

ADVISORY COMMITTEE ON THE CIVIL RULES

April 21, 1986

Minutes by P. Carrington, Reporter

Original in  
Harvard Law Library  
Unauthorized Reproduction  
Prohibited

F. A. K. M.  
Minutes

The meeting commenced at 9:15 a.m.

The Committee discussed H.R. 1335, The Rules Enabling Act of 1986. It was generally agreed that the statute would be a desirable enactment with respect to its provisions on local rule-making. It was generally the view that the supercession provisions of the original Enabling Act were no longer needed. Judge Wiggins questioned whether the role of Congress in the rule-making process needs to be retained if the supercession clause is to be removed. Mr. Beyer, representing the H.R. staff, was questioned on other provisions of the bill. He acknowledged that the function of the bill could be as well served if the rule-making process retained the power to supercede Congressional enactments which were denominated as rules of procedure. He suggested amendatory language to accomplish such a change in the bill. Judge Gignoux undertook to present the question to the Standing Committee.

(Reporter's Note: It would appear on further study that the most effective amendment to accomplish the intended result would be to terminate clause 2072(b) with the word evidence as it appears in the third line. This would leave any rule of procedure or evidence prescribed by Congress subject to amendment by rule-making, while preserving the effect of any Congressional enactment embodied in the United States Code immune from rule-making modification.

Judge Skinner moved to table the proposed amendment of Rule 68. The motion was seconded by Mr. Liman, and was unanimously carried.

The discussion of proposed changes in Rule 4(d)(i) and in Rule 4(i), 28 and 44 were discussed. Note was taken of the proposed Marshal's Service Act, and of the proposals regarding Rule 4(c) received from Mr. Roy Wepner of Westfield, NJ and from the National Association of Process Servers. Judge Weis moved that the proposals regarding Rule 4 be returned to the Reporter for possible synthesis with other modifications of the same rule, for reconsideration at the next meeting of the Committee. The motion was seconded by Judge Zimmerman and unanimously carried.

The comments on the proposed amendments to Rule 51 were discussed. Judge Skinner moved to strike the word "either" in line 7 and to add the words "or both" after "argument" on the same line. Mr. Liman seconded the motion and it carried unanimously. Judge Zimmerman noted that the gender neutralizing modification of the next to last sentence had resulted in a significant loss of readability. He urged the Reporter to rewrite the sentence, and it was generally agreed that this should be done. Subject to such modification, it was agreed that the proposed amendment should be forwarded to the Standing Committee as the recommendation of the Committee.

The discussion of proposed changes in Rule 63 were next discussed. It was agreed that the Rule should be further modified to make it applicable to disqualified as well as disabled judges. It was also agreed that the Committee Note should be explicit that the successor judge is authorized to recall a witness whose credibility must be assessed.

Judge Johnson moved that the word "may" as it appears at the end of each subdivision should be revised to read "shall." Judge Skinner seconded the motion and it carried unanimously.

Mr. Liman moved that the first clause of subdivisions (a) and (b) be revised to read: "If, for any reason," . . . Mr. Bader seconded the motion and it carried unanimously.

Mr. Bader moved that the title of the Rule be changed to "Inability of a Judge to Proceed." Judge Zimmerman seconded the motion and it carried unanimously.

As thus modified, it was agreed that the Rule should be sent to the Standing Committee as the recommendation of the Advisory Committee.

The proposed changes in Admiralty Rules C and E were discussed. It was agreed that the committee note would be revised as suggested by the Department of Justice. The proposal of the Illinois Bar Association to modify Rule F was also considered, with the thought that all the changes to the Admiralty Rules should be considered together. It was concluded that no specific change to Rule F was likely to resolve the problem to which the Illinois Bar pointed, and it was noted that the Bar had not itself suggested a change. It was agreed not to consider changes in Rule F, and to go forward with the amendments of Rules C and E at this time. Judge Weis so moved, Judge Pfaelzer seconded, and the motion carried unanimously.

The Committee moved on to the proposals which have not been the subject of previous action or public consideration. The suggestion of Mr. Morton for an amendment to Rule 5 or 77 was first considered. Mr. Liman moved that the draft language proposed by Reporter Miller for amendment of Rule 77(d) be adopted, but with approval also of the method of communication from the clerk provided in Rule 4(c)(2) being authorized. Judge Skinner seconded the motion and it unanimously carried. The Reporter will provide a final draft for approval at the next meeting of the Committee.

The Committee next considered a proposed change to Rule 9(b) to respond with Judge Forrester's concern about vague pleading in civil RICO cases. At the same time, the Committee considered the article of Professor Sovern advocating the elimination of Rule 9(b). It was decided to take no action.

The Committee next considered the proposals of the ABA Section on Litigation regarding Rule 23. Judge Weis moved that the proposals be tabled. Mr. Bader seconded. The motion unanimously carried. The Committee did, however, agree that the Reporter should embark on continuing study of Rule 23, perhaps with particular emphasis on the fiduciary role of the class representative in (b)(3) actions. Special note was taken of Judge Weinstein's suggestions in that regard.

The Committee considered the proposals of the same ABA Section regarding Rule 45, which have been adopted by the House of Delegates. It was agreed that the present proposals of the ABA were not in a form appropriate for action. It was agreed that the ABA would be invited to make more explicit proposals, and that the Reporter would continue work, bearing in mind the suggestion of Judge Grady that a Rule 11-type constraint might be imposed on lawyers making promiscuous use of a subpoena. In the absence of better suggestions, there was no inclination to modify Rule 45 at this time.

The Committee next considered Rule 50 and the suggestion of late Judge Friendly. Mr. Bader moved that the Committee go forward with Option I as stated in

the report of Professor Miller. Judge Zimmerman seconded the motion, and it carried unanimously, subject to the caution of Judge Gignoux that the deleted first clause of subdivision (b) needs to be relocated in subdivision (a). The Reporter will prepare a final draft of Rule 50 for submission at the next meeting of the Committee.

The Committee then considered Rule 56, both the writings of Judge Schwarzer on the subject, and the efforts of the Reporter to embrace suggestions of others. The Committee expressed general support for the idea of requiring findings and conclusions, for linking the disposition of the motion more clearly to the burden of producing evidence, and to encouraging use of partial dispositions in complex cases. It was also agreed that the relation to Rule 12 could benefit from further study, and that 1986 decisions of the Supreme Court were likely to bear closer study. It was agreed that another draft on Rule 56 would be presented for consideration at the next meeting.

The Committee then considered the suggested change in Rule 72 proposed by Professor Miller in response to the suggestion of Magistrate Hornby. Mr. Bader moved that the proposal be adopted. Judge Zimmerman seconded the motion and it carried unanimously. The proposal will be held for presentation to the public until other material is available.

The Committee then considered a proposal to modify Rule 41 to resolve a circuit split on the finality of involuntary dismissals. It was concluded that no effective change could be made in the rule which would not risk possible conflict with jurisdictional legislation, and that such a conflict would be very untimely. It was moved by Judge Wiggins that no action be taken. The motion was seconded by Judge Pfaelzer and carried unanimously.

The Committee then considered the suggestion of Professor Parness to amend Rule 11. It was concluded that Rule 11 should not be amended again at this time.

A similar response was made to the suggestions of Champ Lyons for changes in Rule 16, and of McMillan and Siegel for changes in Rules 16 and 37. It was generally the view that these proposals could be implemented within the present text of Rule 16, which should not be amended again so soon.

The Committee next considered the well-developed proposals of the Center for Public Resources regarding confidentiality of ADR proceedings. It was suggested by Judge Weis that the issue raised is one of privilege. Judge Gignoux questioned whether the issue was within the competence of the rulemaking process. The Reporter was directed to inquire of other approaches to the problem that might be made before returning the matter to the Committee's agenda. The Committee's efforts should in any case be coordinated with those of others.

The Committee considered the suggestion of Judge Walter Hoffman regarding Rule 47 and concluded that it should be on the agenda for fuller consideration at the next meeting.

The Committee next considered the suggestion of Judge Curran for revision of Rule 49. It was concluded that the risk of inducing error in questioning jurors was too great to justify writing the rule as suggested and the Committee will not give further consideration to this suggestion.

Finally, the Committee considered, at the request of Judge Gignoux, the progress of the gender-neutralizing amendments. It was agreed that it should not be necessary to

publish such amendments for comment inasmuch as they are intended to make no consequential changes. Although there was shared concern about the cost of the step, and about its effect on the readability of the Rules, but the Committee was disposed to go forward. Ms. Holbrook and Professor Rosenberg were assigned the task of joining the Reporter in giving the proposed amendments a very careful reading.

(Reporter's query: could gender-neutralization be accomplished with greater economy and less violence to the readability of the Rules by substituting feminine for masculine pronouns in select places, e.g., referring to the public officers in Rule 25, referring to the physician in Rule 35, referring to the judge in Rule 44 and referring to the judge in Rule 63? As might be explained in an accompanying Supreme Court opinion, the male pronoun would be used only to refer to the ordinary litigant represented by counsel, who might in fact be a he, a she, or an it.)

The next meeting is schedule for Friday, October 17, possibly extending into Saturday. The meeting may be cancelled if it is not required by the agenda in order to assist in the need for economy.

The meeting adjourned at 5:45 p.m.