ADVISORY COMMITTEE ON CIVIL RULES

Minutes of the May 23, 1977 Meeting

The Advisory Committee on Civil Rules of the Judicial Conference of the United States met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D. C. The meeting convened at 9:30 a.m. on Monday, May 23, 1977. The following members were present during the meeting:

Elbert P. Tuttle, Chairman
A. Sherman Christensen
Oren Harris
David N. Henderson
Shirley M. Hufstedler
Earl W. Kintner
William T. Kirby
Walter R. Mansfield
Robert W. Meserve
Louis F. Oberdorfer
Abraham L. Pomerantz
Donald Russell
Frank W. Wilson
Bernard J. Ward, Reporter

Judge Tuttle welcomed Mr. Henderson, a new member of the committee and mentioned that Judge Hunter could not attend the meeting because of a graduation in his family. Others attending the session were, Judge Roszel C. Thomsen, Chairman, and Judge Charles W. Joiner, member, of the Standing Committee; Paul Nejelski, Deputy Assistant Attorney General and Stephen Berry, of the Justice Department's Office for Improvement in the Administration of Justice; and Mr. William E. Foley, Deputy Director of the Administrative Office.

Mr. Berry briefed the committee members on the function of his office with regard to Rule 23. He stated that the first priority of this new office for improvement in the administration of justice was magistrates reform and the second, class action reform. They feel some substantive changes will ultimately be made and the first draft proposals which will take care of both the admonitory and compensatory functions of the rule are expected to be available in 6-7 weeks. This will then be presented to a panel of ten people, one of whom may be a representative of the rules committee. In view of the Department of Justice's position, Mr. Meserve questionned the function of the rules committee at this point. Mr. Berry indicated that it has not been determined whether the Justice recommendation will be in the form of a legislative proposal or a rule proposal or both and that it would be wise for the rules committee to move ahead or possibly work together. Judge Tuttle asked Professor Ward to express his views on the subject, and Professor Ward replied that they must keep in mind the recent happenings in regard to the rulemaking process. Most of the recent efforts to amend the rules have been suspended by an act of Congress. He relayed the comments of former chairman, Judge Maris, that the rules committees may be taking on a new function of initiating changes with suggestions and thereby inspiring Congressional action. Professor Ward stated it would be well to preserve the Supreme Court's rulemaking

power but he doubts that anything the rules committee might recommend regarding Rule 23 will automatically be approved by Congress. Judge Thomsen pointed out that the committees have tried to promote greater liasion with Congress by inviting counsel from the House and Senate Judiciary Committees to attend their meetings. Also, his committee is currently preparing a history of the rulemaking process for discussion at their next meeting.

Report of the Rule 23 Subcommittee

Judge Tuttle asked if there was an inconsistency between the very strong vote of the judges in opposition to Question No. 11 to amend the requirement of class certification "as soon as practicable after the commencement of an action" to require certification within a specified period of time (e.g. 90 days) after the filing of the complaint, and the action they have taken to amend the rule to provide that within 60 days after the suit is filed, the plaintiff shall make a motion to have the certification procedure. Mr. Oberdorfer replied that the committee may need to revisit the proposed amendment to make it clear that even though the motion is filed, it is within the judge's discretion to table it until he has considered the merits on a prima facie basis. Judge Tuttle felt there has been much criticism from the standpoint of the court of appeals that they get many cases where there has never been a certification. When the amendment was tentatively adopted, the committee had in mind that the burden should be on someone to call it to the court's attention that a certification is required or a judgment declining to give a certification. Judge Tuttle believed this may have been misunderstood as requiring an actual certification within 90 days, and this is what they voted against.

Judge Christensen, as a member of the Rule 23 Subcommittee, gave the totals from five categories, excepting circuit judges and government attorneys, of what he felt were the most controversial questions (Part I, Nos. 1 and 6, and Part II, Nos. 5, 8

10 and 11). These figures indicated that the attorneys representing neither category (independant attorneys) were very representative of the total in each category with the exception of Question No. 8.

After learning that before the amendment of 1966 to the rule, the opt-in provisions were in effect meaning no one could become a member of a class action unless he opted-in, Judge Tuttle observed that perhaps some of the judges who responded to the questionnaire were unaware of this history of the opt-in provisions as against the opt-out provisions. Without any motion before them, he then invited discussion and comments from the members.

Judge Hufstedler expressed concern about whether or not there should be an amendment, either by rule or legislation, to permit discretionary review to give denial or class action certification. This problem is there is no way to review this now until after final judgment when it's too late, except by way of a § 1292(b) certification or by way of a writ of mandamus. Mr. Meserve pointed out a significant consensus given on Question No. 4 which indicates that the judges seem to agree with the defense counsel in favor of doing something about the role of the plaintiff's attorneys being placed in the position of an entrepreneur. Judge Tuttle was surprised that such a strong vote appeared in an area in which judges have the authority to act. Mr. Meserve stated that this suggests a possible need to amend the rule to strengthen the judges' power. Judge Thomsen felt

the difficulty is because class actions are not fungible and he suggested a need for further guidelines for district judges to follow. Judge Christensen pointed out that the results of the questionnaire show a special manual on class actions would be helpful. Mr. Pomerantz expressed his view that there is need for purification of the plaintiffs bar which can be done by the judges, through Congress, or the rulemaking process.

Judge Mansfield asked how the subcommitee arrived at Question No. 4 and Mr. Oberdorfer replied that the first draft of the questionnaire contained quotes from authors who made charges back and forth about class actions, for example, that the class action is a lawyers' relief fund or a class action makes a lawyer an entreprenurer. These quotes were used to elicit a response from the recipients as to whether they agreed or disagreed with the remark. The subcommittee was trying to find some evidence and identify the source of the feeling that lawyers are enjoying this to the disadvantage of the profession. Mr. Oberdorfer felt there is a problem in these cases like the problem which exists in the administration of bankruptcy cases. In these situations they have drawn a line between the role of the judge and that of the layman. He stated there is a suggestion that the judge could appoint someone as a receiver to regulate the class action case.

Mr. Kintner expressed his view that the lawyer's abuse could be corrected by giving judges more discretion and by making changes in the Manual. Judge Tuttle questioned the authority of the Manual and stated he is reluctant for anybody in the area of judicial action to publish documents which have no authority. Judge Joiner pointed out that the Manual comes from the Judicial Conference Committee on Pretrial Procedures. Judge Tuttle further questionned the usefulness of a manual on class actions if it were published without any more authority than the Manual on Complex Litigation. Mr. Kirby recommended the committee decide on the Rule 23 issues before dealing with the Manual. He thought that no manual could deal with the two subjects they had discussed (the question of a mini-hearing to determine whether there is merits and the opt-in, opt-out) until they decide whether to amend the rule. Professor Ward agreed that a manual type reference book for judges would be helpful, however, there are problems in the rule which must be solved first. Keeping in mind the view's of Mr. Pomerantz, he suggested they vote on a provision for this likelihood of success on the merits. However, Mr. Pomerantz stated that empowering the judge to get the best attorney available might help to hasten the class action case in the most practical and best way. Judge Harris disagreed and Judge Joiner implied that they need some kind of prior identification of people who can take over that aspect of the litigation that has to do with being the private attorney general (the enforcement of the law). Judge Christensen

stated he is in favor of a mini-hearing to establish reasonable likeliness of success in which case the ability of the attorney would be considered. Judge Hufstedler indicated that she is concerned about Mr. Pomerantz's observations but does not want to lose sight of Mr. Oberdorfer's suggestion regarding the use of a receiver for the plaintiff. The committee should be thinking in terms of pretrial exploration of the issues which does not require a mini-hearing of the merits but requires a sufficient definition of the issues so that the judge can exercise more rational control.

Judge Tuttle felt the committee had reached a point in the discussion in which they were ready to have a preliminary vote on whether to give the court power either by rule, legislation, or as guidance in a manual, that a mini-hearing or preliminary decision should be arrived at by a trial judge before he decides on whether or not to certify. In other words, did they feel the present situation is not adequate to protect a defendant against a frivolous action where he has to go to the very expensive proceedings of widespread discovery on the merits of the case as against discovery on the ex istance of the class, without some kind of hearing in advance. Judge Hufstedler shortened the motion as follows: "For precertification, may there be a preliminary hearing to ascertain whether there is substance to the asserted class action claim (complaint)?" All the committee members agreed.

Following the lunch recess, Judge Tuttle asked for a show of hands on the other basic issue which they had discussed on the question of whether the rule should be changed to provide for class actions to be certified only after those people opt-in. Professor Ward pointed out that if they vote to make no change it would be appropriate as indicated by past experience to include a note, that for reasons stated the committee considered this but they felt changes were inappropriate at the time. Judge Christensen stated that if they vote in favor of leaving the opt-out provision and oppose an opt-in provision, would it be appropriate to consider the suggestion of Judge Mansfield that some flexibility be built in and the suggestion of Judge Hufstedler for some changes in the notice forms and a provision subject to review by interlocutory appeal as well as a provision that there should be no awards of costs against the class. Mr. Pomerantz felt if they agree to make opting-in discretionary with the district judge, the effect would be judicial repeal and if repealed it should be by Congress or the Supreme Court and not by a referendum across the country.

Judge Joiner reported his experience as a member of the committee to write the Uniform Class Action bill. He stated that in the beginning of the discussions on class actions he felt the members agreed 2-1 for the opt-in provision, however, as they tried to prevent abuses such as discussed earlier and

to solve everybody's individual problems they decided that if you are really going to have a class action then everybody should be in the litigation and therefore they voted for the opt-out provision.

Mr. Oberdorfer then moved that they not replace the opt-out provision of Rule 23(c)(2) with an opt-in requirement. However, Judge Christensen questioned if he meant that they not replace it with a mandatory opt-in requirement and Judge Hufstedler suggested the motion be restated to indicate they decline to replace the opt-out provision with a mandatory opt-in provision. This means that the rule may still be amended in some other way. Judge Tuttle explained that it may be appropriate to indicate that the whole matter of class actions is under continuing study and at the present moment the only step the committee has taken is to reject the replacement of the opt-out provision with a mandatory opt-in provision. Also that the committee will continue to study alternate means by which some of the criticisms of the opt-out rule can be modified. The motion was carried unanimously.

Judge Mansfield expressed his concern about the disenchantment of the judiciary toward the opt-out provision based on many cases where it was unwise to see the class action extended as far as it has been and would have been advantageous if the district judge could have used his discretion to permit opt-in in certain cases. Therefore, he suggested the addition of opt-in discretionary with the trial judge.

As an alternative to Judge Mansfield's recommendation, Judge Joiner suggested provision for a precertification inquiry of selected or all prospective members of a class to determine whether there is really interest in this litigation by members of the class so as to determine whether in fact there is a good class that wants to litigate and whether it is so extensive that ordinary litigation would not be able to take care of it. Mr. Pomerantz expressed his opinion that this question of whether or not there is sufficient reason for a class action and for certification should not be tied in with the discretionary opt-in and opt-out provision.

Judge Tuttle asked if anyone had a motion as to the manner in which they felt Rule 23(c)(2)(A) and (B) should be amended. Mr. Meserve suggested the Reporter draft language along the lines of Judge Mansfield's statement with regard to steps that could be taken short of a mandatory opt-in provision but some provision which might be a compromise in a case where a judge is ready to exercise sound discretion laying down some criteria for his exercise of this discretion. Judge Tuttle added that the change should require the trial judge in an appropriate situation give findings of fact on which he based his decision in order to make this a reviewable order. Professor Ward thought they had agreed on Judge Joiner's suggestion regarding criteria for certification, however, Judge Christensen felt they should also consider Mr. Meserve's proposals which is somewhat different. Therefore, he suggested that Mr. Meserve's proposal

which originated as a suggestion of Judge Mansfield should be offered as an alternative draft to the suggestion of Judge Joiner. He asked the Reporter to draft two rules: (1) incorporating Judge Joiner's view permitting liberal discovery to determine whether the class should be certified and (2) along the lines of Mr. Meserve's motion to provide for certification as a general rule by opting-out with the judge empowered in his discretion to depart from the usual practice and upon findings of fact to order an opting-in system under certain circumstances. Judge Mansfield expressed his agreement with Judge Joiner that the place for the consumer type mass class action with a fluid recovery lies with a government agency and the opt-in, opt-out provision, if adopted, will not alter anything to help protect these consumers without alternative legislation.

Judge Tuttle stated it is his understanding that everyone agrees to the Reporter bringing two alternative drafts incorporating the proposals of Judge Joiner and Judge Mansfield to the meeting next August for consideration and vote. Also, if any of the views of the members differ from the proposals discussed they should send their suggestion to the Reporter before the meeting. As to the status report for the Standing Committee, Judge Tuttle indicated that their decision not to change the present opt-out and any modification of the remaining sections of Rule 23 could be decided at the next meeting. Judge Thomsen agreed.

Rule 47 - Jurors

Judge Tuttle explained that this agenda item deals with the resolution adopted in Atlanta by the American Bar Association recommending that Rule 47 dealing with the voir dire of jurors be amended to require that every district court permit the lawyers to voir dire the jury. He informed the members that it is his impression that the ABA may propose legislation to that effect. He also indicated that the Judicial Conference has rejected this recommended change. As a result of the resolution of the ABA, the Federal Judicial Center has undertaken a study of the subject under the direction of Mr. Gordon Bermant, who presented a summary of the results of the survey taken in March 1977.

After Mr. Bermant's report, Mr. Meserve stated it is doubtful that the vote of the ABA in Atlanta expresses the opinion of the informed organized bar. He stated the debate was perfunctory. Also the resolution which was proposed by the Section on Litigation was adopted and half of the members present were not necessarily experienced in the field of trial practice. His own attitude, he stated, is that from a lawyer's viewpoint, the trial of a case is an adversary process. He is trying to win. His participation in the examination, therefore, is a participation which is diametrically opposite in its purpose from the purpose that an impartial judge ought to be working for. The judge should be trying to secure impartiality, the lawyer ought to be trying to find a jury who is most satisfactory for his client. Mr. Meserve expressed his

view that the present rule works very well and that his experience had indicated the judges have been fair in permitting counsel to suggest questions for the jury.

The members then discussed a possible conflict with the fact that the Jury Committee had been instructed by the Judicial Conference to study the voir dire examination. However, it was unanimously agreed that Mr. Kintner's motion reaffirming and not changing the rule would be in the form of a resolution for inclusion in Judge Thomsen's report to the Conference. Judge Harris added that the resolution should include the fact that the committee reviewed the results of the voir study by the Federal Judicial Center.

Rule 4 - Service on Foreign States

Professor Ward explained that the Foreign Sovereign Immunities Act of 1976 tells litigants for the first time how to serve foreign governments and foreign agencies and a new section (8) is added to Rule 4(d) to provide for this and an amendment to Rule 4(i) to make it clear that its alternative provisions for service in a foreign country do not refer to service upon a foreign state, etc. Judge Wilson preferred the amendment adding, "Except upon a defendant referred to in paragraph (8) of subdivision (d)" to begin, "Except as provided." Professor Ward pointed out that in drafting this language he simply followed the language used throughout the rule. Mr. Oberdorfer suggested the reference in the proposed amendment to Rule 4(i) should also include a reference to the

new statute. After a brief discussion, Judge Hufstedler moved approval subject to any necessary style changes based upon the suggestions discussed.

Rule 81 - Applicability in General

Professor Ward stated that these technical changes are necessary to take care of recent changes in the law and the newly enacted Rules under Title 28 U.S.C. §§ 2254 and 2255. Judge Hufstedler moved approval of the proposed amendments recommended by Professor Ward. Judge Wilson pointed out that the reference to habeas corpus in subsection (2) of Rule 81(a) should be deleted because § 2255 is not identified in the same context. However, on page 2 of the committee note, he suggested adding "for post conviction relief" to the reference to § 2255 proceedings to correspond to the habeas corpus reference there. The motion carried with the suggested changes.

Copyright Rules

Professor Ward called attention to Mr. Carl Imlay's letter suggesting the need to study the present Copyright Rules in light of the 1976 Copyright Act which will take effect January 1, 1978. Since the actions in copyright are governed by the Federal Rules of Civil Procedure except the procedure for impounding, he questioned the need for new rules but felt the old rules 3-13 should be reconsidered. Professor Ward also stated he would be delighted to receive the expressions

of opinion from among others, Benjamin Kaplan, who is a copyright scholar and former reporter of the Civil Rules Committee. Judge Christensen pointed out that there is an advisory committee of the Patent Office which is considering this subject. Since no one on this committee is experienced in copyright law, Judge Thomsen stated he would write to Mr. W. Morton Brown, who is a former member of the Civil Rules Committee and is recognized as one of the leaders of the copyright bar. Professor Ward further explained that if they agree to simply make a change that the present rules are applicable under the new Act, they would write to the Chief Justice since the Supreme Court has jurisdiction over it.

Admiralty Rules

Professor Ward referred to the pamphlet of Possible Amendments to the Admiralty Arrest and Attachment Rules proposed by a Committee of the Maritime Law Association. He explained that these proposed amendments had not been given full attention at the last meeting of the MLA and he recommended postponement of their consideration by this committee. The members agreed.

Rule 58 - Entry of Judgment

Professor Ward explained the problem created by the requirement that every judgment be set forth on a separate document to be effective. He also called attention to the

proposed amendment to Appellate Rule 4 designed to correct the problem by reference to Civil Rule 58 and a note regarding the Indrelunas case, however, he felt this would not help in every instance. Judge Hufstedler suggested another approach since the problem lies in the timing. Since the time for appeals runs from the date upon which notice of the entry of judgment is given, she stated the burden should be placed upon either party to give notice of the entry of such judgment. Judge Christensen did not see a great problem, however, he suggested the Administrative Office might write to the clerks of courts and the Federal Judicial Center might emphasize the requirement during their seminars. Judge Harris added that upon receipt of a letter from Judge Gibson calling attention to the problem, his court has complied with the requirement and he now makes this clear to his law clerks. When Mr. Oberdorfer suggested they do nothing, Professor Ward emphasized his simpathy with the problems called to his attention by Judge Seitz. Therefore, Judge Thomsen proposed that the committee make this problem known to the Federal Judicial Center so they could put this in their indoctrination course for newly appointed judges to inform their docket clerks. Judge Hufstedler expressed hope that this situation could be discussed further at the next meeting.

Rule 4(g) - Return

Judge Tuttle referred to a letter from Judge William W. Justice proposing an amendment requiring the person serving the process to indorse the date of service thereon. Judge Christensen felt it would be helpful to the litigants but it is not necessary. Judge Wilson moved to make no change in the rule. The members agreed.

Discovery Materials

Professor Ward reported that he had received criticism from a number of clerks of courts and district judges regarding the requirement of Rule 5 that papers served on a party must be filed with the clerk, even certain types of discovery documents upon which the court takes no action. Also, the Special Committee on Pretrial Abuse of the Litigation Section of the American Bar Association reported to the meeting of Metropolitan District Judges that they should treat discovery materials the way they treat other exhibits.

Judge Thomsen suggested they ask the Administrative Office to get in touch with the clerks of courts as to how they handle the situation and what practical problems they are faced with. Judge Christensen expressed the hope that a selected number of chief judges might be included in the questionnaire to get a sampling of their views.

Report of the Subcommittee on Abuse of Discovery

Judge Mansfield stated the purpose of this subcommittee consisting of Judge Harper (no longer a member of the Advisory Committee), Mr. Kintner, and himself, is to identify problems in the field of discovery, to gather suggestions with respect to discovery rules which might require revisions and to consider what study of changes in the rules should be made. He reported that the ABA Litigation Section has a special Committee on Discovery headed by Joe Ball of Long Beach, California and the Federal Judicial Center has appointed a similar committee headed by Judge Charles Renfrew of the Northern District of California. Also, the American College of Trial Lawyers wants to amend Rule 23 to facilitate the examination of members of the class and revise the Manual on Complex Litigation.

During this study, Judge Mansfield found criticism that the rules are being abused with over discovery, irrelevant discovery and harassment. The big issues that are being raised are: (1) Should notice pleadings be modified to require that the pleadings be made more specific and thus to narrow the scope of depositions; (2) Should discovery Rule 26 be limited to discovery with respect to the issues involved in pending action rather than the present rule which permits inquiry into any matter; (3) Should there be a mini prehearing where the primary issues could be determined and thereby limit discovery to those issues; (4) Strengthen the sanctions for

abuse of discovery, for instance by restoring the requirement of a showing of good cause; and (5) To lower the cost by facilitating the use of recording equipment and yet impose some cost, over and above what is presently authorized, to those who abuse discovery

Judge Mansfield also stated that during the later 1960's the Rosenberg Study found no evidence of a serious abuse of discovery requiring a change except to simplify the structure and make changes with respect to insurance and expert opinion. He informed the members that at the fall 1976 meeting of the ABA, 590 lawyers voted unanimously that discovery was being abused. Also, at a meeting of the FJC, Messrs. Kirkham and Connally strongly recommended adopting new rules to prevent abuses and cut down on discovery. In conclusion, Judge Mansfield suggested it might be appropriate that a study folder be prepared for the next meeting of the rules committee where each of these suggestions are set out with the papers that support them.

Rule 12(f) - Motion to Strike

Professor Ward called attention to a letter from Harvey B. Rubenstein, an attorney from Wilmington, Delaware, who complains of what Professors Wright and Moore have regarded as an oversight in Rule 12(f). Mr. Rubenstein urges an amendment which would permit a plaintiff to challange an insufficient defense to the same extent that a defendant can challenge

an insufficient complaint. Judge Hufstedler saw no reason that this rule could not parallel the other one. Professor Ward explained this could be accomplished by adding the language of Rule 12(b) and (c) that converts a motion to dismiss and for judgment on the pleadings into motions for summary judgment when matters outside the pleadings are presented and not excluded by the Court. Judge Tuttle stated they should consider this recommendation in view of the support from Professors Wright and Moore. Mr. Meserve moved that this inadvertent error be corrected. The members agreed.