ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
DURHAM NC 27706

919-684-5593 *919-489-8668 (HOME)* *FAX: 919-684-3417*

June 26, 1991

MINUTES OF MEETING OF MAY 22-24, 1991

The meeting opened at 8:30 on Wednesday morning, and resumed at the same time on Thursday and Friday. Present were Bertelsman, Brazil (absent on the 24th), Carrington (Reporter), Holbrook, Keeton, Linder, Miller (absent on the 22nd), Nordenberg, Pfaelzer, Phillips, Pointer (Chair), Powers, Spaniol (Secretary), Stevens, Winter, Zimmerman. Also present was Ms. Gardner (Administrative Office). Observers were Cecil (FJC), Leonard, Morgan, Shell (Senate Judiciary Committee), Walker (Univ. of Virginia Law School), Willging (FJC), Womack (American College of Trial Lawyers), and others not identified.

The embargo on the Rule 11 drafts was lifted. The minutes of the previous meeting were approved. The communications from the Lawyers for Civil Justice and from lawyers at Milberg, Weiss were circulated as supplements to the many comments previously distributed. The final report on Rule 11 from the FJC was acknowledged, and the interim report from the American Judicature Society. The Chair also reported on the partial approval of the Committee's 1990 recommendations by the Supreme Court; those not so far approved pertain to international matters. It was noted that some matters approved, Forms 1 and 2 and Rule 15, refer to matters not approved.

The Technical Amendments and the amendment to Rule 38 were approved without discussion.

Discussion turned to the disclosure rules, attention being directed to the list of complaints and suggestions received from those who had commented on the informal drafts circulated since the last meeting. It was decided not to await the experience with local rules promulgated under Senator Biden's bill, partly for the reason stated by the chair that local districts do not clearly have the power to promulgate local rules including all the proposed provisions. Judge Stevens thought the process too lengthy to merit delay, the present schedule leading to an effective date of 12-1-93.

Justice Zimmerman expressed concern about the phrase "reasonably likely" to "bear significantly." Judge Bertelsman thought most cases involve interrogatories that are equally vague. Judge Brazil thought interrogatories even broader. Judge Winter thought the present language about as good as the Committee can do. The San Francisco Bar proposal that witnesses be "readily identifiable" was considered. Judge Keeton thought "reasonably" in front of likely may mean less than probable. It was agreed to strike "reasonably."

The California Bar concern about identifying hearsay witnesses was considered. Ms. Holbrook argued against having to decide admissibility decisions at the point of disclosure. Dean Nordenberg suggested the possibility of requiring a list of witnesses having personal knowledge. Judge Winter analogized to the requirement of discoverability that the Committee had previously rejected. The Reporter suggested that little would be lost by tightening (a)(1), which seems to be the provision in the disclosure package that attracts most of the concern. The Committee decided to make no change.

A change in the text to "any claim or defense" was approved with little discussion. Justice Zimmerman called attention to the Civil Justice group concern regarding the scope, but no response to that concern was agreed to.

Judge Pointer noted that some comments thought disclosure should be sequential; others thought the conference should be absolutely mandatory. The problem of extensions for the time to answer was revisited by Judge Pfaelzer, who was concerned about wasteful disclosure on legally insufficient claims. Judge Bertelsman picked up on the defense bar's objection that disclosure treads on the adversary tradition; he favored simultaneous disclosure. Mr. Powers, picking up Judge Pfaelzer's view, was concerned about the claim based on the worthlessness of bonds, where the defendant had much information, the plaintiff none, but with an infinite number of possible causes. Judge Pfaelzer and Judge Brazil thought that a scheduling conference to manage disclosures is advantageous, at least in big cases. Judge Pointer and others again regretted that disclosure could not be tied to the appearance rather than the answer, the proposal abandoned under pressure from the Department of Justice. Judge Keeton joined Judge Pfaelzer in questioning the time periods, suggesting 60 days rather than 30, and favoring sequential disclosure. Justice Zimmerman, Judge Brazil, and Judge Winter resisted extension and sequentiality, Judge Winter noting that the argument for sequentiality is an argument against notice pleading, and Judge Brazil arguing that defendants receiving a disclosure would simply use it to fortify more pre-answer motions. It was agreed to leave the draft as is with respect to the relation to filing of the answer.

Discussion turned to the question whether documents could be produced in lieu of disclosure. Judge Pointer thought the matter could be handled in the Notes. Judge Brazil argued that the Notes lack status as law. Justice Zimmerman thought the Notes should be published with the Notes. Judge Winter thought it was a fortiori that production could be performed in lieu of disclosure, but lawyers seemed uncertain, as Ms. Holbrook emphasized. Judge Keeton called attention to the problem of documents having multiple locations. The Reporter suggested taking some language from the Notes to move to the text, requiring that the information be sufficient to enable the adversary to make an informed decision about the examination of the documents. Judge Brazil and Mr. Linder supported this suggestion. Justice Zimmerman noted the need for textual changes, substituting "provide" for "disclose." Mr. Powers and Dean Nordenberg argued for requiring a description and forestalling the dumping of documents in large quantities and in disorder as a compliance with the disclosure requirement, Ms Holbrook and Judge Winter supported the right to produce a few documents in cases in which that is all that is involved.

It was agreed that production of copies should be permitted, and not to impose a condition about the order of production, since production would be useful only where a small number of documents is involved. It was agreed to omit the word " general," and to add the words "by category." It was agreed by divided vote to leave in the requirement that the location of documents be disclosed.

Judge Winter urged that non-party custodians should be identified. Judge Pointer thought that this might offend the work product protection. Judge Brazil noted that parties would have to make the disclosure in response to interrogatory. The Reporter wondered

whether the disclosure would not normally be secured directly from the non-party, and asked whether one should be asked to disclose what is in the opposing party's file. Mr. Linder and Ms. Holbrook expressed concern for overloading the disclosure process. Judge Pointer thought it appropriate to require use of an interrogatory to discover such information, and Judge Winter agreed.

In a digression, it was agreed that the Committee should not recommend compliance with the request of the Admiralty bar for membership on the Committee. Ms. Holbrook noted that the Chief Justice makes the appointments.

The chair suggested that the principal issue on expert disclosure was whether it should be sequential. Judge Stevens favored sequential presentation, the party initiating the use of experts going first. The Reporter supported this suggestion. Justice Zimmerman and Dean Nordenberg questioned the timing. It was acknowledged that the time would be changed, perhaps to the 90 and 60 day periods suggested by the chair. Judge Winter agreed that rebutting witnesses needed additional time. Justice Zimmerman thought this acceptable if the late expert was limited to rebuttal. The chair suggested that there should be an earlier identification of an expert to be called at trial, perhaps pursuant to paragraph (a)(1). The reporter noted the difficulty of disclosing unretained experts and the work-product aspect of disclosing retained experts who will not testify at trial. Arguing for a different provision for rebuttal, Judge Winter noted that without such a provision, litigants would be required to hire experts when neither side wanted one. Judge Brazil agreed.

The reporter questioned whether the cross-examiner should make disclosure of material to be used to attack the expert who is frozen in her or his testimony. Ms. Holbrook said there is no such thing as unfair surprise on an expert, and the committee agreed.

The comments on the oral report provision were discussed, with particular reference to the provision on testimony at trial. The Reporter reminded the Committee that the purposes of the provision were to save expense of double appearances by expensive experts, while protecting the opposing party's right to cross-examine on the one occasion when the expert's testimony is for real. But the chair cautioned that the party calling the deponent might want the security of having a record of the testimony in case the expert is not available at trial. Concern was expressed that the deposition might be used to force the opposing party to disclose his or her cross-examination so that witness could be prepared for it when giving testimony at trial. It was agreed that if the provision is to be retained, better explanation of the reasons could be provided in the notes as to why the deponent cannot be called. Justice Zimmerman thought this "sandbag" concern legitimate. Mr. Powers and Judge Brazil agreed. Ms. Holbrook thought the party using the expert should not have two shots, "take one" or "take two." Judge Winter favored leaving the provision as is. Judge Pointer argued that this possibility still exists if the party can depose the expert after preparing the report. The reporter acknowledged this clearly to be so, expressing a preference for a one-bite rule even in the situation Judge Pointer described. Judge Pointer thought that this would be unfair to the party who had good reason for taking a deposition as a fall-back.

It was agreed to withdraw the oral expert-report provision, but to prevent expert depositions before a written report had been provided in order to assure an opportunity for an informed cross-examination. It was also agreed to add a new subparagraph (B) providing for rebuttal experts. It was agreed that (a)(1) should have no application to experts. It was agreed that no notice of use of an expert would be required prior to delivery of the written report. It was agreed that the dates for disclosures should be measured from the date on which the case is to be ready for trial. It was agreed at Dean Nordenberg's suggestion that the rebuttal report should be due within 30 days after delivery of the primary expert report.

Judge Keeton suggested deleting "is scheduled for trial or" as surplusage. The suggestion was accepted. He also questioned whether the disclosure provisions are worth it. It was noted that Judge Keeton could by local rule exclude FELA and admiralty cases, which were the object of his concern.

Discussion turned to the New York bar suggestion that "communicate" be substituted for "confer" with respect to the "golden rule" requirement. It was agreed that a nasty message on the phone is not a good faith effort to resolve. It was decided to modify the text to provide for an "attempt to confer" in good faith effort to resolve.

Discussion turned to subdivision (e). It was agreed that disclosure should be supplemented when the answer raises new issues. Minor changes in sentence structure were agreed to.

Attention turned to Rule 29. The language suggested by the chair to limit agreed extensions of time where extensions interfered with the court's scheduling was approved.

Rule 30 was raised, and comments by lawyers and court reporters were considered. Mr. Linder noted that the lawyer comments were supported by some Justice department reactions to presumptive limits. Justice Zimmerman thought that such comments reflected misundertanding of the need for default provisions. It was agreed to retain the presumptive limits.

The problem of "per side" was reviewed. Justice Zimmerman thought that the complaints about the provision were from those who did not want to sit down and work out their problems. Judge Winter noted that the "per side" issue may not be so easily negotiated. Judge Phillips described the lawyer responses as "despairing." Judge Stevens and Judge Pfaelzer agreed that there was no reason to look back, Judge Pfaelzer suspecting that some the feelings were related to the need for billable hours. Ms. Holbrook regretted that Judge Pfaelzer was probably right in her suspicions. Judge Bertelsman thought that the Committee should no more expect lawyers to approve limits on discovery than it should expect court reporters to approve videotape.

The 8-hour deposition limit was also reviewed. It was facetiously suggested that 8-billable hours would be a standard to be considered. Judge Pointer thought it meant 8 hours exclusive of breaks, or at least that a clarification was needed. Ms. Holbrook called attention to long breaks for telephone calls or for witness-coaching sessions. Judge Stevens suggested "on the record." Justice Zimmerman wanted to limit to one business day. Ms. Holbrook favored a limit of 8 hours of actual examination. Judge Brazil thought that this was too many hours for one working day. Mr. Linder preferred the one-day rule. Six hours of actual examination on the record was agreed to.

The division of time between counsel was next considered. Justice Zimmerman thought the lawyers could work it out. Judge Bertelsman agreed, as did Judge Brazil. Judge Pfaelzer feared that the limitation was unworkable and would produce a lot of motion practice. Ms. Holbrook said most depositions could be taken in 6 hours, that many lawyers begin depositions without preparation and cruise for the first day on questions regarding irrelevancies. The Reporter noted that one function of the time limit was to protect the deponent who is not being paid by the hour, or in some cases the employer of the deponent who is bearing the real cost. Judge Pfaelzer noted the possible benefit of discouraging "speaking objections" that occupy 7 pages of record. Judge Phillips questioned how much discovery is really achieved by depositions and thought all the incentives were in the direction of long depositions. Judge Winter thought perhaps the time should be divided in half; Ms. Holbrook and Mr. Powers thought that most depositions are conducted mostly by the noticing

party. Judge Pointer thought that there might be a provision for sanctioning an unreasonable refusal to agree to an extension. It was thought that this presented additional problems, but unreasonable refusal could be used in the notes as an example of oppressive conduct that frustrates fair examination. Judge Stevens noted that the workability of the scheme depends on a judicial officer being accessible to the parties. Judge Pointer thought the note could simply call attention to the duty to work matters out. It was so agreed, the proposal to be modified only with respect to a 6-hour limit.

The chair called attention to the vast correspondence from court reporters, and recited their arguments against the reporterless depositions provided by the draft rule. It was agreed that the reporters had a point, especially in regard to audio tapes, but that the arguments should be addressed to the market, not to the rules. The requirement of a certified person to conduct a deposition was discussed. It was understood that such a person would be needed where mistrust is high. The requirement would likely be waived in those circumstances in which the audio tape recorder would be usable. Justice Zimmerman again emphasized the market place as the appropriate decision maker.

At the suggestion of Justice Zimmerman, the text was modified at line 181 to create two sentences, thus denying to parties power to agree that no one else should see the deposition.

The California Bar's comments on the provision bearing on the supplying of copies were considered. At line 163, it was suggested that the deposition should go to the party who requests preparation of the transcript rather than the party who noticed the deposition. It was observed by Ms. Holbrook that this portion of the rule applies only to transcribed depositions, not to untranscribed tapes. The Reporter suggested a possible reorganization of the paragraph, the first subparagraph bearing on certification, the second bearing on the right to copies; and the third bearing on storage. At Judge Pointer's suggestion, it was decided to resolve the matter in the notes.

Discussion moved to Rule 32. The American College of Trial Lawyers' concern with lines 22-27 was considered, regarding protection of deponent or party who has inadequate notice of a deposition; the proposal would allow a deponent not to appear if notice was less than 7 days and no ruling had been made on an objection. Judge Brazil emphasized the need for a text change to clarify the time limit on the filing of objections. Judge Stevens thought the presumptive 7-day limit could be avoided by staying with the requirement of a reasonable time. Judge Pointer reminded the Committee that the unavoidable problem is the pending motion requiring more or better notice: a party should not have to go to a deposition just because the court has not yet ruled on a substantial objection that notice was not "reasonable." It was suggested that a time should be designated which would be presumptively reasonable. Judge Leonard reported that North Carolina had adopted the federal rule, but added a 10-day rule. Judge Brazil noted that California has a 10-day presumption and that an 11-day rule would achieve the same result. Judge Pfaelzer noted that this would protect non-parties as well. Judge Brazil asked whether the rule should apply where the motion asked that no deposition should be taken at all. Dean Nordenberg thought that such a motion raised a different issue. On the other hand, it was noted that shortness of time might prevent a ruling on such a motion as one attacking the adequacy of notice. Justice Zimmerman cautioned against giving more time and protection to parties than to non-parties. It was agreed to keep the proposed change but increase the notice period from 7 to 11 days. The words "upon receiving such notice" were deleted.

Attention turned to Rule 33. Judge Pointer reviewed the concerns expressed. No member of the Committee desired to change the draft. It was thought that a "per side" limitation is not needed, given the scale of the burden entailed in answering interrogatories,

and the difficulty of diverse parties agreeing to the language of interrogatories. An "identity of interest" rule was also rejected.

Attention turned to Rule 37. It was agreed that the revision should encourage parties to comply promptly with discovery requests, and the SF Bar suggestion was accordingly resisted. It was decided not to try to improve on "substantial justification."

The discovery proposals were approved as revised.

The Rule 1 revision was approved without discussion.

Rule 16 was again considered. The suggestion that the rule guide judges to use pretrial to schedule discovery with more aggressive provisions than the present draft contains, to compensation for deletion of Rule 26(f). Judge Pfaelzer thought a stronger mandate would be ineffective. The ADR provision was reconsidered in light to adverse comment that they may encourage inappropriate use of non-judges. The American College has expressed opposition to the summary jury trial. But the Committee nevertheless concluded that it should authorize the use of jurors for summary jury trials. Judge Brazil reported that 90% of the attorneys forced to go through ND Calif programs thought they should be expanded, but that Senator Heflin is strongly opposed. Mandatory is necessary to get parties to come to such proceedings, otherwise the first volunteer is signalling weakness in negotiation. Judge Bertelsman noted that the first draft of the Biden rule made mandatory-ADR mandatory for the courts. It was noted that the cross-references to Rules 50 and 52 merely reflected changes in those rules already promulgated by the Supreme Court. Judge Pfaelzer recorded her concern that single-issue trials is a managerial technique used to induce settlement that can be abused.

Judge Pointer called attention to the provisions in the draft on ADR costs. Judge Brazil predicted that these will arousee opposition, especially when considered in combination with the revision of paragraph (9). Judge Winter questioned whether the proposal regarding costs was "procedural" within the Rules Enabling Act. Mr. Powers expressed opposition. The clause was stricken from the draft.

Attention was given to Rule 43. The American College expressed concern about the adopted statement technique as a means of facilitating the preparation of slick expert reports. Judge Bertelsman and Judge Pfaelzer reported that this is done frequently already. Judge Pointer reported his experience with the device. Note was also taken that anything in the statement should be admissible, and that the text should permit adoption of a deposition as well as an affidavit. Judge Winter thought the Notes should offer examples of cases in which it is appropriate to use this device. Judge Leonard called attention to the relation between Rules 32 and 43. Judge Pointer thought it might in the Notes be indicated that the adopted statement is most useful for experts, and in non-jury cases. Judge Stevens thought this authorized speech-making by witnesses. Judge Keeton thought making a speech no worse than canned testimony, and that it is more efficient whenever there is no credibility issue. The Reporter suggested limiting to non-jury or experts in jury cases. Judge Keeton thought it sometimes useful to include in the jurors' notebooks in a well-prepared case as an aid to understanding. Giving witnesses free rein, he argued, is a better way of hearing from witness rather than lawyer; for that reason, he preferred on occasion to use or even require oral narratives. Judge Pointer noted that it was necessary to go to Rule 611(a) to require the oral testimony. Judge Schwarzer reported his successful use of adopted statements in many trials to get out the non-controversial background and as a device to prod good preparation, and makes a better record for the court of appeals. Judge Powers asked how the statement is acquired in advance. Judge Schwarzer required exchange at pretrial conference, and this was upheld in his *Chapman* case. Judge Pointer noted that there is review now for an abuse of discretion, and thought that sufficient constraint. Justice Zimmerman thought that if this is, as it seems, a good device, its

use should not be constrained. Mr. Powers thought the draft too loose in allowing a lawyer-prepared statement to serve as the testimony of a liar. Judge Keeton argued that this is more than compensated by improvement in the cross-examination. Judge Schwarzer suggested that one could confer on lawyers right to present oral Q-and-A but let judge require advance exchange of affidavits. Judge Stevens thought the method one more properly suited to administrative proceedings. Judge Winter proposed that a clause be added: "If it will expedite trial, assist the trier of fact to ascertain the truth, and not prejudice a party;" and Judge Brazil asked that the note discourage the use of the device for a "fact witness." Judge Pfaelzer reported that 80% of testimony is not contested and could be presented more briefly in written form. It was agreed to phrase a conditional clause and to modify the notes to caution overuse. Dean Nordenberg thought it enough if the device will expedite, and not harm the search for truth; the language suggested was "If it will expedite the trial and not impair the ability of the trier of fact to understand the evidence," although Judge Winter would have preferred "enhance" in lieu of "not impair." Judge Phillips suggested that there should be a finding of the condition, but the suggestion was not adopted. The Reporter suggested a cross-reference to Rule 1. It was decided to require that the use expedite trial and assist the trier of fact.

Judge Keeton proposed language to substitute for the cross-reference to Rule 56. Justice Zimmerman supported the proposal. Judge Pointer agreed to revise the draft to effect that result for later approval by the Committee.

The Committee next addressed Rule 11. The Chair saluted the work of the Judicial Center. Its report was reviewed by Mr. Willging and Ms. Wiggins.

Possible revision of Rule 11 was next considered. The draft before the Committee was examined. The questions raised were whether the principle of Rule 11 should be applicable to oral representations to the court, and whether it should impose a continuing duty. As to the former, Dean Nordenberg thought these were different in regard to the state of mind of the attorney. As to the latter, Ms. Holbrook argued that many cases marginal at the time of signing become sub-marginal as time passes, as where there has been adverse precedent established. Judge Winter thought that no decision other than a square Supreme Court decision could have a significant effect. Judge Pfaelzer expressed the view that factual indeterminacies are often resolved as discovery proceeds, leaving the pleader high and dry of facts.

The Reporter expressed the view that the evil to be corrected is insistence on a contention after its legal or factual deficiency was made apparent by the adversary's brief or motion papers. Judge Phillips could not favor extending the responsibility to "maintaining" a contention or to oral contentions unless the Committee could make a better provision on sanctions. Judge Pointer observed that the Reporter had tried to draft a comprehensive sanctions provision, but had been unable to make the discovery sanctions mesh with the Rule 11 type of problem. The Reporter confirmed that there were different foci in two different types of situations, discovery being different from the others, and that no advantage in coherence had been gained in drafts trying to merge them. Professor Miller reminded the committee that the stop-and-think approach could not be extended to many oral statements, although it could apply to some, but he thought the bail-out provision might be a good idea, although it might be a litigation breeder by requiring a second set of papers.

Justice Zimmerman spoke for bail out as suggested in Draft B as a precondition to sanctions motion: it reduces the harm caused by the failure to stop and think. It is a rule that can be imposed on defendants as well as plaintiffs. The Reporter suggested that there need be no second set of papers, that the party would be permitted to withdraw without sanction after seeing the adversary's motion. Ms. Holbrook thought this a waste of the moving party's money to prepare a motion that would merely result in withdrawal of a claim or defense, that

the offended party should not have to prepare papers, and that a mere letter demanding withdrawal without statement of reasons should suffice to put the offender on notice. Professor Miller called the proposal "shadow litigation," bargaining under the shadow of Rule 11. Judge Bertelsman thought that a lot of the hostility could be relaxed without the court being involved if withdrawal after seeing motion papers was permitted. Judge Phillips insisted that if the applicability of the sanction were to be extended beyond the signing, then you have to leave the exit door open or find some other alternative to looking for a mis-signed document. Judge Pointer supported Justice Zimmerman's view that the bail-out would go a long way to balancing the rule.

Judge Brazil thought that one function of the rule was to deter malice. He was concerned about the use of law suit to harm competitors, as by securing meritless TROs. Justice Zimmerman thought the bail-out helped identify malice. Judge Bertelsman thought that one need not be stupid or malicious to make mistakes in a field such as civil rights law. Judge Winter thought the bail out a good idea, but thought we might identify a list of mitigating factors to be taken into account, as withdrawal of a weak claim or defense when defect called to his attention. In this respect, he was attracted to Draft B. He thought that what is needed in the warning is an explanation of the defect - the warning notice should come in the form of a Rule 12 or 56 motion. Justice Zimmerman emphasized the need for predictability in the safe harbor and Judge Winter's suggestion would provide that. The Reporter thought Judge Brazil's problem could be handled under Rule 65, and that the warning could be provided in that form. Judge Brazil thought that requiring notice in official form would induce more motions. Judge Phillips accepted that cost since there would be no need to rule on them if they were in fact meritorious. Ms. Holbrook reiterated her view that notice should not be required for initial signing based on inadequate prefiling inquiry. Judge Pfaelzer thought that warning should be required to inform parties of the nature of the defect, that the taking of a party by surprise is one of the worst features of the rule. Justice Zimmerman thought it unnecessary to be more explicit as to the means of warning than the proposed Draft B, but would require indicia of notice, maybe sometimes a copy of the informative warning letter or sometimes a motion or objection on file. But moving party should make a record of the warning. Professor Miller questioned whether anyone would take the "safe harbor," that it would not reduce litigation, and did not think it a cost-free choice. Justice Zimmerman expressed the thought that the safe harbor would protect the notice pleading tradition. Professor Miller acknowledged that Rule 11 could be thought of as a defendant's rule, but to balance Rule 8, the plaintiff's rule; he favored giving easy access under Rule 8, but forbidding abuse. Mr. Powers expressed the view that the rule should be returned to 1982. Judge Winter asked about repetitious refiling of the withdrawn claim. The Reporter noted that tort law was available to deal with that. Judge Bertelsman called attention to Section 1927 as a response to Judge Winter. Judge Pointer thought that some things should be left to tort law, leaving Rule 11 to do what can be done by procedure rules, i.e., cause weak cases to depart. Mr. Willging reported that 10% of the cases in his sample settled after a Rule 11 threat was uttered. The Committee tentatively agreed that it should try to make a safe harbor for persons not put on appropriate notice of the defect in their case, with a dissent and one member still stopped to think. The Committee also agreed that the duty should be a continuing duty.

The Chair moved the discussion to the question of the negligence standard. The Reporter explained what he perceived to be the advantages of getting away from the negligence standard, to wit: (1) avoidance of Rules Enabling Act issues raised by *Business Guides,* (2) particularly if the rule is to be extended to law partners and represented parties who share the responsibility, so that (3) the same standard is applied to all who so share; (4) the subjective standard mutes the troublesome difference between "shall" and "may;" (5) the safe harbor device works more easily; (6) makes it possible to provide carrots as well as sticks, and (7) it permits conformity to state practice. Judge Brazil expressed tentative complete disagreement; he believes that fee-shifting is the Rules Enabling Act problem, and that a change to a

subjective standard would eviscerate stop-and-think. Judge Winter argued that there should be no safe harbor for the malicious plaintiff, but the list of factors in draft B could be used as mitigating factors. Professor Miller gave his final disapproval of Draft B, for it would be a total victory for Mr. Powers. The evidentiary issue raised would be as big as "all outdoors." It would de-stabilize the law of Rule 11. He did not think that state practice should be considered by the federal judiciary. Judge Pfaelzer expressed concern that an inquiry into purpose would imperil attorney-client confidentiality. Justice Zimmerman thought that the safe harbor on the negligence standard made it sufficiently subjective to correct the deficiency in the present rule. Judge Bertelsman favored the negligence standard with a safe harbor; Judge Pointer agreed, and also noted that the safe harbor in effect created an element of willfulness.

Attention turned to the shall-may issue. The proposed draft used both. The Chair explained draft A. The Reporter expressed concern about the permissive form that might produce different standards of practice according to the judge's discretion. Judge Phillips doubted that it mattered, given the amount of discretion created by the rule. The district judges disagreed, asserting that many sanctions were imposed as a result of the requirement. Judge Phillips remained dubious. Justice Zimmerman argued that a change in the sanctions would make the issue less consequential. The Reporter reminded the Committee that the 1982 Committee thought that "shall" was important to get the judges to act. Judge Brazil thought that "may" would send the wrong signal. Judge Pointer noted that everyone agreed that "shall" is correct as to intentional violations, but that there was overwhelming sentiment among judges and some lawyers to go to "may" for negligence. On the other hand, with the bail out provision, there is little significant difference. Judge Bertelsman thought that the change of climate made the change to "may" less consequential; Judge Pfaelzer disagreed, but emphasized the need to make discretion in choosing sanctions more apparent. Justice Zimmerman supported that approach. Judge Pfaelzer thought that this would give support to appellate review on the choice of sanction. The Committee was tentatively disposed to keep "shall," but with loosening up on sanctions and providing the bail-out.

Attention turned to the sanctions and the notion of least severity. Judge Pointer argued that "least severity" overstated the point, and suggested that the sanction should not be greater than necessary to achieve purpose. Judge Winter suggested "sufficient to deter." The Reporter thought the aim should be to refocus attention on deterrence, and away from compensation, although for intentional violations, fee-shifting might be necessary to deter. Ms. Holbrook argued for fee-shifting, but Judge Brazil acknowledged that the aim of compensation is a tort law purpose, and that non-deterrence steps across the Rules Enabling Act line. Judge Winter argued that fee-shifting is always the appropriate sanction where the act is willful, and sometimes double or triple compensation is needed to deter. Judge Brazil argued against any cap, which would not work in intellectual property cases at all. Mr. Powers asked how what is proposed differs from tort law. Judge Brazil argued that the courts have a duty to protect themselves from abuse. Justice Zimmerman argued that deterrence is best determined by the trial judge in light of the particulars. Judge Brazil agreed that the rule should not require fee-shifting in cases of intentional harm. Judge Pointer commented on the Supreme Court opinions in *Business Guides*.

The Committee digressed to address a re-draft of Rule 26 done to conform to earlier directions. Minor changes in sentence structure were effected, and one change made to effect a decision earlier made but not reflected in the re-draft.

Returning to Rule 11, discussion returned to the continuing duty. The Reporter emphasized the need for content in the warning to trigger the duty to withdraw. Justice Zimmerman pointed to lines 66-67 of Draft B as a means of effecting that result. It was agreed to strike the words "orally or" in any such provision.

Judge Pointer directed attention to the draft's treatment of the "information and belief" plaintiff who does not know the facts, as a Title VII plaintiff who knows only that she has been passed over for promotion. Professor Miller added the example of asbestos ID to illustrate the plaintiff who needs discovery to ascertain whether she or he has a case. Dean Nordenberg wondered whether it was necessary to abandon the "well-founded in fact" language; Judge Brazil thought this a much-needed change. It was agreed that the pleader should not have to possess admissible evidence as a basis for a belief.

Judge Phillips wondered about representations of fact not likely to be tried, e.g. too sick to attend hearing. "That can be adduced at trial" seemed not to apply. Judge Pointer agreed that lying to secure a continuance should be sanctionable.

Judge Pointer suggested that, as part of the objective standard, the rule should require a "reasonable" argument, not one that is made in good faith. Judge Winter suggested that candor is what should be required, not substantive reasonableness. Judge Bertelsman thought no one gets sanctioned for legal deficiency if they did homework. Judge Brazil thought that any legal argument might be apprropriate "if expressly made." Mr. Powers and Judge Pfaelzer suggested minor changes in that proposal. Judge Pointer noted that this would result in overruling *Golden Eagle*, but Justice Zimmerman noted that with the bail-out provision, this should pose no problem. Ms. Holbrook argued for the retention of the "good faith" requirement. Judge Pointer thought that either "reasonable" or "good faith" should be required. The question arose whether good faith is in this context a subjective test; Judge Winter argued that one could make a terrible argument in good faith if one thinks the court is terrible and might buy it. Professor Miller likewise agreed that good faith in Rule 11 is an objective standard. Judge Winter suggested the test should be "non-frivolous." Professor Miller noted that this was consistent with Rule 11 case law. It was agreed that a pleading should be warranted by law or if specially identified as such by a non-frivolous argument for modification.

The question was raised whether the court should act on its own motion, and if so under what circumstances. Judge Pointer argued that court should have power to act in accordance with proper standards. Mr. Powers, favoring civility, thought that sua sponte action is to be preferred to motion practice. He argued that the present rule requires lawyers to make motions to protect their clients' interest by seeking a fee shift. Judge Pfaelzer thought sua sponte OK if judge is constrained to step back for a moment so as not to act in anger. Judge Pointer urged that his draft would in effect require a cooling off through the show cause procedure required before money sanctions can be imposed. Judge Bertelsman reported that he often used warnings to get parties to find necessary proof or withdraw. Judge Brazil thought the process should not be limited to money sanctions. Judge Pointer thought that a reprimand should not require elaborate procedure, but agreed that some notice and opportunity to be heard should be provided. Mr. Linder spoke against sua sponte as a potential abuse, even where the sanction is "just a reprimand." Judge Pfaelzer agreed that there is a risk of abuse. Justice Zimmerman argued that the offending party should be entitled to the same warning for sua sponte sanctions as for sanctions on motion. Judge Pointer thought sua sponte action unlikely except in fairly extreme cases, where the chief harm is visited on the court, as where court spends a lot of time examining materials submitted in opposition to a motion for summary judgment. At that point, there is nothing to withdraw, and the judge should have some recourse. Judge Winter added that a judge should not comment on a case until the judge has decided the merits. It was decided by a narrow vote that a party should not be permitted to withdraw once notified that the judge is considering sua sponte sanctions.

The draft before the Committee authorized "or remedial measures." It was decided to delete that phrase. It was agreed that any fees sanction should be limited to those related to the violation and that are unavoidable. The proposed note authorized consideration of the

resources of the sanctioned party. Monetary sanctions on the non-signing party would be limited to the bad faith violation. Mr. Powers proposed that the rule be clear that fee shifting is a disfavored remedy. Justice Zimmerman and Judge Pfaelzer recommended the sentence in draft B. Judge Pointer emphasized the need to make recovery of costs of the winning motion. Judge Brazil argued that the prevailing opponent of the motion should not be rewarded for having a barely non-sanctionable pleading. Given the de-emphasis on fee-shifting, there will be many fewer motions, and there is no incentive to bring the issue up if the moving party is at risk. It was agreed that the purpose of deterrence should be stated in the rule to comply with the Rules Enabling Act and reduce the frequency of fee-shifting. It was agreed that there was still need to identify fee-shifting as one possible deterrent, but to add other possibilities as suggested in draft B in order to relieve the focus on fee-shifting. Justice Zimmerman suggested a separate sentence to authorize but not require one-way fee shifting on the motion; Judge Pointer argued successfully that it should be two-way discretion in order to control the frivolous Rule 11 motion.

Judge Pointer suggested that the Rule 11 motion should be required to be on a separate paper. This was agreed to, despite some reservations by the Reporter that it was the most formal of requirements. The purpose was to discourage the casual add-on motion that gets lost in the file. The Reporter presented the suggestion that the motion be precluded until the merits have been resolved; this was disapproved as inefficient, Judge Pfaelzer being the chief critic. Judge Pointer argued for simultaneous motions. Judge Keeton noted that he had often postponed ruling on Rule 11 motions until the merits had been resolved.

Other details of draft A were considered and approved. Professor Miller argued successfully that appealability should not turn on whether money was involved. Judge Keeton suggested the need to consult the Appellate Rules committee on the issue of appealability. Mr. Powers thought that immediate appeal should lie if interest runs on the obligation. Judge Brazil suggested striking the proposed sentence, but others thought that there was need to require formal compliance with Rule 58. The Reporter suggested that draft A conformed to what is being proposed on Rules 54 and 58. Judge Winter agreed with Judge Brazil, and the Committee concluded that the resolution of the issue should be left out of the rule.

Judge Pointer asked whether the Committee wished to require a hearing as well as notice and opportunity to respond in writing. Judge Pfaelzer and Justice Zimmerman argued for an opportunity to face the judge. Ms. Holbrook thought lawyer feelings should not be weighed more heavily than client feelings in regard to dispositive orders, where hearings are not always required. The text of Draft A as proposed was approved in conformity with her argument.

There was no sentiment for a cap on sanctions that might defeat deterrence in large cases. Justice Zimmerman argued that double damages should not be awarded to the party, but that the excess should be paid into court.

It was agreed that the rule should apply to law firms, not just signers.

After an overnight break, the Committee reviewed a draft of Rule 11 embodying the foregoing decisions. The draft broke out the sua sponte action for a separate paragraph, and did not provide for fee-shifting when the action is taken on the court's initiative. This was agreed to.

"Reasonably calculated" was substituted in the overnight draft for "Sufficient to" in order to suggest constraint and avoid overdeterrence. Judge Phillips argued for the use of the word "least." Professor Miller opposed that. Judge Keeton suggested "likely to be sufficient to deter." Justice Zimmerman suggested "limited to one sufficient to deter." Judge Pointer

supported this suggestion, and it was approved. Judge Winter moved that the safe harbor not apply to intentional wrongs covered by (b)(1). Judge Pointer noted that this would result in getting the same motions, but shift the issue to bad faith; he thought that it was necessary to provide the safe harbor for (b)(1) in order to make it effective for (b)(2) and (b)(3). Judge Keeton thought perhaps the limits on sanctions should not apply to (b)(1). Judge Pointer responded that larger sanctions are appropriate to deter (b)(1) acts under the present draft. The Reporter supported Judge Pointer's suggestion that Judge Winter's proposal would make the safe harbor unsafe, and noted that Rule 65 and attachment statutes provide other deterrents for misuse of provisional remedies. Judge Stevens urged that the distinction of (b)(1) is justified only if the safe harbor is not applicable. Judge Phillips and Judge Pointer noted that the opposing party would be less likely to withdraw voluntarily if they would still be exposed to liability for sanctions. Judge Winter expressed willingness to go along for this reason, if the Notes indicated that the court could deal with (b)(1) matters sua sponte.

Judge Winter noted that there will be objection to conducting an inquiry into the participation of partners, but it was nevertheless agreed to retain that provision. Professor Miller opposed a split infinitive and a latinized caption; his points were accepted. The overnight draft was approved for publication with these changes.

An overnight draft of Rule 43 was reviewed and approved.

Attention was turned to Rule 56. Judge Pointer urged revision of draft with respect to time to respond, and supported SF Bar's suggestion that the statement of legal principles not be required. It was agreed that the motion probably would contain some statement of the law, but that this should not be required. Judge Pfaelzer emphasized the need for brevity. Judge Keeton suggested adding the word ",defenses," after "claims." The suggestion was broadened to include "issues." Justice Zimmerman argued against the injunction: "Without argument."

Judge Phillips suggested that "defenses and issues" should also be specified in subdivision (a). Justice Zimmerman noted that there was no motion for a determination of an issue in draft subdivision (c). Mr. Powers questioned whether one could decide that an "issue" is not "in issue." Judge Pointer explained the need to get away from the term "material facts" as the items to be decided, but agreed that the word "issue" cannot be used in two ways. Justice Zimmerman suggested that an issue may not be "genuinely in dispute." It was agreed to substitute "not genuinely in dispute" for "not in issue" wherever the latter term appeared in the draft.

Discussion focussed on the partial disposition. Judge Keeton affirmed the need for three terms, summary adjudication to include summary judgment and something else. Debate proceeded on whether an issue not in dispute should be summarily established, resolved, decided, or determined. Judge Phillips thought the word establishment had caused some of the misreading of the prior draft. Judge Pfaelzer and Judge Pointer agreed. It was agreed to call the rule "Summary Adjudication." Subdivision (a) will specify two forms of summary adjudication, summary judgment and summary something. Judge Keeton urged that the word "judgment" not be used unless a final disposition is intended. The Committee at last settled on "determination" as a counterpart to "judgment" to describe the interlocutory disposition of an issue. It was noted that this would require the abandonment of the use of the verb "determining" elsewhere in the rule.

Judge Pointer recommended that a party not be permitted to rely upon its own pleading even if verified. Justice Zimmerman questioned the words "substantially affecting" as a limitation on the power of the court, but the words were left in the text. Other suggestions from bar groups were reviewed. It was decided not to require an oral hearing, and not to permit the movant of right to supplement the motion with additional affidavits because of the dilatory effect of supplementation. The effect of non-compliance as an admission was considered and it was decided that the sentence bearing on the problem should read: "To the extent that the party challenging an asserted fact does not comply with (C), it shall be deemed to have admitted that fact." It was decided that no additional provision is needed bearing on reply briefs. Mr. Linder questioned whether the court should have discretion to deny a summary judgment to which a party is entitled; Judge Phillips thought it appropriate to let the court act on intuition that a trial is appropriate. The Reporter called attention to the present subdivision of the rule providing discretion to deny the motion. Mr. Linder also expressed the hope that the Notes would be clear that the Committee is not changing the standard.

The Reporter called attention to provisions of the former draft omitted or partially omitted from the new draft. It was decided that the subjects of the provisions adverted to were adequately covered in the new draft. The Reporter also questioned whether the relationship between Rules 43 and 56 was appropriate and clear, or whether some of the language

describing affidavits should be in Rule 43, too. Judge Phillips questioned whether the relation to Rule 11 was so clear that the deletion of the present subdivision is justified. It was decided that the deletion is appropriate. The Reporter suggested a change in the caption to make it more precise. Professor Miller called attention to the comparable provision of Rule 23, and it was agreed that the subdivision caption should be "Conduct of Proceedings." With the foregoing changes, Rule 56 was approved for publication.

Attention turned to Rule 54. It was decided that it was not necessary to specify the court in which the services were performed. The SF Bar comments were reviewed. Justice Zimmerman questioned the use of different terms for valuation of services and the determination of the fee award. Justice Zimmerman and Judge Pfaelzer argued for the use of taxing masters. Others questioned the device. Ms. Holbrook and Judge Bertelsman thought the parties should not be required to pay for the disposition. Professor Miller noted that some courts were appointing committees of lawyers, and that the problem of common fund cases is quite different. It was decided to delete the word "taxing" and to collapse the difference between a mastership created by local court rule or by special order. Judge Keeton recommended the use of presumptive findings, and language was added to permit other such devices.

The revision of Rule 58 was considered and approved, it being understood as a device for allowing the district court to resolve the problem of separate appeals on costs issues. Judge Leonard questioned the relation to Rule 59, but no change was deemed necessary.

Rule 83 was next considered. The Reporter questioned whether "not inconsistent" would supersede "consistent" in the Rules Enabling Act. It was decided to delete the double negatives in the present rule to conform it to the 1988 legislation. The concern that the new rule might unduly encourage local rulemaking was discussed. The Reporter thought that the experimental rule provision would channel local rulemaking in a constructive way. It was agreed that an experimental rule is consistent with the national rules as required by the Rules Enabling Act. The suggestion of special notice to the parties of each experimental rule was considered, but no action was taken. Judge Winter noted that an experimental rule could be reenacted every five years, but the Committee was indisposed to prevent such persistence.

Evidence Rule 702 was considered. The objections of the Criminal Rules Committee were reviewed. It was reported that they disapproved of the requirement of a judicial finding, of the requirement of substantiality, and of the setting apart of civil cases. Judge Keeton urged the Committee to express its own independent view to the Standing Committee. He also cautioned against having different Evidence rules in criminal and civil cases.

Justice Zimmerman suggested that the text should be revised to require a finding that there is reliable information on which the opinion is based. He argued that the whole system is off the tracks on experts; he and Judge Winter argued that the problem of experts is at least as great in criminal cases as in civil. Judge Pointer thought that the weakness of the draft is that it does not go far enough; he endorsed Justice Zimmerman's suggestion. The Reporter called attention to the academic critics that the desire to curb expertise is anti-intellectual. Justice Zimmerman emphasized that the courts have abandoned the effort to control quackery because there is no protection for the judge who does so. He was cautioned against preaching to the choir, as Judge Pfaelzer, Judge Bertelsman, and Judge Phillips supported his views. There was no dissent. Justice Zimmerman's proposal was adopted.

Rule 705 was also considered. Judge Keeton thought the rule needed to permit in limine rulings by requiring sufficient disclosure to facilitate such rulings. Judge Pointer argued that the rule deals only with sequencing. Judge Winter thought perhaps the last sentence of the rule could be deleted. But the Committee concluded that the draft should be left substantially in its proposed form.

Judge Keeton noted that the Standing Committee may wish to have the Committee consider a more radical alternative to Rule 26(a)(1). He expressed concern that the proposed draft is complex and may be used to produce delay and impose expense. The Reporter acknowledged that consideration had been given to more sweeping requirements set forth in earlier drafts, but the Committee had been troubled by the unenforceability of a general duty to disclose "smoking guns." Judge Pointer suggested local experimentation with broader rules.

It was agreed to set August 23-24 in Boston as the date of a meeting if needed to respond to the Standing Committee. The next regular meeting was set for November 21-23 in Los Angeles, the meeting to include a hearing.

The meeting adjourned at 12:10 on Saturday.

Paul D. Carrington
Reporter