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

JOSEPH F WEIS JR
CHAIRMAN

JAMES E MACKLIN JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
JON O NEWMAN
APPELLATE RULES
JOHN F GRADY
CIVIL RULES
LELAND C NIELSEN
CRIMINAL RULES
LLOYD D GEORGE
BANKRUPTCY RULES

June 12, 1989

TO: HON. JOSEPH F. WEIS, JR, CHAIR, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM: JOHN F. GRADY, CHAIR, ADVISORY COMMITTEE ON CIVIL RULES

I have the honor to report the recommendation of the Civil Rules Committee that the bench and bar be asked for comment on a substantial package of amendments to the Federal Rules of Civil Procedure.

It is the expectation of the Civil Rules Committee that so much of this package as your committee may approve for publication will be circulated for comment in August, September, and October of this year. The Civil Rules Committee hopes at its next meeting in November to review the public comment in order to make recommendations to your committee at your meeting in January, 1990, to the end that at least some of these amendments will be promulgated and will become effective in 1990.

A few of these revisions are remnants of proposals published for comment in 1985, but never recommended for the reason that they composed too slight a package to merit the attention of the bar. Others of these revisions were approved for publication by your committee at its meeting in San Francisco in January of this year. I am nevertheless transmitting to you the entire package including those items previously approved in order that your Committee can view the entire list of revisions that would be proposed.

RULE 4.

This rule would be almost entirely re-written. Your committee reviewed the proposals of the Civil Rules Committee in January and approved them for publication with the recommendation that the provision authorizing the use in federal court of methods of service established by state law be retained. The issue was raised as to whether the state law modes available should be those of the state in which the federal court sits or the state in which service is

effected or both. While your committee was divided on that matter, the Civil Rules Committee was unanimous in agreement with your majority that the law of both states should be incorporated into the rule. Unless your Committee wishes to revisit that particular issue, the rule as now presented has been previously approved. On this account, we have identified the present draft as one available for public comment after July 18, 1989. This is not intended, however, to foreclose further discussion of this rule if there is felt need for such discussion.

RULE 4.1.

This is a new rule. In the form in which it is now presented, it was approved for publication by your Committee at its January, 1989 meeting.

RULE 5.

This rule would be revised in two significant respects. The first is to authorize the use of electronic or other advanced methods of service of papers on opposing parties and counsel. The second is to foreclose the local practice in some districts of requiring the clerk to reject for filing instruments that do not conform to specified standards.

RULE 12.

This technical amendment of Rule 12 was approved by your Committee at its meeting in January.

RULE 14.

This rule would be amended to assure that third party defendants are provided with copies of pleadings previous to third-party complaints.

RULE 15.

This amendment was approved for publication by your Committee at its January meeting. It was suggested that the Civil Rules Committee might wish to consider going further in the revision by striking the provision set forth on lines 22-25. This suggestion was considered, but it was concluded that there is a hazard that such a revision could be deemed substantive within the meaning of the Rules Enabling Act because its effect would be to diminish the force of

applicable statutes of limitations more than is necessary to assure fidelity to appropriate standards of pleading in the federal practice.

RULE 16.

An amendment to subdivision (b) is proposed with respect to the time for scheduling. The present rule requires that this be done within 120 days after filing, but it is possible that the defendant may not have been served by then. The Civil Rules Committee proposes that the time for scheduling be within 60 days after service of an opposing party.

The revision of subdivision (d) is derivative from the proposals to be made with respect to Rules 50, 52, and 56. We do not perceive that they raise any independent issues requiring further discussion.

RULE 24.

This revision would merely conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged.

RULE 26.

Two revisions of this rule are proposed. The first is to subdivision (a) and creates a preference for internationally agreed methods of discovery when such methods are available. This revision was approved for publication by your Committee at its January meeting. The second revision is to add a paragraph to subdivision (b) to impose on parties asserting privileges a duty to disclose as much information as can be disclosed without compromise of such privileges.

RULE 28.

The amendments to this rule were approved by your Committee at its January meeting.

RULE 30.

The purpose of this revision is to facilitate the use of videotape and other modern methods of recording testimony at depositions. The revised rule would authorize the party taking the deposition to designate the method of recording.

Any other party could provide additional recordings by other means at the other party's expense. Other technical changes are made to accommodate to this principle.

RULE 34.

This proposed amendment was approved for publication by your Committee at its January meeting.

RULE 35.

This revision was approved for publication by your Committee at its January meeting.

RULE 38.

The purpose of this revision is to remove a possible inconsistency in the present rules.

RULE 41.

This rule would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c) that would be more broadly useful. We do not perceive that this revision raises any independent issues; perhaps it may therefore be considered only in connection with the proposal of Rule 52(c).

RULE 44.

The revision of this rule was approved for publication by your Committee at its January meeting.

RULE 45.

This rule would be completely re-written. The proposals of the Committee were thoroughly discussed at the meeting of your Committee in January. Suggestions were made that have been adopted by the Civil Rules Committee. Three matters should be called to the attention of your Committee as matters possibly requiring further discussion.

One issue specifically raised was the wisdom of requiring a witness to travel to a trial at any place within the state in which the subpoena was served. The Civil Rules Committee has on reflection adhered to that proposal, but

has revised subdivision (c)(3)(B)(iii) to make it clear that the court may impose the full cost of the inconvenience on the party requiring such additional travel.

The Civil Rules Committee has also added a new paragraph (d)(2) to impose on non-party witnesses. This provision corresponds to the new provision proposed to be added to Rule 26.

Finally, the Civil Rules Committee has revised its draft to make most of its provisions applicable to parties as well as non-party witnesses. While this enlarges the overlap with the discovery rules, it avoids the creation of any significant lacunae in the rights of witnesses created by the revision. The Civil Rules Committee was moved to make this change in part by the difficulty encountered in trying to make a clear distinction between corporate employees who should be treated as parties and those who should be regarded as non-parties. By allowing the overlap, the further revision makes that issue one of little significance.

RULE 47.

This revision was approved for publication by your Committee at its January meeting.

RULE 48.

This revision was approved for publication by your Committee at its January meeting.

RULE 50.

This rule would be revised for several purposes. One is to enable the court to render judgment at any time during a jury trial that it is clear that a party is entitled to such judgment. A second is to abandon familiar terminology that carries a burden of anachronisms suggested by the text of the present subdivision 50(a). A third is to articulate the standard for entry of judgment as a matter of law with sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function. The standard is not changed from the present law.

Likewise retained is the provision requiring that a motion for judgment be made prior to submission if it is to be renewed after verdict. The Civil Rules Committee determined that there was sufficient reason to retain that requirement although some persons have argued for its

deletion; the requirement does protect against possible surprise.

RULE 52.

This rule would be revised to add subdivision (c) authorizing the court to enter judgment at any time during a non-jury trial that it became clear that a party is entitled to such judgment. This provision is a companion to the revision of Rule 50. The two proposals are also reflected in the language added to Rule 16. Their shared purpose is to reduce the number of long trials. Judges using these devices as intended may schedule the course of a trial in such manner as to reach first any dispositive issues on which either party is likely to fail to carry a burden of production or proof.

RULE 53.

This rule would be revised to impose on special masters the duty to distribute their reports to the parties. This would reduce dependence on the office of the clerks to perform this service.

RULE 56.

This rule would be substantially re-written. The purposes of this revision are to (1) enlarge the availability of the device of summary establishment of fact provided in subdivision (d) of the present rule; (2) provide for the summary establishment of law to control further proceedings; (3) assure a party opposing summary action of reasonable opportunity for discovery; (4) integrate this rule with Rules 50 and 52; and (5) provide guidance on several troublesome issues arising under the present rule. Some unnecessary text has been deleted from the rule, notably the former subdivisions (a) and (b).

This revision shares the purposes of the revisions of Rules 50 and 52 in providing means to reduce the compass of dispute. Where those rules are designed to confine long trials, this rule is designed to confine protracted discovery.

Like the proposed revision of Rule 50, this proposed Rule 56 would articulate the standard for the rule, explaining the relation between this rule and Rules 50 and 52, and to the burdens of production and proof. This is not a revision of those standards, but should make the rule more accessible to users.

The revised rule specifies the requirements imposed on both the moving and non-moving parties, and is more explicit than the present rule in providing for the use of evidentiary materials to make a "pretrial record."

RULE 63.

This proposed revision was approved for publication by your Committee in 1987.

CHAPTER HEADING VIII.

This revision was approved for publication by your Committee in 1987.

CHAPTER HEADING IX.

This revision was approved for publication by your Committee in 1987.

RULE 72.

This revision was approved for publication by your Committee in 1987.

RULE 77.

This revision is proposed to conform to a proposed revision of the Federal Rules of Appellate Procedure which will enable the district courts to deal with the increasingly frequent problem of the party receiving no notice of an unfavorable judgment from which an appeal might be taken. The revisions were discussed at the meeting of your Committee in January, 1989, and it is believed that the proposal was agreed to by your committee subject to approval by the Appellate Rules Committee, which was secured in February.

ADMIRALTY RULE C.

This revision was approved for publication by your Committee in 1987.

ADMIRALTY RULE E.

This revision was approved for publication by your Committee in 1987.