

ADVISORY COMMITTEE ON CIVIL RULES

July 11, 1969

To the Chairman and Members of  
the Standing Committee:

In forwarding to you a revision of the Preliminary Draft of the proposed amendments to the discovery rules, I stated that there were some matters on which I would write shortly.

One such matter related to the special problem posed by electronic computers. I have circulated by mail among the members of the Advisory Committee on Civil Rules a proposed change in Rule 34 and an additional paragraph in the note to that rule, together with a full explanation. I attach a copy of the precise language in Appendix A to this letter. I have spoken about this proposal to three members of the Advisory Committee, Messrs. Frank, Kaplan, and Morton, and they approve. I invited mail comments from all members. I have received approval from Judge Thomsen, and no one has voiced disagreement.

A second matter is a topical listing of the major changes contained in the proposed amendment. I attach such a listing in Appendix B. It may be helpful with respect to the agenda for our meeting.

A third matter, which I did not mention in my letter of June 30, relates to a proposed new provision in Rule 26 (b) (3). It provides that a non-party witness may without any special showing obtain a copy of a statement previously given by him. The text appears in brackets at p. 12, lines 77 j to 77 l, and the explanatory paragraph in the note appears in brackets at p. 27.

This material was not included in the Preliminary Draft, so that there was objection in the Advisory Committee to its being adopted without a fresh submission to the bar and bench. The Committee approved it if there could be a 60 day submission to the bar. I was unable to prepare a revised version

Chairman and Members of  
Standing Committee:

of Rule 26 (b)(3) in time for such a submission, and there hasn't been any. I included the provision in brackets and took up with Judge Maris the question whether a submission was possible over the summer. He has concluded that the submission would be unwise if not impractical. In my view, this means that the bracketed material should be dropped for the present. I will report more fully at the meeting, giving other views of members of the Advisory Committee on this matter.

Albert M. Sacks

APPENDIX A

Proposed Changes in Rule 34

At page 68, lines 6-9, delete

and other data compilations from which intelligence  
can be perceived, with or without the use of  
detection devices)

and insert in place thereof:

6 and other data compilations from which information can  
7 be obtained, translated through detection devices into  
8 reasonably usable form when translation is practicably  
9 necessary)

At page 70, delete the last sentence of the bottom full  
paragraph and insert in place thereof the following new  
paragraph:

"The inclusive description of "documents" is revised  
to accord with changing technology. It makes clear  
that Rule 34 applies to electronic data compilations  
from which information can be obtained only with the  
use of detection devices, and that when the data can as  
a practical matter be made usable by the discovering  
party only through respondent's detection devices,  
respondent may be required to use his devices to trans-  
late the data into usable form. In many instances, this  
means that respondent will have to supply a print-out of  
computer data. The burden thus placed on respondent

will vary from case, to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs."

APPENDIX B

Topical Listing of Changes in Discovery

Rearrangement of the Rules

Rule 26 (b)(2): Insurance

Rule 26 (b)(3): Trial Preparation Materials

The general showing required

Special provision for attorneys

Party statements and non-party witness statements

Rule 26 (b)(4): Trial Preparation - Experts

(A) Expert Witnesses: scope of discovery

(B) Experts who are not witnesses

(C) Provision for fees and expenses

Rule 26 (c): Protective Orders

Rule 26 (d): Sequence and Timing

The priority issue

Related timing provisions in Rules 30, 33, 34, and 36

Rule 26 (e): Supplementation of Responses

Rule 29: Stipulations

Rule 30: Oral Depositions

(a) and (b)(2) Timing: Special provisions responsive to maritime practice

(b)(4) Non-stenographic recording

(b)(5) Relation to documents and Rule 34

(b) (6) Special procedure for deposition of an organization

Rule 31: Deposition Upon Written Questions

Timing; conforming changes

Rule 32: Use of Depositions

Rule 33: Interrogatories to Parties

New Procedure for objections, motions, and orders including new timing (Same for Rules 34 and 36)

Opinions, contentions, and legal conclusions

Option to produce business records.

Rule 34: Production of Documents, etc.

Elimination of court order as prerequisite

Elimination of good cause

Provision for electronic data

Non-party discovery

Related issue of Rule 45

Rule 35: Medical Examinations

Examination of non-parties

Provisions against pre-emption

Rule 36: Requests for Admission

Changes in scope

-Matters of fact and law

-Matters in dispute

-Duty to acquire additional information

Changes in procedure

Binding effect

Related provisions in Rule 37(c)

Rule 37: Sanctions

Changes to conform to new procedures in other rules

Changes to clarify

Award of expenses and fees

Award against United States

Rule 45(d): Subpoena for Taking Deposition

Rule 69: Execution

ADVISORY COMMITTEE ON CIVIL RULES

June 30, 1969

To the Chairman and Members of  
the Standing Committee:

For consideration by the Standing Committee at its July meeting, I am enclosing a revision of the Preliminary Draft of proposed amendments to the Rules of Civil Procedure relating to discovery. The changes made in the Preliminary Draft, apart from minor editorial matters, were adopted by the Advisory Committee on Civil Rules at its last meeting in April. (Copies of the present revision are being sent to all members of the Advisory Committee.) The changes were almost entirely in response to comments on the Preliminary Draft received from the bench and bar.

I have assembled the revision in the form of a reproduction of the printed Preliminary Draft on the left side of each page with deletions indicated by circling material in pencil and typewritten insertions made at the right side of the page, with pencil lines and carets to indicate the location of the insertion. In a few instances, I have "inserted" the typewritten addition into the left side of the print. This "scissors and paste" format is occasionally a bit difficult to follow (though I have tried to minimize the difficulty) but it seems the best way to show what part of the proposal was circulated to the bench and bar, and what part represents changes in response to their comments.

I plan to forward material to you very shortly on two matters. The first is a topical listing of the major changes contained in the proposed amendments which should be helpful with respect to the agenda for the July meeting. (A summary of the major changes contained in the Preliminary Draft is set forth at pp. 1-4 of the Draft.) Secondly, I have received recommendations from a member of the Advisory Committee, John Frank, with respect to reflecting in the discovery rules some



Chairman and Members of  
the Standing Committee  
June 30, 1969  
Page 2

response to the special problem posed by electronic computers. These problems were mentioned but not considered at the meeting of the Advisory Committee. Mr. Frank's recommendations reached me in early May, but I haven't been able to deal with them until now. After consulting with him and others, I plan to send the Committee a brief statement and perhaps a recommendation.

Albert M. Sacks