MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

February 21, 22, 23, 1994

The Advisory Committee on Civil Rules met on February 21, 22, and 23, 1994, at The Cloisters, Sea Island, Georgia. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Chief Justice Richard W. Holmes; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Judge William O. Bertelsman attended as liaison member from the Standing Committee, and Judges Robert E. Keeton and George C. Pratt attended as members of the Standing Committee Subcommittee on Style. Professor Daniel R. Coquillette, Reporter of the Standing Committee, was present, as were Standing Committee consultants Joseph F. Spaniol, Jr., Esq., and Bryan A. Garner, Esq., and Peter McCabe, Esq., and John K. Rabiej, Esq., of the Administrative Office. Professor Edward H. Cooper was present as reporter.

The sole agenda item was work on the current draft of a restyled set of Civil Rules, prepared by Judge Sam C. Pointer from the Style Subcommittee draft.

Before turning to the style project, the schedule for the April meeting of the Committee was discussed. One of the major items on the April agenda will be Rule 23; background materials will be sent out soon. Three experienced lawyers have been invited to attend the afternoon session on April 28 to discuss the history of Rule 23 beginning with the 1966 amendments and to discuss its present effects. John P. Frank, Esq., Professor Francis E. McGovern, and Herbert M. Wachtel, Esq. will form a panel. It was observed that settlements of truly massive tort actions now are creating private ADR mechanisms — "the market" is pushing to develop mechanisms that up to now have eluded legislative solution.

Note was made of the October recommendation with respect to offer-of-judgment legislation, which was approved by the Standing Committee in January. The recommendation that the Judicial Conference suspend its endorsement of such legislation pending completion of Enabling Act consideration may be on the Conference discussion calendar in March.

Early experience with the voluntary disclosure provisions of new Rule 26(a)(1) was discussed. Judge Brazil has prepared a tentative list of variations among districts that have suspended

Rule 26(a)(1), those that have adopted variations by local rule, and those that operate under the national rule. Discussion of the experience with Rule 26(a)(1) led in two directions.

One part of the Rule 26(a)(1) discussion was devoted to the reactions it has stirred to the Rules Enabling Act process. Groups dissatisfied with the new rule have used it to focus attention on the Enabling Act process. The milder reactions are that Congress should lengthen the period between submission of rule amendments to it and the effective date. Stronger reactions address more fundamental aspects of the process.

Another part of the Rule 26(a)(1) discussion was devoted to the perennial problems created by local rules. Several members observed that local rules generate far more complaints than the national rules. The problems become more aggravated as practice becomes increasingly nationalized. The problems may be severe even on a local basis, however; one member reported that each judge in a large local district has a different disclosure practice. Once again, as at earlier meetings, the hope was expressed that evaluation of experience under the Civil Justice Reform Act of 1990 will provide the occasion to reduce the proliferation of local rules.

Style

The style revisions were reviewed by subcommittees for presentation to the full Committee.

Judge Doty led a group that reviewed Rules 21 through 25. Discussion of their recommendations lasted to 4:30 on Monday, February 21.

Phillip Wittmann led a group that reviewed the discovery rules. Judge Brazil had special responsibility for Rules 26 through 29 and led the discussion of those rules. That discussion ran through into Friday morning, February 23. Mr. Wittmann led discussion of Rule 30 until the meeting was adjourned at 11:30 a.m.

Some common styling questions emerged from the discussion.

In Rule 26(a)(3)(B)(ii), the style draft changed the provision that objections not timely made are "deemed waived" unless the failure is excused by the court. The style draft provided that an objection may be made only if permitted by the court. The Committee recognized that a "deemed waiver" is not a waiver at all, not an intentional and voluntary relinquishment of a known right. It further recognized that it is harsh to describe procedural forfeiture as waiver. Nonetheless, it was concluded that the

familiarity of fictive waiver concepts warrants retention of the term. The "deemed waived" language was restored.

A few word conventions were adopted. "Parts" or "partly" should be used for "portions" or "partially." "Limits" should be used for "limitations." Phrases including "pendency" ordinarily should be simplified.

A number of substantive questions were noted, often with suggestions of study for amendment outside the style project.

Rule 26(a)(3): The present rule requires that disclosures be "made," and that "[w]ithin 14 days thereafter," objections be made. The style draft, Rule 26(a)(3)(B)(i), required objections "[w]ithin 14 days after receiving the disclosure." The change was thought to entail a change of meaning, since the present rule does not define the time when a disclosure is "made." We may wish to consider amending the rule to set the time from receipt, since that would provide a clear answer for cases in which the disclosures are served by mail.

Rule 26(b)(4)(C): The present rule requires that an expert witness be paid a reasonable fee for time spend in responding to discovery. The style draft required compensation for expenses as well. This change was thought desirable – indeed mere correction of a probable oversight – but beyond the scope of the style project.

Rule 26(c)(1): This draft has been published for public comment up to April 15, 1994. It was agreed that the word "also" should be elaborated before the Committee recommends the rule to the Standing Committee: " – and, on matters relating to a deposition, ~~also~~ either that court or the court for the district where the deposition will be taken * * *."

Rule 26(e): By a 7:6 vote, the restyled version was adopted, as amended. Those who preferred to continue the present language without change agreed that the new structure is better, but feared that any variation in the still-controversial disclosure provisions might prove controversial.

The final sentence of present Rule 26(e)(1) now requires disclosure of any additions or other changes to information provided by an expert witness. The style version added the requirement that the additions or changes be "material." The requirement of materiality was thought desirable – indeed a limit that should be implicit in the present rule – but a matter that should be accomplished by amendment outside the style process.

Rule 26(g)(2): Subparagraph (A) does not contain the language

added to Rule 11 in 1993, permitting positions taken by good-faith argument for "establishing new law." The "new law" provision was deleted from styled Rule 26(g)(1)(B)(ii), with the recommendation that it be considered through the amendment process.

The final paragraph of present Rule 26(g)(2) provides for striking an unsigned "request, response, or objection." The style draft added "disclosure" to the list. Although Rule 26(a)(4) requires that disclosures be signed, the addition of disclosures to Rule 26(g)(2) was deleted as a substantive change that should be accomplished through the amendment process.

Rule 27(a)(3): The final sentence was deleted as unnecessary. Rule 34 has not referred to the court in which the action is pending since the 1970 amendments. Rule 35 still refers to the court in which the action is pending, but the style version deletes the reference. If the reference is restored to Rule 35 — as might be appropriate for orders directing a party to produce a nonparty — the cross-reference in Rule 27(a)(3) likely should be restored.

Rule 28(b)(2): [These notes include brief research by the Reporter following the meeting.] Up to 1963, Rule 28(b) provided: "A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice * * *." The limit imposed by "only when necessary or convenient" was deleted in 1963. The Rule now reads "A commission or a letter rogatory shall be issued on application and notice * * *." The 1963 Committee Note does not explain the change, but the overall purpose of the 1963 amendments was to ease access to these devices. It has been thought clear "that the discretion the courts formerly had in deciding whether to issue a commission or letters rogatory has been considerably reduced." 8 C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil § 2083. The history, at any rate, suggests that "shall" was not used to indicate that a commission or letter regatory must issue. "Shall be issued only when necessary or convenient" does not readily translate to "must be issued when necessary or convenient." The scant authority cited in § 2083 seems to bear out the view that courts still have discretion to refuse a commission or letter rogatory.

Further research must be done to verify the meaning of the current rule. If indeed it recognizes discretion to refuse to issue a commission or letter rogatory, the styled version of Rule 28(b)(2) would be introduced as follows: "A commission, a letter of request, or, in an appropriate case, both a commission and a letter of request, may be issued: * * *." Experts in international procedure should be consulted to determine whether there is an identifiable common understanding or practice.

Rule 30(a)(2)(B)(i): This Rule requires leave of court or consent of the parties if a proposed deposition "would result in

more than ten depositions being taken under this rule or Rule 31 * * *." The meaning of this provision was debated. Some thought that depositions of expert witnesses authorized by Rule 26(b)(4) do not count for this purpose, reasoning that these are Rule 26(b)(4) depositions rather than Rule 30 depositions. Others thought that Rule 26(b)(4) does not of itself supply authority for taking depositions, but simply regulates the practice for Rule 30 or 31 depositions when a party wishes to depose an expert. This view was supported by observing that Rule 26(b)(4) does not address any of the many deposition practice questions regulated by Rules 30 and 31, and Rule 37 nowhere provides for enforcing Rule 26(b)(4) depositions. If this doubt proves troubling in practice, it may be desirable to provide a clear answer by amending the rule.

Rule 30(f)(1): This Rule provides for sending a copy of the deposition to the attorney who arranged for the transcript or recording. It does not provide for sending the copy to a party who proceeded without an attorney. This omission should be cured by amendment.

Rule 30(f)(1)(B): This rule provides "that if the person producing the materials desires to retain them the person may * * * (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition." The style version, Rule 30(f)(1)(A)(ii) translates this: " * * * with originals being returned to the producing party and the copies then being used as if originals annexed to the deposition." The style version highlights a possible ambiguity in the present rule. Many members of the Committee believe that "materials" must be read in the same sense in both places in the same sentence – it is the originals, not any copies made by other parties, that may be used as if annexed to the deposition. This has been the practice of several. Others believe that it is desirable to allow the copies to be used as if annexed, and that the style draft reflects the correct meaning of the current rule.

The history of Rule 30(f)(1) is reflected in the 1970 and 1980 Committee Notes. It is not particularly helpful. The current version was adopted in 1980. The 1970 version, set out in 8 Federal Practice & Procedure: Civil § 2114, was criticized as ambiguous. The 1970 version read:

> except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person

producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

It was suggested that this version was intended to create two procedures: under (A), substituted copies would serve as originals for all purposes. This meaning is clear in (A) as it has been amended. Under (B), the apparent sense was that the original "materials" could be used as if annexed to the deposition.

This question too should be investigated further, to determine what meaning should be reflected in the styled rule. In addition, the Committee may wish to consider amendments to change the present rule. Some members thought it would be useful to allow use as if originals of copies made by parties other than the party who produced the originals.

Respectfully submitted,

Edward H. Cooper
Reporter