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**To: Honorable Anthony J. Scirica, Chair, Standing
Committee on Rules of Practice and Procedure**

**From: David F. Levi, Chair, Advisory Committee on the
Federal Rules of Civil Procedure**

Date: December 1, 2000; January 8, 2001

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on October 16 and 17, 2000, in Tucson, Arizona. It voted to recommend approval of four changes in the Supplemental Admiralty Rules. These are the sole action items recommended for consideration at the January 2001 meeting of the Standing Committee. Part I of this report explains the recommendations.

I. Action Items: Technical Amendments — Admiralty Rules

Four technical changes are recommended to adapt the Admiralty Rules to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff.

The provisions of the Admiralty Rules to be amended are themselves new. The Supreme Court transmitted them to Congress on April 17, 2000, to take effect on December 1. These rules grew out of a years-long project that stemmed from joint study by the Department of Justice and the Maritime Law Association. The purpose of the changes was to separate some procedural aspects of civil forfeiture proceedings from the procedures long used for true in rem admiralty proceedings. Attention was paid to forfeiture reform bills pending in Congress during the drafting stages, but it was not possible to anticipate the precise form of the law that came to be enacted, also in April 2000.

Because the new Admiralty Rules took effect on December 1, it would be possible to resolve inconsistencies with the new statute by invoking the supersession provision of the Rules Enabling Act, 28 U.S.C. § 2072(b). There was no purpose to supersede yet-to-be-enacted legislation, however, and no reason has appeared to resist the specific provisions of the new statute. The legislation is more recently drafted, even if earlier effective, and the nature of the specific inconsistencies will demonstrate the reasons for choosing to conform the Rules to the statute.

The proposed changes were worked out in close consultation with representatives of the Department of Justice. The details are intricate, and may seem obscure to those who are not versed in admiralty or forfeiture practice. Given the purpose to conform to the new legislation, however, the potential intricacies do not seem to merit extensive elaboration.

(1) Time To Claim. Amended Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest in an in rem civil forfeiture action must be filed "within 20 days" after specified events. New 18 U.S.C. § 983(a)(4)(A) provides that a person claiming an interest in property seized for forfeiture must file a claim "not later than 30 days" after somewhat differently specified events (see Item (2) below). The 20-day period in the new Rule was chosen under the impression that a 20-day period was specified in some versions of the long-pending forfeiture reform legislation. If it had been known that Congress favored a 30-day period, as adopted in the new statute, a 30-day period would have been provided in Rule C(6). It is recommended that the 20-day period in Rule C(6) be changed to a 30-day period. This change will avoid an inadvertent supersession of the statute.

Because Rule C(6)(a)(i)(A) also would be amended under the proposal described as Item (2), this change is incorporated in the text described in Item (2).

(2) "[S]ervice of Government's Complaint". The 30-day period that new § 983(a)(4)(A) sets for filing a claim runs "after the date of service of the Government's complaint, or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." New Rule C(6)(a)(i)(A) sets the period to run "after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." The provisions that relate to publication of notice seem consistent, and no change is recommended in Rule C(6) on this account. It seems likely that the publication-of-notice provision will control the claim time in many proceedings. But there is a difference between the "date of service of the Government's complaint" and "actual notice of execution of process." The most likely difference in practice will occur when the claim is filed by a person who was not served but who claims an interest in the forfeiture property. An actual

notice requirement offers greater protection, although the protection will be cut off 30 days after completed publication of notice. It might be urged that the government should be content to rely on the 30-day period that runs from completed publication, invoking a shorter period only as to a claimant who had actual notice. But that is not the choice made in the statute, and on balance it has seemed better to conform the Rule to the statute. An added reason for conforming to the statute is that it ensures that the time to file a claim has a clear expiration date if for any reason publication of notice is not completed.

Rule C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

- (i)** a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:
 - (A)** within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or
 - (B)** within the time that the court allows * * *.

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

(3) "Serve" or "File" an Answer. This proposed change not only conforms to the new statute, but also catches up a drafting oversight in new Rule C(6)(b)(iv). The starting point is new Rule C(6)(a)(iii), which provides that a party who files a statement of interest in a forfeiture proceeding "must serve an answer within 20 days after filing the statement." New

§ 983(a)(4)(B) provides that the party "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." These provisions need not be inconsistent; both service and filing can be accomplished within 20 days. The statute does constrain the operation of Civil Rule 5(d), which allows a reasonable time after service for filing, but it has not seemed wise to amend Civil Rule 5(d) to supersede the new statute. The relationship between statute and Rule 5(d) may create a trap for the unwary, however, so it is recommended that Rule C(6)(a)(iii) be amended to require both service and filing within 20 days.

Review of this question showed that new Rule C(6)(b)(iv) calls for the answer in a true admiralty proceeding to be "filed" within 20 days after the statement of interest. That provision was a drafting oversight; the ordinary requirement is that an answer be served within the time set by rule, and it seems wise to conform this practice with the practice adopted in Rule C(6)(a) as well as other rules. It is recommended that the filing requirement in Rule C(6)(b)(iv) be changed to a service requirement.

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:
* * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

Committee Note

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

(4) "Arrest" of Real Property. New Rule C(3)(a)(i), carrying forward the practice established by former Rule C(3), requires the clerk to issue a summons and warrant for the arrest of forfeiture property. New 18 U.S.C. § 985 provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government initiates an action to forfeit real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint. Provision is made for arrest in certain circumstances.

The arrest provision in Rule C(3) is too broad. An exception to the warrant requirement is recommended to reflect the new statute.

Rule C. In Rem Actions: Special Provisions

* * * * *

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

- (i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

* * * * *

Attachment

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FEDERAL RULES OF CIVIL PROCEDURE

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(i) a person who asserts an interest in or right

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against the property that is the subject of the

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action must file a verified statement identifying

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the interest or right:

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(A) within ~~20~~ 30 days after the earlier of (1)

20

~~receiving actual notice of execution of~~

21

~~process; the date of service of the~~

22

Government's complaint, or (2) completed

23

publication of notice under Rule C(4), or

24

(B) within the time that the court allows;

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* * * * *

26

(iii) a person who files a statement of interest

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in or right against the property must serve

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and file an answer within 20 days after

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filing the statement.

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(b) Maritime Arrests and Other Proceedings. In an

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in rem action not governed by Rule C(6)(a):

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* * * * *

33 (iv) a person who asserts a right of possession
34 or any ownership interest must ~~file~~ serve
35 an answer within 20 days after filing the
36 statement of interest or right.

37 * * * * *

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served

within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

**PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE
JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE**

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and recommendations to

the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.
- c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the

Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

- a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.
- b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.
- c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available

for public inspection.

- d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.
- b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original

publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.
- d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.
- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the

Standing Committee meeting to present the proposed rules changes and Committee Notes.

- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.
- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

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Alaska Bar Association
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Idaho State Bar
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Shirley J. Wahl, Esquire

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Martha C. Gaythwaite, Esquire

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The North Carolina State Bar
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State Bar Association of North Dakota
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