

## ADVISORY COMMITTEE ON CIVIL RULES

Minutes, November 17-19, 1988

The Committee met in the Robing Room of the Old Federal Court House in New Orleans. Members present were Grady (Chair), Brazil, Halbrook, Nordenberg, Pfaelzer, Phillips, Powers, Stephens, and Winter. The undersigned was present as Reporter. Absent were Linder and Miller. Representing the Standing Committee were Judges Pointer and Weis. Mr. Summitt of the staff of the Judicial Conference was present. Organizations represented were the American College of Trial Lawyers, the department of Justice, and the National Association of Process Servers.

Judge Weis reported on the Local Rules Project and on the plan to revise Rule 84 to authorize a practice manual that would include a set of forms.

The Committee held an extended discussion of Rule 4, the proposed Advisory Committee Note and the draft Forms. The Reporter's Draft was approved for transmission to the Standing Committee subject to minor textual changes, subject to the following decisions:

1. Subdivisions (a) and (b) will be reversed with respect to location, and the burden should be placed on the plaintiff to prepare the summons.
2. The new subdivision (d) is recommended in the form presented in the Alternate Draft appearing on p 40 of the Agenda materials. This draft was preferred because it is less confusing to users of what is presently misleadingly described as "mail service" and because it may be less offensive and hence more serviceable when used abroad.
3. The waiver request forms for subdivision (d) shall be set forth in the new Practice Manual.
4. Subdivision (e) as it appears in the agenda materials shall be divided, with a separate subdivision of service in a foreign country.
5. Subdivision (1)(as redesignated) shall be divided into two paragraphs and reorganized.
6. With misgiving expressed especially by Judge Winter, the Committee adopted the suggestion of Judge Pointer to leave the issue of pendent jurisdiction unresolved in the text of the rule, revising the Notes to reflect the purpose not to enlarge the subject matter jurisdiction and to urge caution in the use of

pendent jurisdiction in the "double pendent" situation. The concern especially expressed was that the defendant would be required to enlarge the action if there were a compulsory counterclaim to be made, while the plaintiff might be foreclosed from asserting related state law claims. It was agreed that this issue should be addressed more fully in the Advisory Committee Note.

7. At the suggestion of Magistrate Brazil, revision was made at line 315ff to respond to Judge Grady's concern about the anomaly of the Court's exercising its power subject to the Constitution which it interprets.

8. At the urging of NAPS, the provision for an amendment of proof of service should be retained.

9. Subdivision (n)(as redesignated) shall be rewritten. By a vote of 6-3, the Committee voted to retain the requirement of dismissal but to authorize an extension of time as an alternative and to require an extension of good cause be shown.

The Committee considered at length but did not support the request of the Department of Justice that the requirement of multiple service be retained.

The Committee approved the draft of Rule 4.1, with modifications in subdivision (b). It was decided not to condition this recommendation on approval of the nationwide service provisions of Rule 4.

The amendment to Rule 12(a) to conform to changes in Rule 4 were approved.

The draft of Rule 45 and the accompanying Notes were approved for transmission to the Standing Committee, with minor textual changes:

1. The Committee considered but rejected the proposal of the New York State Bar for nationwide service of subpoenas and the pertinent provision of the Reporter's draft was stricken. This was done with the expectation that a different amendment, to Rule 30, will entitle a party to take a videotape deposition.

2. The Committee voted to delete the words "or is served" appearing in line 171, even *Erie* to the contrary notwithstanding.

3. The Committee considered Judge Weinstein's concern about the monopolization of expertise. Judge Pointer observed that Rule 26(b)(4)(B) deals adequately with the problem and it was decided that lines 204ff deal adequately with the problem.

4. Subparagraph (c)(2)(C) will be subdivided to distinguish those protections that are absolute from those that are discretionary.

5. It was decided not to specify attorneys' fees as a cost of non-party witnesses to be compensated by the party issuing the subpoena.

6. It was decided not to sanction expert witnesses for giving unfounded opinions.

7. Language from Rule 34(b) was added to Rule 45 as subdivision (d) which will also be printed on the subpoena.

8. The Committee reaffirmed its position that the non-party is entitled to recover reasonable expenses of responding to a subpoena, even if these are "undue" in relation to the stakes.

9. The Committee voted to require a privilege list from non-party witnesses. This will be added to the new subdivision (d). *Similar language should be added to Rule 26.*

10. Line 16 - "promptly before trial" added.

The Committee approved the related change in Rule 34 as it appears on page 84 of the agenda material with textual changes.

Judge Grady pointed to the redundancy of parts of Rule 45 to Rule 26. It was agreed that the comment should say that Rule 45 does not restrict any protections available under Rule 26. Other revisions were made in the Notes, including deletion of the runover sentence beginning on page 108 and two paragraphs appearing on page 110

The preference in proposed Rule 26 for internationally agreed means of discovery was approved, but with a qualification if discovery not forthcoming within 6 months, and with a substitution of "inadequate" for "less effective" as it appears on line 12.

The related revision of Rule 34 was approved with a textual change.

The revision of Rule 28 was approved with revision. Judge Weis suggested that the devices enumerated in Rule 28 for discovery abroad should be reordered. This suggestion was approved by the Committee, with a cross-reference back to Rule 26.

Rule 35 was approved as it appears in the agenda materials.

Rule 44 was approved, using the generic term proposed by the Department of State, with textual changes.

The amendment to Rule 15 was approved in the form of the primary recommendation set forth in the revised material circulated at the meeting.

Rule 47 was approved as presented.

Rule 48 was approved with textual revision to make six the minimum jury size, and to clarify that a juror may be excused during deliberation. It was decided not to ask the Federal Judicial Center to study the relation between jury size and settlement rates.

Rule 77 was approved with revisions to delete the complications of reference to Rule 60(b), subject to negotiations with the Appellate Rules Committee over the text of FRAP 4.

On the advice of Judge Weis, the Committee voted to discontinue consideration of the amendment to Rule 6 proposed by the Standing Committee. The committee decided also not to consider the standard discovery definitions proposed by the NY State Bar, but to place on the agenda the Rule 16 issue raised by *Oat Corp. v. G. Heileman Brewing Co.*

The Committee voted to meet next in Santa Fe on Thursday-Saturday of the last week in April.