COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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May 3, 1991

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TO: Members, Reporter, and Secretary--Advisory Committee on Civil Rules
Chairman and Liaison Member--Standing Committee on Rules
Chairmen--other Advisory Committees

RE: Committee Meeting
Room 638, Administrative Office, 811 Vermont Ave. NW, Washington
May 22-24, 1991

I look forward to our meeting in Washington on May 22-24 and hope each of you will be able to attend. As in the past, the meetings will start at 8:30 in the morning, and the meeting on the 24th will end in time for people to catch afternoon flights. Meetings will be in Room 638 of the Administrative Office, 811 Vermont Avenue N.W., which is a block-and-a-half from the Hay Adams, where I assume most out-of-towners will be staying.

At the end of this letter is a tentative agenda, which, of course, is subject to change by the Committee. Please remember to bring with you the May 1991 draft of proposed changes, together with the April draft regarding possible changes to Rule 11.

Since distribution of the May 1991 draft, Paul and I have received several informal comments and suggestions. Of particular interest have been those received from Professor Ed Cooper and from the group of attorneys serving on the Federal Rules Committee of the American College of Trial Lawyers.

One clerical error was detected in the May 1991 draft. In Rule 34, page 34-1, line 8, the word "interrogatories" should be replaced by the words "a request." Please make this change to your copy of the May 1991 draft.

Some of the comments involve minor changes, *e.g.*, simply changing the number of days of some event or condition, or simply opposition to some change. Of the latter type would be the opposition expressed by the ACTL group to Rules 16(c)(2) and 43. These can be conveniently addressed at the meeting without preparing any redraft.

However, several of the comments that have potential merit involve more substantial changes in the language of the rules or notes that can best be discussed by showing old language (*i.e.*, May 1991 draft) and possible new language. In the attached draft, I have attempted to come up with language that reflects these comments and suggestions.

Finally, there are several comments that I have not attempted to put in the form of suggested language changes but that you should be aware of. These are summarized below:

Rule 26: Should 26(a)(1) be tightened, perhaps in some way paralleling 30(b)(6)? (Cooper)

Rule 30: Concern as to workability of 10 depositions "per side". (Cooper)

Rule 32: Is sufficient protection afforded for non-attendance at depositions while motion for protective order is pending? Should the 7 days be replaced by 10 days? (ACTL)

Rule 33: Should rule be reworded for multi-party situation, like that for depositions? (Cooper)

Rule 56: Should movant be allowed to supplement supporting materials as a matter of right? (ACTL)

Rule 83: Concern with proliferation of local rules . . . recognition of standing orders . . . authorization to adopt inconsistent rules (ACTL)

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

TENTATIVE AGENDA

I. Status Report on Rules Submitted to Supreme Court/Congress

II. Confirmation of Submission of Technical Amendments to Standing Committee

III. Old Business, including items for possible publication

- A. Discovery (FRCP 26-37)
- B. FRCP 11
- C. FRCP 1
- D. FRCP 16
- E. FRE 702, 705
- E. FRCP 43
- F. FRCP 54, 58
- G. FRCP 56
- H. FRCP 83
- I. FRCP 23

IV. New Business, including future meetings.

FEDERAL RULES OF CIVIL PROCEDURE
(suggestions for change in May 1991 draft)

Note: The text of rules and notes shown in this draft incorporates the revisions shown in the May 1991 draft. This is to facilitate identification of the suggestions made for changing the draft.

Rule 23. Class Actions

* * * *

(c) * * * *

(3) The judgment in an action ordered maintained as a class action, whether or not favorable to the class, shall specify or describe those who are found to be members of the class or have as a condition to exclusion agreed to ~~be bound by the judgment~~ *restrictions with respect to any separately maintained actions*.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) * * * *

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence which the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years. Unless the court designates a different time, the disclosure shall be made *by plaintiffs* at least ~~60~~ *90* days before the date the case is scheduled for trial or has been directed to be ready for trial *and by other parties at least 60 days before such date*. The disclosure is subject to the duty of supplementation under subdivision (e)(1).

* * * *

(e) Supplementation of Disclosures and Responses. * * * *

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party learns that the information disclosed ~~(A) was incomplete or incorrect when made or (B)~~ is ~~no longer~~ *not* complete and ~~true~~ *correct*. With respect to expert testimony that the party expects to offer at trial, the duty extends both to information contained in reports under Rule 26(a)(2)(A) and to information provided through a deposition of the expert, and any additions or other changes to such information shall be disclosed by the time the party's disclosures under Rule

26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party ~~obtains information upon the basis of which (A) the party knows~~ *learns* that the response ~~was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ *is not complete and correct*.

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COMMITTEE NOTES

SUBDIVISION (a). * * * *

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for this disclosure in a scheduling order under Rule 16(b), and ~~frequently~~ *sometimes* it will be appropriate to require that *the parties exchange such information simultaneously or that the defendants* ~~one party~~ make ~~its~~ *their* disclosure*s* before ~~other parties~~ *the plaintiffs* make their disclosures. The rule provides that, in default of such an order, the disclosures are to be made by *the plaintiffs* ~~all parties~~ at least ~~60~~*90* days before the case is set for trial or has been directed to be ready for trial *and be made by other parties at least 60 days before such date*.

* * * *

SUBDIVISION (e). * * * *

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and request for admission, but not ordinarily to deposition testimony. However, changes in the opinions expressed by an expert at a deposition are subject to a duty of disclosure under subdivision (e)(1). *The obligation to supplement discovery responses applies whenever a party learns that its prior response is no longer complete and correct, and is not limited (as under the prior rule) to situations in which a failure to supplement would have constituted a "knowing concealment."*

* * * *

Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, *if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial,* be made only with the approval of the court.

COMMITTEE NOTES

As revised, the rule provides that, unless the court otherwise orders, the parties are not

required to obtain the court's approval of stipulations to extend the 30-day period for responding to interrogatories, requests for production, and requests for admission unless the effect would be to interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

Rule 33. Interrogatories to Parties

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(b) Answers and Objections.

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(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories ~~The court may allow a~~A shorter or longer time *may be directed by the court or, in the absence of such an order, agreed to in writing by the parties*.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

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(b) Procedure. * * * *

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. ~~The court may allow a~~A shorter or longer time *may be directed by the court or, in the absence of such an order, agreed to in writing by the parties*. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

* * * *

Rule 36. Requests for Admission

(a) Request for Admission. * * * *

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may ~~allow~~ *direct or as the parties may agree to in writing*, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and

when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

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Rule 54. Judgments; Costs

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COMMITTEE NOTES

SUBDIVISION (d). * * * *

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees. It applies also to requests for reimbursement of expenses not taxable as costs to the extent recoverable under governing law. *Cf. West Virginia Univ. Hosp. v. Casey*, ___ U.S. ___ (1991) (expert witness fees not recoverable under 42 U.S.C. § 1988). As noted in subparagraph (A), it does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract; ~~except as permitted by Rule 54(b), such claims must ordinarily be resolved as part of the merits of the action before a judgment will be final and subject to appeal~~ *such damages typicaily are to be claimed in a pleading and may involve issues to be resolved by a jury*.

Rule 56. Summary Judgment

* * * *

(c) **Motion and Proceedings Thereon.** A party may move for summary judgment at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within ~~28~~*30* days after the motion is served, any other party may serve and file a response thereto~~, except that the response shall be served and filed within 14 days if the party has stipulated or admitted the facts asserted not to be in genuine issue~~.

* * * *

(e) **Matters to be Considered.** In determining whether an asserted fact is not in genuine issue, the court shall consider stipulations, admissions, and, to the extent on file, the following: (1) depositions, answers to interrogatories, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (2) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate

copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, *even if verified,* only to the extent of allegations therein that are admitted by other parties. Notwithstanding the foregoing, the court is not required to consider evidentiary materials unless called to its attention pursuant to subdivision (c)(1) or (c)(2).

COMMITTEE NOTES

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SUBDIVISION (c). * * * *

~~The time a response is due depends on whether the facts asserted to be not in genuine issue have been stipulated or admitted. A fact is "admitted" for purpose of this provision and subdivision (e) not only as provided in Rule 36, but also if stated, acknowledged or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as in a conference under Rule 16.~~

* * * *

A party is not required to file a response to a summary judgment motion. The failure to make a timely response, however, will be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine issue, the party must file a timely response that indicates the extent of disagreement with the movant's statement of the fact and provides reference to the evidentiary materials supporting its position. Failure to do so will, *like Rule 36,* result in the fact being deemed admitted *for purposes of the pending action*. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

SUBDIVISION (d). The revision provides that, when a court denies summary judgment in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary judgment is an interlocutory order *not subject to the law-of-the-case doctrine;* and ~~a party is not precluded from resubmitting a motion for summary judgment~~ *the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of* ~~when merited by~~ developments in the case or changes of law.

* * * *

SUBDIVISION (e). Implementing the principle stated in subdivision (b) that the court should consider *(in addition to facts stipulated or admitted)* only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary judgment. *Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as in a conference under Rule 16.*

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SUBDIVISION (g). * * * *

Paragraph (1)(B) recognizes the court's power to change the time within which parties may respond to summary judgment motions. Depending on the circumstances, particularly the extent to

which discovery has or has not been afforded or available, *the extent to which the facts have been stipulated or admitted, and the imminence of trial,* the ~~14-day and 28~~*30*-day periods prescribed in subdivision (c) may be lengthened or shortened.

* * * *

Paragraph (1)(D) addresses the power of the court to conduct hearings relating to summary judgment. One such purpose would be to hear oral arguments supplementing the written submissions. (Other portions of the revision to Rule 56 have eliminated the language that seemed to require such a hearing.) Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the ~~evidentiary~~ hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. *Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.*