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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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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 Supreme Court of the United States be advised to promulgate a substantial package of amendments to the Federal Rules of Civil Procedure.

These recommendations are based upon many extensive comments by the bench and bar on the package of proposals published for comment in October, 1989. Minor revisions have been made to many of the proposed amendments then published, and two of the proposals, the amendments to Rules 30 and 56, have been temporarily withdrawn pending further reconsideration.

It is the hope of the Civil Rules Committee that so much of this package as your committee may approve will be transmitted to the Judicial Conference of the United States for consideration at its fall meeting, and that the rules might be promulgated with an effective date in 1991.

The minor revisions that we have made in the amendments in response to public comment are enumerated and explained in the material set forth in the Reporter's Note appended to each rule. What follows in this covering memorandum is largely an

explanation of the general aims of each of revisions that will be familiar to your Committee. In addition, I point to the changes explained in the Reporter's Notes.

**RULE 4**

This rule, as your Committee will recall, would be almost entirely re-written, to serve the following aims:

First, the revised rule authorizes the use of any means of service provided not only by the law of the forum state, but also of the state in which a defendant is served.

Second, the revised rule clarifies and extends the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants magnifying costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects of service.

Fourth, the revision calls attention to the important effect of the Hague Service Convention and other treaties bearing on service of documents abroad and favors the use of internationally agreed means of service. In some respects, such treaties have facilitated service in foreign countries but are not fully known to the bar.

Fifth, the revision enables the United States to effect service more economically and further reduces the use of United States marshals in the performance of routine duties of service.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made who can be constitutionally subject to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law

and the Fourteenth Amendment. But a new provision makes those limits inapplicable to cases in which there is no state in which the defendant can be sued.

As the Reporter's Note will reveal, several minor changes in the proposals have been made in response to public comment, and one change has been made in the last-mentioned provision to reflect the 1989 revision of 28 U. S. C. §1391(c).

### RULE 4.1

This is a new rule.. The purpose in creating a new rule is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. The new rule would provide nationwide service of orders of civil commitment enforcing decrees or injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights.

A clarifying clause has been added to this proposal in light of public comment.

### RULE 5

This rule would be revised in three significant respects. The first is to authorize the use of private couriers for service of papers on opposing parties and counsel. The second is to require that the person making service under the rule certify the date and means of service. The third 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.

In light of public comment, our Committee recedes from its proposal to authorize the use of facsimile transmission as a means of service under this rule. Minor textual changes are also made in response to public comment.

### RULE 12

Amendment of this rule is necessary to conform to the revision of Rule 4. The revision provides additional time for answer by defendants who waive service of process. Minor textual changes would be made in light of public comment.

### RULE 14

This rule would be amended to assure that third party defendants are provided with copies of current pleadings in actions to which they are joined as parties. Minor textual changes were made in light of public comment.

RULE 15

The revision of this rule would prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. It extends the relation back of amendments that change the party or the naming of the party. Minor textual changes have been made in response to public comment.

RULE 16

Two revisions are proposed. 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 adheres to its proposal that the time for scheduling be within 60 days after the appearance of a defendant.

The revision of subdivision (d) calls attention to the appropriate uses that may be made of Rules 42, 50, 52, and 56 at the pretrial stage to reduce the compass of discovery or of trial. The revision is related to concurrent amendments of Rules 50 and 52. Minor textual changes were made in response to public comment on the amendment of subdivision (d), as will be explained more fully in the Reporter's Note to the revision.

RULE 24

This revision would conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged. No change has been made in this proposal in light of the limited public comment.

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. Clarifying modifications in the text have been made in response to public comment.

The second revision is to add a paragraph to subdivision (b) to impose on parties asserting privileges a duty to disclose information enabling adversaries to resist such claims of privileges. As the Reporter's Notes will explain more fully, this proposal evoked substantial comment, causing our Committee to recede from its proposal that claims of privilege be justified routinely in detail.

RULE 28

The amendments to this rule conform the rule to the Hague Evidence Convention. A minor textual change has been made in response to public comment.

RULE 30

This rule would be revised to conform to the revision of Rule 4, to postpone depositions in actions in which the defendant has waived service of process. This is a technical amendment. Our Committee has at least temporarily receded from the more substantial revisions of this rule published for comment, in light of the content of the comments received.

RULE 34

This amendment would reflect the change effected by the proposed revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. No change from the published proposal is suggested here.

RULE 35

The revision adds a requirement that a professional appointed pursuant to this rule must be suitably licensed or certified. It is occasioned by a 1988 Congressional amendment of the rule. The requirement that the examiner be suitably licensed is intended to authorize the court to consider the appropriateness of the credentials of any specialist whom the court is asked to appoint pursuant to this rule. In light of comment Committee has receded from its published proposal to allow the court to designate a wider range of experts to conduct a physical or mental examination.

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. No change from the published draft is proposed here.

RULE 44

The revision of this rule would make appropriate use of the Hague Documents Convention and would delete an obsolete reference. No change from the published draft is proposed here.

RULE 45

This rule, as your Committee will recall, would be completely re-written. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a) of the rule is modified in signicant respects. First, Paragraph (3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. Second, Paragraph (3) of this subdivision authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished. Fourth, Paragraph (1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. Fifth, Paragraph (2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. Sixth, Paragraph (1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d). Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party.

Proposed paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. Other provisions of subdivision (c) enumerate the appropriate constraints on the use of the subpoena power, providing a statement of witness rights.

Under the proposed rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides. Proposed paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980. Paragraph (d)(2) would be new and corresponds to the new Rule 26(b)(5). Its purpose is to provide a party whose

discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified.

Minor textual changes have been made in this proposal in light of the public comment.

### RULE 47

This revision would eliminate the use of alternate jurors, a practice that was derived from the assumed need for precisely twelve jurors to render a verdict. It would also allow the court to excuse a juror during deliberations if the juror could not continue.

In light of public comment, the Committee recedes from its proposal to authorize juries larger than twelve, and here proposes a rule that would limit the jury to that size. It is otherwise now presented in the form in which it was published.

### RULE 48

This revision specifies that all jurors shall deliberate and that a jury may render a verdict with as few as six remaining members. A minor textual change in the proposal is made in light of the public comment.

### 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 when 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.

Minor textual changes have been made in light of the public comment, as the Reporter's Notes more fully explain.

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 if it became clear that a party is entitled to such judgment. This provision is a companion to the revision of Rule 50, and replaces the deleted provisions of Rule 41. 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. A minor textual change was made in response to public comment.

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. A minor textual change is proposed in light of public comment.

RULE 63

This proposed revision would provide for a substitute judge. Such a judge at a bench trial would be required to recall material witnesses who are available to testify again if such a recall would not be an undue burden. This latter provision has been added to the proposal in light of the public comment.

CHAPTER HEADINGS VIII AND IX

These revisions clarify the organization of the rules. There is no change in light of public comment.

RULE 71A

This revision would delete an incorrect reference to Rule 4. It has not been published for comment, but is merely technical in nature.

RULE 72

This revision would clarify an ambiguity regarding the time for objection to a magistrate's report. There is no change in the proposal in light of public comment.

### RULE 77

This revision is proposed to conform to a proposed revision of the Federal Rules of Appellate Procedure which would 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. If, as appears, the related revision of the Federal Rules of Appellate Procedure is not to go forward, then this proposal should be deleted from the package presented by our Committee.

### APPENDIX OF FORMS

Most of these revisions are technical in nature and have not been published for comment. These involve gender-neutralizing changes, or in Rule 2 a change to conform to contemporary law regarding jurisdictional amount. One proposal of substance is to delete the present Form 18A, and to replace it with new Forms 1A and 1B that accurately reflect the proposed new Rule 4. These latter forms have been published for comment. One minor textual change is made in light of comment.

### ADMIRALTY RULE C

This revision conforms to the amendment of Rule 4 by reducing the required use of United States marshals. There is no change suggested by the public comment.

### ADMIRALTY RULE E

This revision conforms to the amendment of Rule 4 by reducing the required use of United States marshals. There is no change in the proposal suggested by the public comment.