To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **December 16, 2003**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on October 2 and 3, 2003, at the Hyatt Regency in Sacramento, California. Its Discovery Subcommittee met on September 5 in Washington, D.C., and its Civil Forfeiture Subcommittee met on December 9, also in Washington, D.C. Draft Minutes of the Advisory Committee meeting are attached.

Part I of this report describes recommendations to publish for comment Style versions of Civil Rules 16 through 37 plus Rule 45. Publication would be made in a single package with Rules 1 through 15, as approved for publication by the Standing Committee in June, 2003.

Part II of this report is an informational summary of matters described more fully in the draft Minutes.

I Action Items: Styled Civil Rules 16-37 and 45 for Publication

The Style Project has proceeded at a remarkable pace. This pace has been possible only because of the near-heroic efforts of the Standing Committee's Style Subcommittee and its consultants; of Administrative Office Staff; and of the Advisory Committee's Subcommittees and their consultants. Work is already under way on Rules 38 through 63, less Rule 45. It cannot be said that the end is yet in sight, but the ambitious schedule set for the project now seems feasible.

Styled versions of Civil Rules 16 through 25 (without Rule 23) were first considered by the Advisory Committee's Style Subcommittees at meetings in April and May, 2003. They were considered further at the August meetings that also worked through the discovery rules, Rules 26 through 37 and 45. Work on Rules 26 through 37 and 45 has been completed without the need for further subcommittee meetings.

The Advisory Committee recommends August 2004 publication for comment of Style Rules 16 through 37 and 45 as part of a single package with Style Rules 1 through 15 as approved for publication last June.

The Standing Committee's Style Subcommittee is reviewing Rules 1 through 37 and 45 to ensure that commonly used terms are used consistently throughout these rules. The inconsistent use of some common terms presents "global" issues that must be resolved. One rule, for example, may require that the court "direct" action, while another requires that it "expressly direct" action. It should be possible to decide whether "expressly" is ever useful to emphasize the need for clarity or to exclude any possibility of implicit direction. Establishing firm conventions now will expedite work on later rules. The Style Subcommittee expects to propose revisions to the first publication package for the Advisory Committee's consideration at its April 2004 meeting.

Apart from these matters, the Advisory Committee may recommend that the Style Project be supplemented by parallel proposals to make minor noncontroversial substantive changes. The repeated painstaking examination of the Civil Rules required by the Style process has inevitably revealed many candidates for revision. Some of the possible revisions will require close study and, at times, difficult judgments. But others, although in some sense "substantive" changes of meaning, seem beyond possible controversy. As one example, Civil Rule 26(g)(1) requires that the person who signs discovery papers provide an address. Unlike Rule 11, it does not require a telephone number. The Advisory Committee is concerned that adding a telephone number requirement to Rule 26(g)(1) would go beyond the limits of the Style Project. But it may prove possible to publish a small number of changes of this sort on a parallel track that lies between the pure Style proposals and the more complex proposals that are published in the ordinary course of the rules process. A recommendation whether to take this approach is likely to be made to the June, 2004 Standing Committee meeting.

II Information Items

A. Conference: Discovery of Computer-Based Information

Professor Dan Capra, Evidence Rules Committee Reporter, has sponsored a conference to be held next month at Fordham Law School. The conference will explore developing experience with discovery of information maintained in computer form. Members of the Advisory Committee and Standing Committee will attend. The conference discussion will provide current information on this continually evolving field. It also will help to advance consideration of the central questions: Are rules amendments appropriate now? What might they be?

The question whether rules amendments are appropriate now can be divided into two broad parts. The first part looks to the progress courts and lawyers are making toward adapting the flexible discovery rules to the opportunities and problems that arise from computer-based information. If experience suggests that practice is moving toward uniform and satisfactory approaches, there may be no occasion to add specific rules to address discovery of these (very broad) forms of information. If experience suggests that practice is in a continuing state of upheaval because of ongoing changes in technology and the use of technology, the time to frame specific rules may lie in the future.

The second part of the inquiry assumes that it is sensible to continue to develop proposals to amend the discovery rules. This part looks to the specific topics that might be addressed and to rules to address them. The Minutes describe the Advisory Committee's October discussion. The topics listed there include a definition of electronic information; means to prompt early discussion among the parties to help approach computer-based information; the need to define what is a "document" in this realm (including such matters as "embedded" data and "metadata"); the form of production; the burdens that may be imposed to retrieve information that is not retrievable through routine ongoing operation of the information system ("much has been inadvertently retained"); inadvertent privilege waive (a problem familiar from paper discovery but perhaps exacerbated by

computer-based discovery); and preservation-spoliation obligations. Tentative drafts address each of these topics and will provide a basis for further study.

B. Civil Asset Forfeiture

Many statutes invoke the Supplemental Rules for Admiralty and Maritime claims to govern civil asset forfeiture proceedings. That makes it useful to continue to locate these procedures in the Supplemental Rules. But disadvantages arise from scattering the forfeiture provisions among the rules that were developed to deal with admiralty practice. Forfeiture practice presents issues that do not arise in admiralty. Some of these distinctive issues are addressed at different places in the present rules. Other of these distinctive issues are not addressed at all in the present rules. It will be useful to bring the present forfeiture provisions together with desirable new provisions in a single rule. Separation of civil forfeiture practice from admiralty practice will have the further advantage of insulating admiralty practice from interpretations of common provisions that reflect the distinctive needs of forfeiture practice at the expense of admiralty practice.

The Civil Asset Forfeiture Subcommittee held a series of lengthy conference calls over the spring and summer. These calls led to a substantially revised new Rule G. This revised draft was discussed during a day-long meeting in December, leading to modest further revisions. The National Association of Criminal Defense Lawyers will be asked to comment on this most recent draft. The Subcommittee hopes that with continuing work it will have a proposed rule to present to the Advisory Committee in April.

C. Filed, Sealed Settlements

The Federal Judicial Center is nearing completion of its study of the occasional practice of filing settlement agreements under seal. The study includes a survey of statutes and court rules that address this topic; a comprehensive review of hundreds of thousands of federal actions to determine the frequency of the practice; and an effort to identify cases in which accepting a settlement agreement for filing under seal may have interfered with public access to information about matters that may impair public health or safety. The Advisory Committee and its Sealed Settlements Subcommittee will use the completed report in determining whether to recommend rules amendments to address this topic.

D. Class Action Settlements

The Federal Judicial Center also is nearing completion of its study of the impact of the *Amchem* and *Ortiz* decisions on settling class actions. The Advisory Committee and its Class-Action Subcommittee will use the completed report in its ongoing consideration of Rule 23 and in further considering the need for rule provisions specifically addressing settlement classes.

E. Other Rules

Three other rules have moved to the front of the agenda.

A single Subcommittee has been formed to study Rule 15 and Rule 50(b). The Rule 15 study was prompted by a Third-Circuit request to revise one feature of the relation-back provisions in Rule 15(c)(3). It has burgeoned to encompass many Rule 15 questions. The first question to be addressed by the Subcommittee is whether any of the possible problems justify rules amendments. The recommendation may be to leave Rule 15 as it is; to undertake one or more modest revisions; or to attempt a broader revision.

Rule 50(b) authorizes a post-verdict motion for judgment as a matter of law only if it renews a motion made at the close of all the evidence. The courts of appeals continue to wrestle with this requirement in cases that show that many lawyers overlook it. The cases also show some erosion of the requirement in decisions that accept various justifications for treating an earlier motion for judgment as a matter of law as if it had been made at the close of all the evidence. The functional values served by Rule 50(b) likely can be served equally well by provisions that do not catch so many lawyers unaware. But Rule 50(b) represents a fictionalization of old Seventh-Amendment lore. The central question will be whether the advantages of a more functional rule suffice to overcome the residue of long-ago Seventh-Amendment concerns.

The Solicitor General recommended that the Appellate Rules Committee consider a new rule that would regulate district-court relief from a judgment while an appeal is pending. The Appellate Rules Committee concluded that these questions are better addressed in the Civil Rules. This proposal — in the form of a draft new rule "62.1" — remains on the agenda for active consideration.