

ADVISORY COMMITTEE ON CIVIL RULES

Minutes of the December 12-13, 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, December 12, 1977. The following members were present during the meeting:

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

Others attending the session were, Judge Roszel C. Thomsen, Chairman, and Judge Charles W. Joiner, member, of the Standing Committee; Assistant Attorney General Daniel J. Meador, Stephen Berry and King of the Justice Department's Office for Improvements in the Administration of Justice; Paul R. Connolly of the American Bar Association; and William R. Burchill of the General Counsel's Office of the Administrative Office of the United States Courts.

Judge Tuttle opened the meeting with the announcement of the appointment of Mr. Foley as director of the Administrative Office to succeed Rowland Kirks, and Mr. Spaniol's appointment as deputy director. On behalf of the committee, Judge Tuttle expressed their deep sympathy to the family and its regret of the loss of Mr. Kirks, a man who has given great strength to this office and who with the bravest kind of effort kept active until the last day possible.

Judge Tuttle stated that he is continually impressed with the extent to which the very busy people on this committee have been willing to drop what they otherwise would be doing with great frinzy and spending time necessary to go through the problems before this committee. He pointed out that the committee has before it today two substantial proposals. One was submitted to them by Assistant Attorney General Meador, head of the Department of Justice Office for Improvements in the Administration of Justice, and the other by the Section on Litigation of the American Bar Association. Both recommendations looking towards either modifications of some of the rules or supplanting some of the rules with litigation or a combination of both.

Agenda B - Class Actions

Consideration of "Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Imjury" through a draft proposal for statutory enactment to replace Rule 23(b)(3) prepared by the Department of Justice.

Professor Daniel J. Meador explained the background for this draft. A study of this problem which seems to go beyond rule-making began last spring through contacts with different people representing all segments of the bench and bar. After several meetings, it was quickly decided that the most troublesome aspect had to do with the Rule 23(b)(3) action where there is some alleged wrongful conduct in violation of a federal statute that harms a great many persons but in small amounts each and in the aggregate quite large. They arrived at the premise that the problem here is public rather than private. The main concern is not trying to get the money back into the pockets of these people but rather to deter such conduct. Since Rule 23(b)(3) is not tailored to that end, they felt the procedure needed to be restructured through this new public penalty action. Less than \$500 was arrived at as the figure which most people would consider a small individual claim as distinguished from a large individual harm. Under this proposal two new statutory proceedings would replace 23(b)(3) which would be more expeditious, less costly and fair to all interests. Professor Meador indicated that this proposal has been distributed widely and comments have been invited with a view toward presenting a bill by late January. He felt the question here for the Rules Committee is whether the statutory route is more appropriate than a rule-making one. His office feels the statutory route is preferable because (1) the whole idea of a penalty or deterrent type of proceeding

rather than compensatory is of such import that a legislative judgment is called for if it is adopted and (2) more so than most procedural provisions, the ramifications of these actions affect substantive interests. He also pointed out that through experience and difficulty with which the rule is followed they feel it is on line with or outside the rule-making power. Moreover, there are pressures to do something about the problem and it seems the way to move more expeditiously and publicly is through the legislative route. What they would like from the Rules Committee and ultimately the Judicial Conference is a recommendation endorsing the statutory route as distinguished from the rule-making route as a way of addressing the Rule 23(b)(3) problems and any comments that the individual members or the committee as a whole may have on the contents of the proposed bill.

Professor Ward asked Professor Meador the reasons for the preliminary inquiry utilized in the class compensatory action. He replied that the exact language could be changed but they felt there is need for some formula which expresses prima facie indication of probable merit in order to save the continued expense of the proceedings.

Judge Tuttle thanked Professor Meador for his summary and asked the members to express their views.

Judge Mansfield stated his initial reaction was that it is so substantive with respect to regulation of the recovery of money rather than just procedure that it would go far beyond the justification of the rule-making power of the Supreme Court.

Therefore, the proposal should be by legislation rather than rule-making.

Mr. Meserve indicated that consideration should be given to diversity jurisdiction being held open in cases where the amount is large. He felt that the small cases which in the aggregate are large run two risks and this proposal would help to eliminate these risks by (1) preventing a deliberate offender from escaping action because the individual does not have sufficient funds to bring an action and (2) by exerting control over the lawyers. As to cases involving larger sums, he preferred to reserve his judgment at this time.

From a general observation of the proposal, Judge Oberdorfer stated that there may be elements that are more properly classified as rule-making. For instance, the penalty provision should be subject to legislation but the provisions dealing with settlement, preliminary decisions and time tables should be handled by rules. As far as the contents of the proposed bill, he felt the provision placing plaintiffs' attorneys' fees on a time-charge basis would in some instances be unfair. He also suggested they specify in a provision that the penalty is not deductible for tax purposes if that is the case.

Judge Hufstedler agreed with the Department that it is appropriate for the matter to be undertaken by way of legislation rather than rule-making although there are going to

be some rule-making considerations that would be an adjunct of any legislation that is passed. She endorses the aim and concept involved in the proposals but is concerned about the pragmatic problems of giving the United States these various 60-day time limits. Also, the United States should take over the public penalty action but if it does not there would be problems of due process and res judicata and she stated there should be more thought given to what kinds of appeals will be available. When talking about the penalty phase for the accumulation of the two bit claim and the more substantial class action, there should be two bills since you are talking about two different problems.

Mr. Henderson observed that the discussions here are similar to the hearings in the Congressional committees. To have the thought process of the issues for later presentation to these committees of a bill that will have balance is going to be the task if the legislative route is agreed upon.

Mr. Kintner indicated that he is not prepared to yield so quickly to the jurisdiction of Congress in an area that belongs to rule-making through the expertise of lawyers and judges. If the public penalty action is agreed upon, he suggested Congress go ahead and solve the problems of policy, but let the Rules Committee continue their work in the area involving procedure.

Judge Harris reserved his comments regarding the contents of the proposal until later. As to whether they should proceed

by the rule-making process or whether legislation should be undertaken, he felt the better route is through Congress. He also stated that if this is to be an administrative proposal he would encourage Professor Meador's office to go ahead and the Rules Committee to continue its work with reference to the procedural rules. However, he felt there is nothing wrong with the legislative committees considering the procedural aspects of this proposal and he suggests this committee and any other committee involved be prepared to be available to the Congress in order to work with them in solving this problem.

Mr. Kirby suggested this proposal be put in two parts: (1) a unified set of practice rules and (2) a substantive part for submission to Congress. Professor Meador indicated that the procedural aspects they covered were ones not already dealt with by the Civil Rules such as the preliminary hearing. Mr. Kirby questioned § 3004 of the proposal regarding a 30 percent reduction in damages and the inclusion of violations of state law as remedial in federal courts. In regard to the latter, Mr. Kirby pointed out that it would increase the problems in the federal courts enormously.

Judge Christensen questioned the guide used for the awarding of attorneys' fees because he felt hourly rates can be deceptive. He pointed out that it would be difficult to act on any proposal which is broken into many parts. He agreed that the penalty concept which is creative and helpful,

would have to be considered by Congress as a proposed bill but the only procedural aspects which should be included are those which could be grouped as essential to this unique problem and which are essential as a guide to understanding the basic concept of the proposal.

Judge Joiner stated he agreed with the problems raised by Judge Hufstedler. Also, he expressed his view that the committee should propose changes in the rules along with the changes proposed in the statute so that one package could be presented. In regard to the proposed statute itself, he suggested that in cases involving penalty under \$500 if the claim is started by an individual and is turned over to the state, the matter should then be pursued as an individual action rather than as a class action. Professor Meador explained that after debating that issue they concluded that there is a sizeable sentiment around the country to preserve the individual initiative because the government does not always pay enough attention to these cases. Judge Joiner felt this problem could be solved by allowing the government to retain the attorney who brought the action if they thought he were competent. He urged the Department to reconsider this issue. Mr. Berry pointed out that there is provision in the statute for the judge to inquire into the past history of the attorney.

Judge Russell expressed his indebtedness to Professor Meador on behalf of the Fourth Circuit as well as the committee. He felt there is an area for legislative action and rules action. If the suggestion regarding the compensation action and if the

provision dealing with a mini-hearing which he feels is good, is adopted, there will have to be changes in the rules.

Judge Hunter stated he agreed with Professor Meador that because of the substantive nature of the matter this would have to go the legislative route. However, he felt this would not foreclose other attempts by this committee to make procedural amendments. Since the proposed statute is tentative the question before the rules committee seems to be whether or not to recommend to the Supreme Court that legislation be passed on the public penalty procedure by mass injury as suggested by Professor Meador.

Judge Mansfield made further comments after looking over the proposed statute more thoroughly. He agreed with the public penalty provision, however, he questioned who bears the costs of depositions, etc. when the counsel (in the governments name) needs money. Professor Meador replied that there is no provision for that but it had been discussed. He added that at the preliminary hearing the plaintiff gets cost expenses and attorneys' fees from the defendant up to that point.

Judge Oberdorfer suggested another version in which the Department of Justice makes a proposal to the Congress for a new statute and a proposal to the Rules Committee for changes in the rules which they think the amendment in the law would indicate or require. For instance there would be consideration of rules changes involving the policing of

settlements, the overseeing of attorneys' fees and preliminary decisions stimulated by the statutory proposal. In answer to this suggestion, Professor Ward indicated that the public penalty provision must be statutory but there is very little in the class compensatory scheme that can effectively be put into the rules. Further, there is very little in the legislative draft which the rules committee should consider, not for lack of authority, but because of going through Congress. Judge Joiner then suggested that if the timing provisions could be worked out, this could be presented as a package from the Department of Justice and the Rules Committee to give strong mutual support which Congress would be more receptive to. Judge Tuttle stated they should consider the possibility of recommending to the Judicial Conference that they approve this proposal in principle remembering that when the bill is finalized and introduced it will be sent back to the Conference for suggested refinement. Professor Meador clarified what the Department would like as follows:

A pronouncement from the Judicial Conference beginning with a recommendation from this committee to that effect that in general the Judicial Conference approves dealing with these problems under Rule 23(b)(3) by legislation subject to retaining the option of disagreeing with specific provisions of the proposed legislation and of saying that certain elements of such legislation should be more properly dealt with through the rule-making process.

Judge Harris did not feel the Judiciary committees will be receptive to this so-called legislative approach on the basis that through the rule-making process there will be some

amendments but they do not know what they are at the time. Also, the Judiciary committees will not be concerned with the division of this proposal as to whether it is procedural or otherwise. Judge Oberdorfer pointed out that Professor Meador's statement to give endorsement in principle of this legislative proposal does not invite any affirmative suggestion from the Rules Committee, or ultimately the Judicial Conference, as to what could be accomplished by rule changes. Therefore, the package should contain not only a legislative proposal but rule changes which could be considered by the Judiciary committees at the same time.

Mr. Kirby expressed his view that the effect of this proposal on the general framework of the rule goes broader than just the two types of remedies discussed in the proposal. For instance, the attorney fees mentioned would affect Rule 23(b)(1) and (2), and the settlement section would affect other rules.

Judge Hufstedler suggested the bill be limited to Rule 23(b)(3) and pointed out that the Department has not been made aware of the results of the Rules Committee's lengthy deliberations on solving the problems related to 23(b)(1) and (2).

Based on the previous discussions it was suggested that Professor Meador draft a resolution of what the Department of Justice would like from the Rules Committee. Also, Judge Hufstedler moved that a resolution be adopted to authorize

the Reporter to maintain liaison with the Department of Justice in an effort to outline the views of the Rules Committee. Her motion carried.

The next day Professor Ward read Professor Meador's suggested resolution that the Conference approve in principle the revisions of Rule 23(b)(3) by direct legislative enactment rather than by the rule-making authority. Mr. Pomerantz made a motion to approve it. He felt the proposed bill is an effort by the Department to meet the sharp and destructive nature of Rule 23(b)(3). Judge Christensen stated he had reservations because it abandons the Rules Committee's commitment to rule by order of the Supreme Court rather than by legislation unless the wording is tied to a particular principle in their proposed statute. So to single out the point they feel requires legislative action, he suggested adding, "through separation of the treatment of compensatory and non-compensatory class actions in general harmony with the draft legislation by the Department of Justice. Judge Tuttle felt the problem here is simply that the Department's suggested resolution speaks too directly over the Rules Committee preferring the legislative route to the rule-making one as to changing Rule 23(b)(3). Therefore, he suggested this committee recommend a resolution approving in principle the objectives of the proposed statute by the Department of Justice. Mr. Pomerantz accepted the amended motion.

Mr. Kirby raised objections on the grounds that stating the committee's approval of the proposed legislation goes too far. Instead they should simply approve certain substantive issues for legislation. He also felt they should not give approval of the objectives of the proposed bill when it has not been thoroughly studied. Judge Harris expressed his view that it is their duty to give the Congress the benefit of their wisdom and if there is a problem with rule-making, legislation, substance, etc. this committee should give them all the help they can. Mr. Pomerantz' motion to recommend to the Judicial Conference a resolution approving in principle the objectives of the statute proposed by the Department of Justice for effective procedural remedies for unlawful conduct causing mass economic injury, and including a sentence reserving their rule-making authority was carried. Judge Christensen, Judge Russell and Mr. Kirby voted against the motion.

Agenda A - Discovery

Mr. Paul R. Connolly, former Chairman of the Section of Litigation of the American Bar Association, presented the background for the Report of the Special Committee for the Study of Discovery Abuse. He stated that the suggested changes in the rules as enumerated in the October 1977 print were submitted to the Attorney General for comment. His reply supported the new subdivision of Rule 26 and the changes in Rule 30, 33, 34 and 37. However, he felt the changes in Rule 5 go too far,

and the comment to Rule 26(c) suggests the tasks performed by the magistrate are limited in the discovery process. In response to this letter, Mr. Connolly's committee agreed to change Rule 5 to include "unless ordered by the Court," and to delete the last sentence in the second to the last paragraph of the comment to Rule 26. In place of this sentence they added:

When a discovery conference is convened pursuant to this Rule, the Committee believes that the trial judge should preside over it so that he participates in the early definition of issues. Thereafter, reference of further discovery matters to a magistrate may be appropriate.

Mr. Connolly further explained that in addition to these necessary language changes this special committee has sought to make two major changes in the discovery rules. One would limit the scope of discovery from the broad language now referred to as subject matter and the other would give the court power under 28 U.S.C. § 1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan. He also called attention to their change regarding the limit in the number of interrogatories that can be asked as a matter of right and the new paragraph in Rule 34 regarding the manner of document production.

Mr. Connolly informed the committee members that on December 2, 1977 the Board of Governors of the ABA approved this Report for publication and distribution to the bench and bar for comment. Judge Mansfield felt this committee

must make a choice between using the ABA draft as a basis for proposed amendments to the rules and waiting until a study is completed similar to what the Metropolitan Chief Judges are undertaking. Judge Hufstedler pointed out that by the time comments come back on the ABA draft they will have as good an empirical study as possible. Therefore, she suggested this committee study the ABA draft. If approved, this committee could review the comments at the next meeting and if not approved, they could then circulate their own suggestions to the bench and bar.

Mr. Connolly suggested the communication from the ABA in their draft be accompanied by a communication from the Rules Committee to the bench and bar.

Professor Meador relayed the views of the Attorney General that this matter be worked out as expeditiously as possible and that he favors the adoption of the proposals in this draft.

Judge Oberdorfer added to Judge Hufstedler's suggestion the idea of publicly announcing that the Rules Committee has received this presentation from the ABA Section of Litigation and that it is under consideration for expeditious action. Then he stated this circulation by the ABA could be used by this committee as a substitute for reserving our right to circularize again if changes are necessary. Judge Hufstedler then suggested a statement be added to the draft indicating that the commentary received by the ABA will be considered by the Advisory Committee on Civil Rules on a date set. Mr. Kintner

moved that they ask the ABA to state in their draft that these and other matters involving changes in the discovery rules are before the Advisory Committee on Civil Rules and request comments. Judge Hufstedler suggested a reference be included stating this committee will give consideration to the comments on the ABA Committee draft on a given date. Mr. Kintner agreed. Professor Ward urged reconsideration of this action. He felt this will be misunderstood as being approved by the Rules Committee since the format is so similar to the Rules pamphlets, and the ABA draft has not even been considered fully by the Advisory Committee. Mr. Meserve agreed that nothing should be sent out over the Rules Committee signature at least until it has been given some consideration. Mr. Connolly indicated he would like a letter from the Advisory Committee acknowledging receipt of the draft and stating that they wish to treat this proposal expeditiously, therefore, they are asking that the comments be submitted by a certain date. Judge Joiner then read the usual letter to the bench and bar which accompanies published drafts and substituted appropriate language according to Mr. Kintner's motion. Judge Tuttle called for the question and Mr. Kintner's motion with Judge Joiner's letter carried. Judge Christensen and Mr. Meserve requested their votes be recorded as negative.

The meeting recessed at 5:00 p.m. and reconvened at 9:00 a.m. the next morning.

Judge Thomsen stated he had second thoughts about sending out to the bench and bar matters which have not been considered and given tentative approval by the Advisory Committee. He, therefore, recommended sending proposals out next year from the Advisory Committee based on the issues discussed. Since the Reporter can have complete position papers with respect to each critical suggestion in the bar recommendation by the later part of January, the Advisory Committee could get their proposals out to the bench and bar for comment with the view toward submitting them to the Judicial Conference in September. Judge Mansfield expressed his view that they should have some empirical evidence to show there has been a change of opinion that necessitates their taking a different stance from what they took 10 years ago. After all the studies which have taken place recently, he wondered whether after 3 months circulation they would find anything different. Judge Tuttle stated that since there are difficulties in the ABA draft which may not be fully apparent to all the members at this time, he felt they should follow the suggested schedule of meeting early in 1978 to circulate proposals to the bench and bar for comment and consideration of responses for submission to the Standing Committee before the ABA has finally analyzed the suggestions to its own proposals.

Agenda B - continued

As a result of discussion at the last meeting and suggestions made by Judge Mansfield and Mr. Meserve, Professor Ward presented to the committee a proposal that the issue of whether the court declines to proceed with an action because it believes that the class is not interested be determined before certification. This would be accomplished by the addition of the following clause:

(E) the benefits that will accrue to individual members of the class if the class action is successfully prosecuted. To assist it in its determinations under this subdivision, the court may order that notice be sent to, or that discovery be directed to, members of the class or a random sample thereof.

Mr. Meserve felt this would be a safety valve and moved approval of new clause (e) as new criteria for the judge in considering the action. Mr. Pomerantz objected, feeling they should not look entirely at the miniscule interests of the individual claims. Judge Mansfield suggested "or to the public" be added to the first sentence. Judge Oberdorfer pointed out that Mr. Pomerantz' argument against this clause is perhaps the suggestion that the public interest in assessing damages against the defendant is not for recovery by somebody, but is assessing the penalty against the defendant. Responses to the class action questionnaire indicated people feel the statement that Rule 23 deters violations of various laws accurately characterizes the rule and no amendment is called for. Therefore, in amending the rule the judge should also have the opportunity to evaluate

the public interest in the assessment of damages and Mr. Oberdorfer drafted a new clause (f) as follows: "Another factor to be considered is public interest in the assessment of damages against the defendant should its liability be determined." Mr. Pomerantz requested the addition of "the deterring effect of" before "assessment." Professor Ward explained that this could not be put into a procedural rule. Judge Tuttle asked for a vote on the motion to add clause (e) to Rule 23(b)(3) and the motion carried.

Agenda C - Proposals for Changes in the Rules

Rule 45(e)-Subpoena For a Hearing or Trial

Professor Ward explained a suggestion from the State Bar of California proposing a change in the territorial reach of a subpoena. He agreed with their first proposal that federal process reach as far as state process but he expressed difficulty with the second proposal for country-wide process since it would be a problem for the witness to contest it. Judge Christensen moved approval of their first proposal adding a provision that if a state extends its subpoena beyond what is now in the rule in the federal court, the federal court has the power to extend its subpoena as far as the state. His motion carried. The members agreed to make no changes regarding their second proposal for country-wide subpoenas.

Rule 45(d)(2)-Place Where Deposition May be Taken

Eleven members of the California Bar suggested a change which would permit a witness to be examined in the place now provided and, in addition, in any county adjoining a county described in the present rule and if a witness resides in a Standard Metropolitan Area he may be examined anywhere within the Area or in an adjoining Area, if any. Professor Ward indicated this is not the time to give added scope to the business of depositions and he does not recommend a change unless they hear from more than 11 attorneys. The members agreed.

Rule 53(c)-Powers of Masters

Judge Winston E. Arnow directed attention to a technical change necessitated by the abrogation of Rule 43(c) as a result of the new Rules of Evidence. Professor Ward explained that the final sentence of Rule 53(c) directs the master, on request of a party, to make a record of evidence offered and excluded in the manner provided in Rule 43(c). This could be corrected by substituting for Rule 43(c) the following: "The provisions of Rule 103 of the Federal Rules of Evidence shall apply to rulings on evidence by the master." Judge Mansfield moved approval and his motion carried.

Rule 4(d)(7)-Service of Process

The Director of the Marshals Service would like a change to allow the marshals to service ordinary people and business entities by certified mail because marshals have much more to do and this is very expensive for the United States. Judge Joiner stated they would have to make it plain that the attempt to serve by certified mail is a part of the whole process. Professor Ward stated he wrote to the Director and informed him that if there are districts in which ordinary service by the marshal is troublesome, such a rule could be suggested in the Court. In discussing this with the committee, Professor Ward indicated there could be a problem when receipts are not returned and when mail does not reach people in certain areas, and default should not be based upon service. Mr. Kirby moved approval of their suggestion by including a provision similar to the two parts of the local rule for the Northern District of Illinois. His motion carried.

Resolved that the Advisory Committee on Civil Rules recommend to the Standing Committee on Rules of Practice and Procedure that the Judicial Conference approves in principle the following: "The Conference approves in principle the revision of Rule 23(b)(3), Federal Rules of Civil Procedure, by direct legislative enactment, rather than by the rule-making authority. The Conference reserves for further consideration the merits of any specific statutory proposals and the appropriateness of dealing with specific aspects of such proposals through the rule-making authority."