ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
DURHAM NC 27706

919-684-5593 *919-489-8668 (HOME)* *FAX: 919-684-3417*

MINUTES OF MEETING, LOS ANGELES, NOVEMBER 22, 1991

Present were Bertelsman (Standing Committee), Brazil, Carrington (Reporter), Cooper, Keeton (Standing Committee), [illegible]der, Nordenberg, Phillips, Pointer (Chair), Powers, [illegible]aniol (AO), Wiggins (FJC), Willging (FJC), Winter, Womack (ACTL) and unnamed members of the public.

The Committee first briefly discussed the degree of revision in a rule requiring republication. It was agreed that revisions that are "between what exists and what is proposed for comment" could be adopted without further republication.

It was agreed that further hearings would be conducted at Atlanta on February 19 and 20, and that the committee would meet for a fully day on February 21 to review the hearings and comments.

It was agreed that the spring meeting would be April 13-14 in Washington.

In reviewing the hearing of the previous day, the Committee discussed the differences between its proposal and the present rule of the Central District of California. Judge Bertelsman argued that the duty to produce the smoking gun gave rise to most of the difficulties people were having with vague pleadings. Judge Pointer noted that the reason for the broader rule was that a narrower disclosure requirement would merely lead to a broad interrogatory asking for "smoking guns." Judge Brazil noted that the purpose was to get core information out early to help with scheduling orders and settlement.

Judge Stevens expressed his continuing concern about the timing of disclosure. The provision for early by one side was also identified as one not free of possible difficulty. Judge Brazil suggested this problem could be

helped by restoring the meet-and-confer requirement. Judge Pointer agreed that requirement should probably be reinstated.

Professor Cooper suggested the need for an incentive to the plaintiff to be explicit in pleadings in order to trigger the duty to disclose. The Reporter suggested that commentary might suggest a relationship between particularity in pleadings and the scope of the disclosure obligation. Judge Brazil urged that the term "reasonably available" or the like needed to be in the text somewhere. Professor Cooper noted that the continuing nature of the duty seemed troublesome to many. It was agreed that the parties should not be required to disclose information they learned together at a deposition.

The relation between the signature and the scope of the duty to disclose. The Reporter urged that (g) bears on sanctions for signing, but does not relieve the party of disclosing information not known to the signing attorney. Judge Brazil urged that this be made more clear.

The question was raised as to how far parties can stipulate out of the obligation as they do in CD Cal. It seemed still to be the prevailing view that the initial disclosure should not be subject to elimination by the parties.

Attention turned to comments on (a)(1). Consideration was given to precluding expert depositions that are merely redundant to the required report except by court order. It was noted that part of the function of the expert deposition was to size up the effectiveness of the witness, not merely to get information. Professor Cooper noted the problem of the deposition being used at trial when the opposing party was holding back on the cross-examination; the Committee considered whether the relation to Rule 32 is appropriate.

Discussion turned to work product disclosed to the expert as part of the expert's preparation. There was little sympathy expressed for the protection of such material if it formed basis for expert opinion.

Rule 11 was discussed. Judge Brazil expressed concern that the rule should not extend to anything less than a claim or defense. He pointed to the pressure of malpractice law to compel Rule 11 activity. Judge Pointer suggested a need for Rule 11 to deal with scandalous allegations or other outrageous acts, such as citing a non-existent case. It was agreed that the issue warranted further consideration.

Judge Pointer asked whether discovery matters should be divorced from Rule 11. It was tentatively decided to drop

discovery requests and objections from the coverage of Rule 11, leaving Rule 26(g) in.

Attention turned to Rule 23. ACTL had raised some questions, but was essentially favorable to the draft circulated for informal comment. The problem of defendant classes was considered; should there be a class where there is no willing representative? Judge Brazil noted that this gave the power to the named party to defeat the class proceeding at will. Judge Keeton raised the question whether it was the party or the counsel who ought to be willing. ACTL also raised the question whether conditions should be imposed on opting in.

The Reporter presented more generally the problem of the faithfulness of representatives of plaintiff classes discussed in the memorandum circulated to the committee. It was tentatively agreed that pre-discovery bidding was too risky and likely to produce collusion. The secondary form of auctioning the representation was regarded as more feasible. Judge Winter emphasized the results of Janet Alexander's work showing no correlation between merits and settlement values as indications that there is a need to discourage groundless cases and reward bad ones; none of the Reporter's proposed remedies did much to discourage bad cases. It was agreed that consideration should be given to further controls on settlement or on the qualifications of representatives to deal with the fiduciary problem. Judge Pointer noted that opposition to settlement was not rare. He also noted the similarity to motions to transfer a case to another district, there being a conflict of interest on the part of the judge. Judge Brazil noted that although the judge might be willing to be an inquisitor, the complexity of the case would prevent that. Judge Pointer thought a smell test might be operative. Judge Stevens thought there were times when one might have suspicions but no basis for pursuing them. Judge Brazil thought that if there is to be a guardian ad litem, it would be better to appoint before the settlement is achieved. Judge Pointer thought that the guardian ad litem is sometimes useful, but should not be imposed in every case. Judge Keeton thought that a master might be more useful than a guardian ad litem. Judge Winter asked how any of the alternatives would play out in an Agent Orange situation, typified by weak showing on causation, where the settlement was either grossly excessive or grossly inadequate, but we can't tell which. Judge Pointer thought that in the absence of cause, the court might as well give a little something to all Viet Nam veterans. He urged that the powers are available to deal with the problem, but generally the court lacks the information on which to act wisely. Judge Brazil thought that if the rule is to be revised, the problem of faithfulness should be addressed.

Conversation returned to the possible requirement of willingness on the part of a defendant class representative. After discussion, it was agreed that the matter merited further consideration.

Judge Pointer called attention to the main purpose of the draft was to eliminate the distinctions in 23(b). No one objected to this aim. The Reporter suggested possible deletion of the typicality requirement in (a), but it was thought that the requirement was worth retaining. Judge Keeton cautioned that no changes ought add to the burden of administering the rule. Judge Pointer noted that the present draft was based on the Uniform Act and the draft prepared by the Litigation Section in 1983. Judge Brazil asked whether the aim was to increase flexibility. Judge Pointer affirmed that this was the aim.

The possibility of increasing appellate review of the class action determinations was discussed. The Reporter was directed to call attention of the Appellate Rules Reporter to this proposal. Professor Cooper noted that the proposal would revive the death-knell or reverse death-knell doctrines.

Dean Nordenberg pointed to the relation between the notice requirement and the opt-in feature. It was suggested that lines 53-66 of the draft should be broken into two sentences. Judge Winter asked about the time limit on opting out after a settlement.

It was observed that the effect of the reform may be to impose more discretion in the district court. Judge Pointer emphasized that appellate review should channel discretion and protect against bad settlements resulting from the intimidating effect of a class action determination. The Reporter asked whether there should be a findings and conclusions requirement to provide a basis for the appellate review contemplated. Judge Brazil asked whether interlocutory appeal would freeze the lower court proceeding. Judge Pointer assured the committee that it would not unless the court of appeals so ordered. The suggestion was made that such issues might be sent to the transfer panel under Section 1407, but resistance was voiced to that proposal.

Judge Brazil urged that the present draft be circulated to scholars and lawyers.

Attention turned to the issue of public access to discovery material. The Reporter reviewed efforts to amend Rule 5 regarding the filing requirement for discovery

material. Seattle Times v. Rhinehart was discussed, The toxic tort cases and the interests of co-plaintiffs was reviewed. The Federal Courts Study Committee favored protective orders to encourage settlement, but this proposal had encountered difficulty in Congress. Judge Bertelsman pointed to the problem of trade secrets, and also suggested that different considerations apply to interlocutory protective orders. It was observed that some critics seem to want a FOIA for private firms. It was noted that there may be a Rules Enabling Act constraint on the Committee.

Mr. Spaniol elaborated on the Rule 5 problem, noting that he received many calls protesting the local rules that authorize nonfiling. Judge Keeton reminded the Committee that there are no facilities for filing all discovery materials. The Reporter reminded the Committee that it had some years ago recommended a revision to provide for nonfiling, and had run into stiff opposition from the press. Mr. Spaniol recalled that Judge Mansfield had emphasized the power of attorneys to stipulate nonfiling. Judge Pointer noted that the pressure now comes from ATLA, not the press, although the press would support more openness. It was observed that the plaintiff's bar would not necessarily want the file to be open; at least some hope to sell their discovery material to other plaintiffs. Judge Keeton noted that the judicial action must be open to scrutiny.

Judge Brazil urged that nothing be done with this problem at this time. This was the view of Professor Marcus in the article cited by the Reporter. Judge Keeton thought that the problems associated with doing anything might be usefully called to the attention of any Congressional committee contemplating action. Mr. Spaniol thought that Congress did not want to deal with the problem, as long as the Civil Rules Committee acts responsibly. He urged that the Committee await communication from the Congress.

Judge Pointer moved to the question whether some provision should be made in Rule 43 for accepting live testimony transmitted by video. It was noted that the subpoena might compel appearance for video transmission at a place convenient to the witness. It was agreed that further discussion might be appropriate.

Attention turned to the question raised about Rule 50 on the eve of the effective date. Concern had been expressed that the rule as promulgated was not clear in authorizing judgment as a matter of law in favor of a plaintiff. Judge Keeton expressed hope that the rule not be disturbed by Congress, but recommended that the Committee come up with a suggestion of the way to deal with the problem if it must be addressed now.

Judge Keeton noted that the two forms 1A and 1B improvidently promulgated by the Court would be withdrawn by Congress. Also, the false reference in Rule 15(c) would be corrected.

The Reporter reviewed the mail bag of proposals for revisions. The Committee resolved not to pursue any of the proposals except to study further the relations of Rules 13 and 14 in light of the Minnesota article.

At Judge Keeton's suggestion, the Committee reviewed the fax filing issue.

Discussion briefly returned to Rule 23 and possible changes in the draft to be circulated. It was agreed that something should be added to the draft to evoke comment on the problem of investigating settlements.

The meeting adjourned at 4:30 PM.

Paul D. Carrington
Reporter