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MINUTES

MEETING OF THE COMMITTEE

FEBRUARY 21-23, 1991

NEW ORLEANS, LOUISIANA

Present: Bertelsman, Brazil, Carrington (Reporter), Holbrook, Keeton, Linder, Miller, Nordenberg, Pfaelzer, Phillips, Pointer (Chair), Powers, Stevens, Winter, Zimmerman.

Observers: Hnatowski (AO), Wiggins (FJC), Willging (WJC), Womack (ACTL)

The Committee met briefly on the morning of Thursday, February 21, prior to the public hearing on Rule 11. Materials and comments were distributed and the agenda for the meeting was discussed. The Committee then adjourned to the hearing room for the public hearing, which concluded at 4:30 PM.

The Committee also met briefly following the public hearing and reviewed some of the material distributed during the day. A few reactions to the discussion were recorded. Professor Miller expressed the view that some improvements could be made in the rule. Discussion focussed on the use of fee-shifting as the sanction of choice. Professor Miller reported that it was not intended in 1983 that fee-shifting should be normative. Judge Bertelsman and Justice Zimmerman expressed concern about the chilling effect of the horrendously large fee shift. Judge Winter noted that those who cause large fees are engaged in extortion and ought to clean up the mess they make. Judge Brazil voiced concern about the Rules Enabling Act.

Justice Zimmerman expressed concern about the standard, observing that the problem law in fee-shifting on cases that are not frivolous but merely losers. Professor Miller urged that consideration be given to comprehensive review of all the sanctions

rules. He argued that substitution of "may" for "shall" would send the wrong message to the judges and lawyers. Judge Winter expressed a preference for shelters or safe harbors. Judge Phillips expressed concern about excessive, over-deterrent sanctions, and echoed Professor Miller's observation that Rule 11 was bearing the burden for many problems only loosely related to the text of the rule and favored an integrated rule covering all sanctions. Mr. Willging noted that the other rules may be working more smoothly.

The Committee reassembled on Friday morning and commenced to work through the agenda material. The technical changes made to conform to the Judicial Improvements Act of 1990 were considered and approved.

The draft of Rule 38 was discussed and approved. Textual changes intended to clarify the use of the term "waiver" were considered, but none were adopted.

With respect to Rule 72, the use of the term "deems" in the present text was questioned. Judge Pointer suggested the substitution of the words "determines to be." It was decided to leave the term as is.

Justice Zimmerman suggested the substitution of "shall" for "will" in line 13 of Form 33. The suggestion was adopted.

The Committee turned to Rule 26. Judge Pointer proposed to measure the time for disclosure from the date of answer, not appearance, but to provide for parties to trigger an earlier disclosure by a demand. Judge Winter reported that some district judges thought that the disclosure rule is a mistake if discovery is postponed until after the answer, that the disclosure rule would be unnecessary for judges who do their job under Rule 16, and a burden to those who do not. Justice Zimmerman thought this a judge-centered view. Judge Pfaelzer echoed the concern that a lot of motion practice would be generated in bigger cases. Mr. Powers, Judge Pointer and Judge Bertelsman supported Justice Zimmerman's view.

The prospect of political opposition to the proposal was considered. It was decided to circulate a draft of the proposals before the May meeting, so that advice can be received before the period of public comment.

Returning to the text of Rule 26, minor textual changes were made in lines 6-8, 11, 13 and 14. Line 6 was made to refer to a each "person reasonably likely to have information that bears significantly on ..." It was decided not to insert "discoverable" in lines 6 and 9 because privileged information should at least be identified in the disclosure. With respect to subparagraph (D) and approved lines 21-22.

Judge Phillips suggested the restructuring of the sentence beginning on line 23. Judge Brazil argued for retention of contemporaneity in disclosure, in part to remove a friction point. It was agreed that the party demanding accelerated disclosure should be required to make disclosure as part of the demand, resulting in sequential disclosure in that circumstance. It was also agreed to provide that a defect in the demanding party's disclosure should not excuse a failure timely to respond. Judge Keeton suggested a restructuring of the sentence in line with Judge Phillips' comment. Judge Stevens questioned whether parties should be able to agree not to make disclosures. Judge Pointer argued that the court should be able to overrule a party agreement, but parties

should not be required to seek approval. Ms. Holbrook suggested that a written stipulation should be required to be filed. Justice Zimmerman questioned whether court approval should be required for extra depositions and interrogatories. This was in principle agreed to.

The Reporter questioned whether the principle that a defect in one side's disclosure does not excuse the other's should not be applicable to disclosures under paragraphs (2) and (3). Anemic disclosures should be punished by exclusion of evidence or foreclosure of discovery, and not by refusal of disclosure. Judge Winter expressed concern that disclosure will not work if only sanctions are applied at trial. Judge Pointer noted that pretrial sanctions could be imposed pursuant to Rule 37. Justice Zimmerman called attention to the application to Rule 56 proceedings. Judge Pointer suggested revision of lines 173-176 to preclude discovery by a party not having made a disclosure, but leaving the sanction. Judge Winter argued for preclusion of discovery unless the disclosure is adequate. In the alternative, Judge Winter argued for moving the first sentence of (d) to (a)(5). It was agreed to modify lines 174-176 as suggest "a party may not seek discovery from another party before" making the required disclosure, or before such disclosure has been made by the adversary. The Notes will explain that the inadequacy of one disclosure cannot excuse the inadequacy of another, and will refer to the possible motion for sanctions under Rule 37. Additional textual changes were adopted to make the text fit multiple party disclosures.

The Committee turned to 26(a)(2). Judge Pointer called attention to the new sentence on lines 39-41. Judge Winter reported that SDNY judges thought that expert reports should often be sequential. The Reporter suggested that the main theme of this provision should be to assure adequate information and time to prepare the cross-examination of an expert. He also suggested the possibility of an oral report, provided that the deposition be done in stages to allow the cross-examiner to prepare after knowing the contents of the direct examination. Problems in scheduling two-stage depositions were considered.

Justice Zimmerman called attention to the problem of the expert who modifies an opinion after being cross-examined on deposition. Judge Pointer thought the text in need of improvement to assure that nothing not in the expert report can be testified to. It was agreed that an oral deposition could serve as the report and that the deposition could be used at trial provided that there is an opportunity for extended recess to prepare cross-examination. Judge Pointer proposed textual changes in the Reporter's draft that were agreed to.

It was agreed to delete the exception in lines 32-33 for work product, all being agreed that the trier of fact should be informed of what the lawyer says to the expert about what the expert has to say to be effective, and to be paid for testifying. Judge Pointer noted that this might generate some political concern. Judge Brazil and Mr. Powers emphasized the need to expose the basis for the testimony. Judge Keeton observed that the lawyer has waived the protection by informing an expert of trial strategy. It was agreed to make this point in the Notes. It was agreed that the expert could also be examined about prior inconsistent statements made before being instructed by the lawyer.

A modification in the syntax of line 54 was approved. "Each" was inserted in line 58. Justice Zimmerman questioned whether the times in lines 56 and 57 were

sufficiently long. It was concluded that they were. It was questioned whether disclosures should be made prior to hearing on preliminary injunction. Judge Keeton suggested that Rule 43 made the matter clear enough. Judge Phillips noted that the possible consolidation under Rule 65(a) could pose a problem. It was concluded that the rule need not address that complexity.

Judge Pointer noted with respect to line 91 that the Biden bill required that courts have authority to track kinds of cases. Judges Bertelsman and Pfaelzer agreed, although the latter lamented the reduction in consistency. Others shared the lament.

It was agreed that an introductory clause should be added on lines 119 and 129 to provide for exceptions by local court rule. The Reporter questioned the utility of the deposition for cross-examination. Judge Bertelsman noted that such depositions can be helpful to settlement. The Reporter asked whether such a deposition could be used at trial without regard to the 100-mile rule, and noted that the cost of multiple cross-exams can be a way of running the meter to impose expense on the party using the expert. Judge Brazil urged that multiple cross-exams cannot be prevented. Judge Keeton thought that the proposed revision would substantially increase the frequency of expert depositions, and thus increase costs. Others disagreed with this observation.

The Reporter raised the question of the relationship to Rule 32. The point was deferred for discussion in connection with that rule. But concern was expressed about the possible supplementation of the expert's report. It was agreed that the court could limit the use of depositions at trial by requiring that only the pertinent parts be used.

Subdivision (c) was revised to authorize protection against disclosure in lines 158 and 162. The diction of line 153 and line 166 was also modified.

The text of revised subdivision (e) was next considered. It was agreed that parties and attorneys could not be expected to be perpetually reviewing interrogatories, but that supplementation of the (a) disclosures should be more broadly required. The draft was generally approved with minor textual change. The Reporter raised the question whether experts should be permitted freely to supplement their reports, and suggested the need for a separate paragraph to deal with supplementation of expert reports. It was noted by Professor Miller that the proposed draft imposed no duty to supplement deposition responses. Judge Pointer called attention to the penultimate paragraph of the Notes. Justice Zimmerman urged that the text be revised to reflect the thought of that paragraph more clearly. Judge Brazil supported the idea that the prerogative of the expert to revise an opinion should be constrained.

At the suggestion of Judge Pfaelzer, subdivision (f) was stricken.

Subdivision (g) met with general approval, but there was a shared desire to eliminate overlap with Rule 37, and perhaps to integrate this provision with Rule 11. Professor Miller noted that this provision does not square precisely with 37(c), but does fit Rule 11. It was provisionally decided to retain lines 228-233, pending reconsideration when Rule 11 is the agenda. It was also decided provisionally to delete the addendum in line 219.

Rule 30 was next considered. The textual changes made by Judge Pointer raised no question. Justice Zimmerman questioned the rule on counting depositions in

multi-party cases Judge Bertelsman again raised the issue of the right of the parties to opt out of the limits on numbers, expressing suspicion that some lawyers would act on self interest in raising the limit. Judge Stevens agreed that lawyers would sometimes stipulate to excessive deposition practice to increase billable hours. But the prevailing view was that the purpose was to give any party the right to negotiate on the limits, subject to the power of the court to control sua sponte through a scheduling order. With respect to the limits in multi-party cases, the word "or" was inserted in lines 17 and 18.

The default limit on the length of depositions was again reviewed. Judge Bertelsman emphasized the absence of a time-keeper to measure the number of hours. Judge Winter expressed concern over time consumed in colloquy. Judge Pointer urged that close timekeeping would be ineffective. Mr. Powers suggested restrictions on objections at deposition. Justice Zimmerman sought to design the rule to compel agreement of the lawyers on the length of depositions. No change in the text was approved.

Rule 31 was considered and attracted no further revision in the text as proposed, with a minor change in diction.

Rule 32 was considered. It was agreed that expert depositions should be generally available if there has been an opportunity for an effective cross-examination on deposition. Judge Winter emphasized the need that there be notice to the opposing party that the deposition would be the one opportunity for cross. It was again suggested that a deposition used at trial should be presented by video if available, to preserve demeanor evidence and prevent the practice of substituting for the expert a more attractive trial witness. Judge Pfaelzer reported experience confirming the use of attractive readers skilled at presenting testimony more persuasively than the witness. Judge Pointer was concerned that this would result in the use of too much of the deposition, wasting trial time. The Reporter suggested that editing videotape to abbreviate it is readily available. Judge Pfaelzer called attention to the difficulty of the trial judge exercising discretion in deciding the form in which a deposition should be presented. Judge Brazil thought that there is a substantial risk that trial judges will not take time to decide whether the video should be used. Judge Bertelsman suggested that cd-rohm should also be embraced by the rule. Judge Keeton and Dean Nordenberg argued for the use of audiotape if available. Judge Winter suggested that the preference should not operate for use of depositions to cross-examine. Judge Winter's motion carried, requiring use of electronic or audio means if available unless the court otherwise for cause orders.

Justice Zimmerman questioned the use of depositions of dentists. It was decided that treating health professionals who are doctors, dentists, or licensed psychologists should be permitted to appear by deposition to testify with respect to treatment.

Rule 33 was discussed. Judge Phillips questioned the syntax of line 14. Improvement was agreed to. Judge Keeton questioned "objectionable portions" in line 15; Judge Pointer's suggested change in language met general approval.

With respect to Rule 37, the question was raised by Judge Winter as to whether (c)(1) should be enlarged to deal with inadequate disclosures more effectively. He also

expressed concern that motion practice might be increased unduly. It was decided to stick with financial sanctions for the time being.

It was decided not to revise Rule 47 at this time, the ABA draft in the materials being less attractive than the Heflin bill from the perspective of the Judicial Conference.

The Committee adjourned at 5:30, and returned to work at 9 on Saturday morning.

Rule 56 was briefly reviewed and compared to the draft of 3-4-90 prepared by the Reporter in response to criticism of the draft published in 1989. It was noted that the primary difference between the two drafts was in the visibility of the device of summary resolution of issues by "establishment" of law and fact. Justice Zimmerman was concerned that the idea of the previous draft not be lost. Judge Brazil thought that the establishment device had drawn the flack; the Reporter urged that the flack had been drawn chiefly by the absence of a control on excess motion practice. Judge Bertelsman thought revision of the rule is needed, and the connection to Rule 50 should be clarified and codified as the proposed draft would do. At the urging of Mr. Powers, the Committee decided to retain the phrase "genuine issue of fact."

Justice Zimmerman questioned the accuracy of the diction in the present draft to speak of a disposition of a single issue as a "judgment." Mr. Powers joined in this concern, but thought the newer draft structurally superior. Ms. Holbrook thought that summary judgment on an issue is not unclear in light of long practice. Professor Miller thought that a person with a law degree would not be too confused by describing such an interlocutory order as a judgment. It was agreed to circulate the new draft, and the 3-4-90 draft as a footnote thereto, but it should not be the rule that a single genuine issue does not preclude partial use of Rule 56.

Judge Keeton questioned whether the summary determination of the law is not misleading since it can be changed by supervening decisions. He urged that it is better located elsewhere, not as a feature of a "judgment." Judges Keeton and Pointer agreed that the powers conferred on the court by either draft of Rule 56 could be found in other rules when needed. Judge Bertelsman suggested a need to codify the trilogy, and thought it appropriate to save the conceptual change in the rule for another time. Justice Zimmerman opposed multiple revisions of the rule.

Judge Brazil questioned whether early motion practice would not generate a lot of cost and traffic in the magistrates' chambers. Ms. Holbrook noted that the previous draft had been intended to encourage judges to permit discovery-restricting motions. Judge Phillips noted that partial summary judgment is not sufficiently used, and we sought to correct that by emphasizing that a partial is not in fact a judgment, and need not be a by-product of a failed motion for summary judgment. Judge Winter thought that the problems with the previous version could be cured by court control over the motions. Judge Pointer and the Reporter agreed that both drafts did that, the difference being in style. Professor Miller thought that Judge Pointer was right that the bench and bar would be more comfortable keeping more familiar language, as the Chair's draft would be.

It was decided at the suggestion of Dean Nordenberg to circulate both drafts

among bar groups interested in advising the Committee.

Discussion turned to Rules 54 and 58. Judge Pointer noted that Judge Ripple of the Appellate Rules Committee had reported possible changes in FRAP to deal with the trap resulting from relation between motion for new trial and notice of appeal. The draft of Rule 58 may need some tinkering to fit what the Appellate Rules Committee is considering.

Judge Winter noted that SDNY judges were upset at the costs-taxing provision bearing on time limits, and he was concerned that costs issues may start coming up on appeal. Judge Pointer noted that there is a problem arising from the absence of any time limit on an application for costs. Judge Bertelsman thought most of it works out between attorneys. Judge Winter thought we might be creating a problem. Judge Pointer urged that the problem is already there. The Reporter noted that there are now many local rules addressing the taxation of fees. There is a difference amongst local rules as to whether fees are taxed before or after appeal. Judge Pointer asked whether the Committee would prefer to leave costs alone, perhaps deleting amendments to (d)(1). With most members abstaining, the Committee voted not to amend (d)(1).

Professor Miller questioned the need to amend the rule even with respect to fees. He thought 14 days not the right time for common fund cases, and suggested the utility of percentage fees in such circuits. Judge Bertelsman thought there were plenty of problems in statutory fee cases. Judge Pointer thought the exceptions to the draft rule were adequate to deal with problems of common fund fees. Judge Pointer emphasized that there are 75 local rules, signifying a clear need for a national rule. The Reporter emphasized that the present rule assigns responsibility to the clerk. Judge Bertelsman emphasized the need to deal with the finality issue, as the draft Rule 58 would. Professor Miller reiterated that the problem arises in fee-shifting, not in fee-sharing. Judge Pointer thought that this could be handled in the Notes. The Committee agreed to circulate for preliminary comment the draft of revision of (d)(2).

Justice Zimmerman asked whether a reference to FRAP 4 might be usefully inserted in Rule 59 as a caution to users. Judge Pointer thought the present text satisfactory pending revision of FRAP 4 by the Appellate Rules Committee. The Reporter again called attention to the need felt by some to provide for interim fee awards, but no member of the Committee came to the support of that idea.

Attention turned to Rule 11. Judge Pointer circulated the pre-83, the 83, and two alternate drafts designed to "generate inquiry." It was decided to consider revision, and not to repeal the 83 revision. Judge Winter urged the development of safe harbors, and the imposition of sanctions against law firms. Ms. Holbrook urged retention of the mandatory language. Professor Miller also thought the rule not to be broken, but he thought that there are some problems that need attention. He favored notice and opportunity to be heard, and perhaps findings and conclusions, and thought perhaps all sanctions provisions should be brought together. Judge Pfaelzer urged retention of the rule, but thought remediation needed to calm the wild side of Rule 11, especially the fee-shifting not needed to deter. Judge Pointer suggested possible revision to encourage use of disciplinary proceedings for intentional violations, this being the recommendation of Congressman Olin. Judge Brazil thought the present standard as stated in the rule is misleading in requiring pleadings to be "well-grounded." He thought the rule can be retained for moral disciplinary purposes. Judge

Phillips expressed concern about the use of fee-shifting as a sanction. Justice Zimmerman recommended that we accept at least those changes for which there is a necessary consensus, e.g., procedure, excessive fee-shifting, safe harbors, the standard of frivolousness, which would not disrupt the present regime.

Judge Winter thought that there is a need to respond formally to the allegations made about Rule 11, to provide a basis for discussion if people are going to continue to discuss this with Congress. Judge Brazil and Dean Nordenberg endorsed this idea. Judge Pointer undertook to prepare such a report to the Standing Committee. Judge Brazil urged that no final decision should be made before hearing preliminary results of AJS survey of lawyer reactions. Judge Phillips emphasized the need to address the question of the effect of the rule on civil rights plaintiffs' bar. Mr. Willging noted that the FJC study does address that issue in several ways. Judge Pfaelzer emphasized that the civil rights plaintiffs feel more threatened by the rule than do others, in part because the application of the rule is not predictable. Judge Brazil thought that the concern spoke to the need for both procedural and substantive standards. Judge Pointer emphasized that safe harbors might also give comfort to that troubled group.

Judge Brazil and Justice Zimmerman thought there were problems in pleading rules that may contribute to a sense of unfairness to plaintiffs. Judge Keeton noted that this may be especially true for civil rights plaintiffs held to higher standards of pleading under Rule 8, echoing Marcus article pointing to specificity requirements in civil rights and fraud cases having disparate impacts. Mr. Willging noted that the phenomenon was ripe for an FJC study. Professor Miller affirmed that Rule 8 is disproportionately applied to civil rights plaintiffs. Rule 9 the same in civil RICO cases. There are probably other rules for which this is true, and Rule 11 may be a lightning rod for anger about that. It was agreed that a new draft embodying some of these ideas would be prepared for consideration at the May meeting, but should not be distributed for preliminary comment, despite Judge Pointer's concern that the Committee have the benefit of suggestions outside the Committee. Judge Phillips and Judge Brazil thought that further circulation should be needed after the May meeting. Judge Winter thought that a publication draft might come out of the May meeting.

Discussion turned to Rule 23. Judge Pointer reported that the draft came from the Asbestos Task Force and the Litigation Section. He also called attention to the NY State Bar group's concern about defendant classes. It was agreed to circulate the present draft even though the Committee has not yet considered. Judge Brazil was concerned that the Committee might dilute the quality of the response if too much material is considered at once. Judge Winter thought that no one needed to promise action at May, but that circulation of Rule 23 could do no harm. It was agreed that the May agenda would commence with discovery, Rule 11, Rules 54-56-58, and Rule 23 would be discussed if there was time. Judge Bertelsman, on the other hand, emphasized the need for action on Rule 23.

Discussion turned to the trial management suggestions of Judge Keeton. The change in Rule 1 found general favor. The Reporter suggested a duty of lawyers to assist in administration; it was agreed that this would go in the notes. Four additions to Rule 16 found favor: a cross-reference to Rule 702, an authorization of summary jury trial, an authorization to limit the length of trial, and an authorization to require attendance of parties at settlement conferences. Judge Pfaelzer asked if insurers could be required to attend; it was agreed that the Notes or text should so provide. It was

agreed to put these also out for comment. Judge Bertelsman noted that trial limitations should be imposable at trial as well as before.

The Reporter questioned whether the trial-limiting power should not be located in Rule 43 or 40. Judge Brazil and Judge Pointer agreed that the text should be made more clear of Rule 16 is to confer powers as well as set an agenda. Judge Pfaelzer also noted that Rule 16 may be overworked as a source of authority. Judge Pointer noted that the present rule authorizes court to terminate frivolous claims and defenses at the conference. Judge Keeton noted that Rule 16 had been focussed on pretrial management; he questioned whether the rules for controlling trial should be located in that rule. He emphasized the need for more effective trial management, for "orders regulating trial." He suggested a separate rule, or at least new captions on the rule. Judge Pointer thought a few changes in the text of Rule 16 would suffice.

Judge Pointer next called attention to proposed revision of Rule 43 to use written testimony subject to oral cross. He noted that some courts do now require this, especially in bench trials. The purpose is to achieve greater efficiency, and sometimes clarity.

Attention turned back to experts, with particular reference to the Evidence Rules, 702 and 706. The proposed proviso had previously been discussed. Judge Pointer suggested limiting the proviso to direct examination, and this was agreed to. The addition to empower the court to exclude expert testimony when not needed drew more critical attention. Justice Zimmerman thought the proposal sound but minimal. Judge Stevens urged that the judge should also be required to approve the particular witness as well as the particular knowledge. Justice Zimmerman endorsed this suggestion, and would require that the court find that there is useful opinion, that is worth the cost, and that the witness proffered is qualified to express it. Judge Keeton urged that the rule be made clear that the factual issue of expert qualification is one for the court. This was agreed to.

Judge Winter regretted that the draft did not change the standard. Judge Keeton suggested a need to clarify the relation to Rule 104. Judge Winter urged a return to the "Fry rule." Judge Brazil supported further tightening. Judge Pointer questioned whether the court could determine the cost factor at trial, and suggested that this consideration should be weighed at the pretrial stage, pursuant to Rule 16. Judge Keeton thought that people would look for such a rule in the 700 series. Judge Brazil noted that there are still savings to be effected at trial by excluding an expert. Judge Stevens urged abandoning the use of the term "expert," but the Committee decided to abide its decision of the previous meeting to stick with the term.

Judge Winter returned to his point that there should be standard to replace "Fry." Support was expressed for his view. Judge Pointer suggested a standard of "substantially helpful," and opposed a return to Fry as too restrictive. Judge Brazil expressed concern that a new brand of collateral lawsuit would arise to litigate the expert's testimony.

The Carnegie proposal for revision of Rule 706 was briefly discussed. Judge Brazil thought the proposal unwelcome because of the excessive influence of "neutrals." Others agreed, although Justice Zimmerman reported that Utah lawyers tended to favor the appointment of neutral experts. Mr. Willging reported that the use

of Rule 706 is never initiated by the lawyers. The Reporter thought that the neutral report might be useful as a neutral evaluation to assist in settlement. Judge Pointer thought that this idea should be expressed in Rule 16. It was decided not to amend Rule 706 at this time.

The meeting adjourned on Saturday at noon.