destroyed, that their integrity would be impaired. At the January, 1979, meeting the Committee voted to withdraw the proposed amendment to Rule 5(d).

That action occasioned a most spirited objection to the Revised Draft. Twenty-six respondents, including eighteen chief judges speaking for their districts, wrote to request reconsideration and restoration of the amendment, mainly because of the cost and inconvenience of providing storage for documents

that were rarely used. Some districts had already adopted local rules dispensing with the requirement that discovery materials be filed.

At its May, 1979, meeting the Committee voted to propose the amendment to Rule 5(d) that appears in the Final Draft. It is not the amendment that was withdrawn. It does not dispense with the filing of discovery materials unless the court orders filing. It authorizes the court on motion of a party or on its own initiative to dispense with filing of the materials.

Rule 26(b)(1)

The Report of the ABA Special Committee recommended that the term "relevant to the issues raised by the claims or defenses of any party" be substituted for the present "relevant to the subject matter involved in the pending action." The Advisory Committee proposed in the Preliminary Draft that the rule be amended to read "relevant to the claim or defense" of any party.

Comments received in response to the Preliminary Draft were generally opposed to any change in Rule 26(b)(1). Many believe the present rule is working well. A number disputed the assumption that there was general abuse of discovery. Others believe that abuse is limited to big or complex cases, which represent a small percentage of all litigation and can be better managed through use of the Manual for Complex Litigation, which is specially designed to deal with discovery in such cases. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms "issues" and "claims or defenses." It was objected that discovery could not be restricted to issues because one of the purposes of

discovery was to determine issues (e.g., in wrongful death, product liability and medical malpractice suits). Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to "shotgun" pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery. Some suggested that the better way of avoiding abuse of discovery would be to increase judicial supervision from the outset, fixing limits on the time and extent of discovery to be permitted according to the needs of each case.

Forty individuals or groups and five bar organizations opposed any change in Rule 26(b)(1); five individuals or groups and five bar organizations approved of the Committee's amendment to eliminate "subject matter;" eight individuals or groups and two bar associations approved of the substitution of "issues" for "subject matter." At the January, 1979, meeting the Advisory Committee voted to withdraw its proposed amendment to Rule 26(b)(1) on the ground that the Rule 26(f) discovery conference was the more appropriate method of dealing with the special classes of cases for which discovery abuses are likely.

With a very notable exception, comments on the February, 1979, Revised Draft, which referred to the Committee's action in withdrawing amendment of Rule 26(b)(1), have been generally favorable. The exception is the action taken by the ABA Special Committee, which had approved the Preliminary Draft. It did not approve the Revised Draft. Its extended Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure concludes:

> "... we respectfully urge the Advisory Committee not to transmit to the Committee on Rules of

> Practice and Procedure its revised proposals for amendments to the Federal Rules of Civil Procedure. Mindful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade, we urge the Advisory Committee to give further consideration and study to the amendments initially proposed and to other ways by which discovery abuse can be deterred and the expense of civil litigation can be reduced." The Special Committee, etc., Comments on Revised Proposed Amendments, p. 43 (1979).

The Report of the National Commission for Review of Antitrust Laws to the President and the Attorney General, which was issued on January 31, 1979, after the Advisory Committee had approved its Revised Draft to be circulated in February for comments, does recommend that Rule 26(b) be amended to narrow the scope of discovery, favoring the ABA Special Committee's proposal to add language limiting discovery to "issues" on the ground that this might lead judges to exercise stronger control over discovery from the outset. While not adverse to early issue definition for discovery purposes where the parties are unable to reach agreement, the Advisory Committee believes that this objective can best be achieved through its proposed Rule 26(f).

Our Committee's decision not to recommend an amendment to Rule 26(b)(1) does not close the door on continued consideration of whether some change in the rule may be devised that will be useful in minimizing discovery abuse. It simply means that we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit. We propose to seek a firmer basis for identifying and defining discovery abuse problems so that effective methods of treatment can be found.

Rule 30

The Preliminary Draft proposed a number of amendments to Rule 30 designed to authorize and regulate the taking of oral

depositions by electronic recording devices without the leave of court that is now required. There was substantial opposition to the authority thus given to a party to record a deposition electronically without either agreement of his opponent or leave of court.

Some attacked the premise that electronic recording is less expensive than stenographic, pointing to the costs involved in operating and monitoring recording equipment even when the recording is not eventually transcribed, to which must be added the cost of transcribing when a transcription is required. Others were unconvinced of the fidelity of electronic recording of depositions, emphasizing the increased number of errors resulting from transcription of mechanically recorded depositions, as compared with stenographic records, often because of difficulty in identifying voices (particularly when persons talk simultaneously or voices overlap), poor recording quality, background noise or acoustics. Others noted that use of a recording (including videotape) posed special problems for the court in ruling upon objections and could have a disruptive effect at trial. In addition it was suggested that recordings are more susceptible to intentional or inadvertent alteration or erasure than stenographic records. Some urged that the rule require that there be a transcription if the recording were to be offered to the court.

The Advisory Committee withdrew the proposal for amendment to provide for electronic recording of depositions as a matter of course. The Revised Draft authorizes electronic recording upon stipulation of the parties or leave of court.

Rule 33(a)

The Report of the ABA Special Committee proposed to amend Rule 33(a) by limiting the number of questions that

could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number. Our Preliminary Draft expressed disapproval of that limitation. Instead, it proposed an amendment that would permit each district court to limit the number of questions by local rule.

There was virtually no support for either change in the responses received. Each of the 12 Committees of City and State Bars that responded opposed a change in Rule 33(a). Fifty-seven individuals and organizations opposed any change; 7 individuals and organizations favored the 30-question limitation; 6 individuals and organizations favored the Committee's proposal to permit local rules on limitations.

The constantly-echoed criticism was that a limitation on the number of questions was arbitrary, unreasonable and unnecessary. Many commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor. It was frequently asserted that limitation of the number of questions would lead to routine requests for court orders enlarging the number. At its January, 1979, meeting the Committee voted to withdraw its proposed amendment to Rule 33(a).

Rule 37(e)

Our Preliminary Draft, following a proposal of the Report of the ABA Special Committee, proposed an additional subdivision to Rule 37 to authorize the court to impose upon counsel or a party "such sanctions as may be just" for abuse of discovery process. A number of commentators objected to the designedly broad language of the rule. Our Committee voted to modify the proposal by restricting additional sanctions to failure to participate in the framing of a discovery plan under Rule 26(f) or failure to obey an order entered thereunder.

In conclusion I recognize that the foregoing summary cannot possibly anticipate all questions that may be raised by you with respect to our Committee's final recommendations. Having been blessed with the presence of Judge Thomsen at our sessions and with Professor Ward as our Reporter, we are confident that they, as members of the Standing Committee on Rules, will be able to fill in any other gaps that we may have left unexplained. Needless to say we are at your command.

Respectfully submitted,

The Advisory Committee on
Federal Civil Rules

By _____
Chairman