ADVISORY COMMITTEE ON CIVIL RULES

Minutes of the Meeting of July 6, 1978

The Advisory Committee on Civil Rules of the Judicial Conference of the United States met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D. C. The meeting convened on Thursday, July 6, 1978. The following members were present during the meeting:

Walter R. Mansfield, Chairman
A. Sherman Christensen
Louis F. Oberdorfer
Philip Pratt
Walter Jay Skinner
Earl W. Kintner
J. Vernon Patrick
Abraham L. Pomerantz
Bernard J. Ward, Reporter

Others attending the session were Judge Roszel C. Thomsen, Chairman, Standing Committee on Rules of Practice and Procedure, Joseph Ebersole, Deputy Director of the Federal Judicial Center, and Joseph F. Spaniol, Jr., Deputy Director of the Administrative Office and Secretary to the Rules Committee. Messrs. Wendell B. Alcorn, Jr., Richard P. Larm, and Warren R. King from the National Commission for the Review of Antitrust Laws and Procedures were also in attendance.

The Chairman welcomed the newly appointed members.

Mr. Pomerantz:

Mr. Chairman, if it is in order at this point I should like to move that the Committee express to your most distinguished predecessor, Judge Elbert Parr Tuttle, our very deep thanks and appreciation for his years of service as Chairman of the Committee on Civil Rules. It was a privilege to sit in the meetings over which he presided. The matters that we considered during the years of his service were those of the utmost importance and delicacy. He presided over all of our meetings with grace and fairness. We could not have been better served. He was a model of what a chairman should be.

The motion was duly seconded and it was unanimously

RESOLVED: That the Advisory Committee on Civil Rules adopts Mr. Pomerantz's remarks as its own, and that they be entered upon the minutes.

Mr. Kintner:

Mr. Chairman, I should like to move that the Committee permanently record its thanks, appreciation, gratitude and affection for all of the members who have worked with us for the past seven years and whose terms have expired, namely, Oren Harris, Edwin F. Hunter, Jr., Shirley M. Hufstedler, Donald Russell, and Robert W. Meserve.

The motion was duly seconded, and it was unanimously

RESOLVED: That the Advisory Committee on Civil Rules adopts Mr. Kintner's remarks as its own, and that they be entered upon the minutes.

Judge Mansfield explained that the business of the meeting was the consideration of suggestions and criticisms received from the bench and bar with respect to proposed amendments to the Civil Rules set out in a draft that had been circulated in March, 1978. He noted that several of those who responded asked that added time be afforded to bench and bar for consideration of the proposed amendments. After discussion the Committee determined to proceed to a consideration of each of the proposed amendments and to defer the question of whether added time should be afforded for comments by bench and bar.

Rule 4(c). (Draft, p. 1)

The Committee voted to reduce the penultimate sentence of this rule to: "Special appointments to serve process shall be made freely."

Rule 4(d)(8). (Draft, pp. 2-3)

This is a new rule. It authorizes service of process by mail on private, competent parties, but it provides that a default judgment cannot be entered following service by mail.

There was extended debate about the desirability of the provision preventing judgment by default where service is effected by mail. Decision was deferred.

Rule 5(d). (Draft, p. 5)

The proposed change in this rule provides that oral depositions, interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in proceedings.

(1) The Committee noted to add "requests for documents" to the papers that need not be filed.

(2) There was discussion about the desirability of changing "need not be filed" to "shall not be filed."

(3) It was suggested that depositions taken pursuant to Rule 27 be excluded from the operation of Rule 5(d).

Rule 26(b)(1). (Draft, p. 6)

The change proposed in this rule is the most controversial of all proposed changes. The first sentence now reads:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .

The Section of Litigation has urged that the language following "relevant" be changed to "to the issues raised by the claims or defenses of any party." The Advisory

Committee in its Draft rejected that suggestion. It suggested elimination of the language "subject matter involved in the pending action, whether it relates to the."

The Reporter noted that the comments received were rather heavily opposed to the term "issues," and that a slight majority opposed any change at all in the rule. After extended discussion decision was deferred.

Rule 26(f). (Draft, p. 7)

Rule 26(f) is a proposed new rule. It provides for a mandatory pre-trial discovery conference if requested by any party. It was suggested by certain members of the Committee:

(1) That the rule be restricted to selected categories of cases;

(2) That there be added a requirement of a showing of good cause for a conference, or a showing that there are non-frivilous discovery problems;

(3) That a conference be made mandatory only on the filing of a certificate of necessity by all counsel;

(4) That before a conference is held briefs explaining the difficulties that have been encountered be filed;

(5) That before a conference is held a discovery status report be filed;

(6) That the final paragraph of the Committee Note be eliminated (Draft, p. 11);

(7) That the subject matter of the rule be transferred to Rule 16 (Pre-Trial Procedure; Formulating Issues).

Decision on these suggestions was deferred.

Rule 28(a). (Draft, p. 12)

The change proposed in this rule would make it unnecessary for the oath taker to remain at the deposition if he is not needed there. When sound recording devices are used the oath taker will not usually be the recorder, hence the proposed change.

The question was raised as to the desirability of a change in Rule 28(c), which provided that a deposition shall not be taken before a person who is a relative or employee or attorney of any party, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.

The purpose of authorizing sound recording is to save costs of stenographic recording. If an independent recording technician is required, the saving will doubtless be substantially reduced. The question was deferred.

Rule 30. (Draft, p. 13)

The general purpose of the changes proposed in this rule was to authorize the taking of depositions by sound recording devices without the necessity of obtaining leave of court, as is presently required by Rule 30(b)(4).

A number of commentators were troubled by the ambiguity of terms used in the proposed changes. The Reporter was instructed to prepare a new draft of Rule 30 to eliminate the ambiguity.

Rule 30(b). (Draft, p. 13)

The proposed change provides that the court may require that the deposition be taken by stenographic means if it deems that method necessary to assure that the record be accurate. (Draft, p. 15, ll. 46-50.) The question was raised as to whether that provision would make it possible for a court that regarded sound recording as inherently inferior to stenographic recording to ban the former by general order. It was suggested that the rule read, "The court may, upon motion of a party or witness, require that the deposition be taken by stenographic means. . . ." (Matter underlined to be added.)

Rule 30(c). (Draft, p. 16)

The final sentence of the proposed draft provides: "If requested by one of the parties, the testimony shall be transcribed upon the payment by the party making the request of the charges therefor."

The present rule ends with the word "transcribed." The question of who is to pay for transcription under the present rule has been variously answered by the courts,

but the general conclusion is that the party who wants the transcription should pay for it. The purpose of the proposed change was to set out that conclusion in the rule.

The Reporter suggested that the rule should remain in its present form. The Committee agreed.

Rule 30(c) refers to "objections. . . to the qualification of the person taking the deposition. . . ." (Draft, pp. 16-17, ll. 85-87.) What are the qualifications of the person? At present the reference is to the disqualifications stated in Rule 28(c). Are those disqualifications applicable to sound recording technicians? The question was deferred.

Rule 30(e). (Draft, p. 17)

The rule provides for submission of the deposition to the witness. If it is stenographically transcribed, the witness is to read it, if it is otherwise recorded, presumably the witness is to listen to it. The question was raised as to what procedure should be followed if a sound recording is subsequently transcribed. Should the witness be given an opportunity to correct the transcription? Should the other parties be given an opportunity to inspect the transcription? The Committee answered each question in the affirmative.

The Committee voted to add the terms "fails" and "failure" in lines 123 and 137, respectively. (Draft, pp. 18-19)

Rule 30(f).

The question was raised as to whether paragraph (3) of this rule should be transferred to Rule 5(d).

Rule 33. (Draft, p. 28)

The Section of Litigation proposed that the number of interrogatories be limited by Rule 33 to 30 except on leave of court. The Committee did not favor that proposal. It proposed that Rule 33 authorize the district courts to limit the number of questions by local rule.

The Reporter noted that neither proposal was favored by commentators. Replies received by the Section of Litigation ran 24 to 3 against restricting the number of questions by a change in Rule 33. Replies received by the Committee ran 29 to 6 against any change in Rule 33. Only three respondents favored a 30 question limitation in Rule 33.

Rule 37. (Draft, p. 35)

The proposed change permits the court to impose sanctions for failure of a counsel or a party "to cooperate in discovery."

It was objected that the term "cooperate" was too broad. The Committee voted to substitute "participate in good faith" for "cooperate." A similar change is to be made in Rule 26(f). (Draft, pp. 8-9, ll. 59-60)

The Committee addressed the question of extending the time for responding to the proposed changes. After extended discussion it determined to extend the time to November 30, 1978. It further determined to hold public hearings on the proposed changes in Washington, D. C. and Los Angeles, California on dates to be determined. It requested the Secretary of the Committee on Rules to give public notice of the extension and of the hearings.

The meeting adjourned at 5:00 p.m.