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May 11, 1992

MINUTES OF MEETING OF FEBRUARY 21, 1992

Chairman Pointer called the meeting to order at 8:30 AM at the United States Courthouse in Atlanta. Present were Bertelsman, Brazil, Carrington, Cooper, Fines, Holmes, Keeton, Linder, Nordenberg, Phillips, Powers, Winter.

Judge Pointer explained the action of the Supreme Court with respect to pending recommendations on Rules 4 and 26 as a response to the British Embassy. He also explained that the Court would in the future like a memorandum explaining the contentious issues resolved.

Attention was directed to Rule 4 and changes proposed to respond to the British Embassy communication. It was noted that the chair and the reporter differed on the use of the waiver-of-service device on instrumentalities of foreign governments. The Reporter argued for retention of the provision for instrumentalities, which are commercial enterprises and not always so easy to serve as are the other parties exempt from the device. On Judge Phillips motion, the Committee took the chair's view that instrumentalities of foreign governments should be exempt.

The Reporter raised the issue of legal constraints on waiver. He urged that British constraints on waiver should be taken into account only if the British law on waiver is applicable to waiver of service in their own courts. Judge Brazil expressed concern that a litigant might be penalized for obeying his nation's law. Judge Keeton noted that no penalty is involved, but only a cost.

Judge Keeton reported on the work of the style committee.

Judge Pointer noted a change on the proposed text of forms 1A and B.

Attention turned to the Rule 26 revision pertaining to the Hague Evidence Convention. It was noted that the chief objection of the British to the proposed rule is that if fails to change the result in Aerospatiale. The Reporter explained that the British sought special treatment for its nationals when litigating in US courts, a proposition on which they lost 9-0 in the Supreme Court. With changes in the Committee Notes, it was agreed to leave the text of the rule as previously proposed.

The February draft of Rule 11 was next considered. Judge Pointer suggested limiting the rule to pleadings and motion, that the rule not apply to discovery matters covered by Rule 26(g). Judge Brazil expressed concern that the Schwarzer opinion in Golden Eagle not be embodied in the rule and suggested deleting the word "argument" from (b)(2). Judge Keeton asked whether a sanction could be visited for a contention made in an unsigned paper. It was agreed that the sanction could be imposed for "maintaining" an argument in a paper previously submitted but signed by another lawyer.

Mr. Powers expressed concern that sanctions be imposed on a senior attorney for not reading all the cases cited by a junior researcher. It was noted that the sanction should be imposed on the firm. Judge Keeton compared the captain of the ship.

It was urged that the Committee should be more explicit that no sanction can be imposed for an expression that is wholly oral and not embodies in a writing. Judge Pointer thought the text clear, but it was agreed to fortify the Notes on this point.

The Reporter asked whether the Committee did not want to constrain inherent power as well as authorized power where it overlaps Rule 11. A negative answer was supplied. Judge Winter noted the need for inherent power to control pro se litigants. Judges Pointer, Brazil, and Keeton emphasized the need for inherent power. The Reporter asked whether the safe harbor should not apply to exercises of inherent power.

The continuing duty feature was discussed. Judge Pointer noted the problems with the snapshot approach of the present rule. The phrase "certified until withdrawn" was thought to obviate the need for "maintaining." The problem of removed cases was considered; it was decided on Judge Brazil's motion that a separate provision would be needed for removed cases.

Attention turned to sanctions on firms. Judge Pointer argued for the term "responsible" as a description of those who are accountable. Judges Winter and Brazil argued for respondeat superior. Judge Phillips argued for personal accountability. Judge Pointer noted the relation between the safe harbor and institutional accountability - the decision not to withdraw a challenged contention should be an institutional decision. Judge Keeton noted that agency law may be viewed as substantive. Judge Brazil thought the deterrence function strengthened by firm responsibility. It was suggested that clients have to pay for the internal controls. Judge Winter suggested using the law of agency as is, that firm is liable unless the advocate is on a frolic and detour. It was tentatively agreed that the firm should be presumptively responsible.

Dean Nordenberg and Judge Brazil questioned "egregious" as it appears in the Committee Notes. Judge Winter suggested the utility of a double negative: "not for inconsequential" offenses. Judge Brazil thought that this provision would take care of the Golden Eagle problem. It was also agreed that the Notes should specify that a candid effort to secure a change in precedent is not sanctionable, at least unless repetitive.

Chief Justice Holmes urged that "may" should be substituted for "shall." Judge Pointer noted the relation to the safe harbor. Judge Brazil noted that the standard has been elevated. Judge Winter noted that the standard of review is "abuse of discretion." The Reporter pointed out that a major complaint against the rule had been erratic imposition.

The sanctions provision was discussed. Judge Keeton favored the use of fee-shifting as a sanction. Mr. Powers argued that liability for abuse of process is a substantive tort in Arizona. The Reporter pointed to Business Guides as a source for the principle of deterrence as

the justification. Judge Winter noted that not all Rule 11 cases require fee shifting as deterrent. But as the proposed Note suggests, compensation may be needed as a deterrent. One purpose of the change was to prevent Rule 11 from becoming an underground method of adopting the English rule.

The agenda moved to Rule 16. Judge Pointer noted strong criticism of mandatory ADR. Judge Brazil was concerned that the rule should not forbid mandating ADR. The Justice Department favors ADR, but opposes court-ordered ADR. So do many others. Judge Pointer proposed change of language to accommodate the powers given by statute, §473. Judge Brazil noted that the statute weaseled on authority to compel ADR. Judge Pointer observed that the statute did go some distance to allow some compulsion, and the rules, while not taking a firm position on mandatory ADR, can "punt" the issue in Rule 16. Judge Bertelsman acknowledged that there is a separation of powers problem with the government, but favored mandatory settlement conferences. Judge Pointer agreed that the rule should not preclude mandating settlement conferences attended by the judge. Mr. Linder again emphasized the willingness of Justice to attend judicially-hosted settlement conferences. Judge Keeton suggested that the comments should be explicit that nothing in the rule authorizes courts to order binding arbitration.

Whether to authorize the court to require attendance of parties at settlement conferences was discussed. Judge Winter and the lawyers present argued against requiring more than access by telephone. It was agreed to eliminate lines 64-66. Judge Brazil sought to make it a matter of record that the Committee was not taking a position adverse to any authority presently exercised by the district courts. The Reporter argued against the validity of Committee deliberations as legislative history having weight as law. It was agreed by all that it was not the purpose of the Committee to retrench any existing power of the courts, that all that was intended was to take no position.

Rule 26 was considered. Judge Winter urged that (a)(1) not be put forward at this time in order to let experimentation to proceed. The Reporter urged that it should at least authorize local rules, in order that the Rules be consistent with experimentation now proceeding. Judge Pointer noted that some districts have adopted the Committee's present proposal. Judge Brazil noted that withdrawing of the proposal would chill experimentation. Dean Nordenberg noted that the districts were looking to the Civil Rules Committee to guide experimentation. Mr. Powers urged that the Committee's work product should, at the least, be published.

The Reporter suggested retention of 26(f) as the basis for a meet-and-confer rule. Judge Brazil suggested that the meet-and-confer should be moved to Rule 16 so that subjects other than discovery could be on the agenda. The Reporter noted that 26(f) could be retained without republication. It was decided to reduce (a)(1) to an authorization for local rules and that (f) be revised to require proposals for a discovery schedule, using that event as the triggering event for opening formal discovery. But there was also general agreement that the work done on (a)(1) should proceed to give guidance to experimenting districts, but not as a nationally-prescribed rule. Mr. Linder preferred to prescribe a rule for use in all districts. It was noted that the Standing Committee might take Mr. Linder's view.

The language of the proposed (a)(1) was reconsidered. The concepts of relevance and materiality were compared. Judge Bertelsman commended the Central District of California rule, especially the language requiring disclosure only of information the party presently proposed to use in support of its allegation. Ms. Fines supported the observation that there is an attorney-client relation problem in disclosing adverse information. Mr. Powers and Mr.

Linder regarded this as a regression from the proposal, and expressed a preference for no rule to the California rule. Professor Cooper thought that an experimental rule could be proposed that would be less "regressive;" Judge Pointer supported this view. Judge Phillips thought that the vagueness concerns were equally applicable without the limitation provided in the Central District rule; he supported Mr. Powers' view is that the Central District rule would be less desirable than to provide no model at all. Five members of the Committee thought that if a national rule were to be put forward, it should be limited to material supporting the disclosing party's contentions; five disagreed. In light of this disagreement, it was decided to prepare no model rule. Mr. Linder and Dean Nordenberg expressed dissatisfaction with this result. Professor Cooper thought that the previously published draft could be used by some districts as a model.

Attention turned to (a)(2). The Reporter raised the issue whether material considered by the expert should be disclosed in the report. Judge Pointer thought that such disclosure would raise questions of privilege. Mr. Powers and Judge Brazil argued that anything received from the parties should be disclosed; otherwise a deposition would be required to secure such information. The Third Circuit decision on point was discussed and questioned. It was moved that the draft be revised to require the report to include material considered as well as material relied upon by the expert, subject to a draft to be submitted in April. The motion passed with the dissent of the chair.

Rule 702 was considered. Judge Pointer questioned the use of the word "substantially." Judge Winter argued for retention of the requirement. Judge Bertelsman also supported the requirement. Mr. Linder urged that a stricter requirement should be imposed. There was no disposition to delete the requirement. The Reporter suggested that the commentary to Rule 16 might suitably be strengthened to encourage motions in limine to limit the use of experts where not needed.

Discussion returned to Rule 26. The proposed revision of the language requiring supplementation of disclosure was received with general approval. It was agreed that "seasonably" was not adequately explicit. Judge Brazil and Professor Cooper undertook to draft suggestions reflecting their concerns.

Judge Pointer noted the possibility of limits on requests for admissions or documents, and asked whether a local rule should be authorized. Judge Brazil noted a case in which 750 requests had been made. The view was expressed that limitations on the number of requests for documents. It was agreed to authorize local rules limiting requests under Rule 36, but not Rule 34. Discussion was held as to whether republication was required; it was concluded that such a limit could be imposed as a complement to the limit on interrogatories.

Attention turned to Rule 30(d)(1) providing deterrence for conduct frustrating depositions. Judge Keeton questioned whether the provision should not be put out for comment. Judge Pointer noted that the language had simply been moved up from commentary to text. Mr. Powers doubted that the rule could be enforced effectively, but thought that it might improve conduct. Judge Phillips argued against the need for further publication to constrain the conduct. Professor Cooper urged that the new language followed from what had been published.

Judge Winter argued against the limitation on the length of depositions as an inducement to strategic behavior. Judge Keeton argued for the limit as long as it is subject to extension by agreement of the parties. Judge Pointer noted that it works in ND Georgia. The

Reporter noted that the purpose of the rule was to give some bargaining power to the party seeking to constrain overlong depositions. Judge Phillips noted the concern that an evasive expert may succeed in stonewalling for six hours. The Reporter noted that one purpose of the proposal was to protect the deponent. Judge Brazil thought that the limit will not be easily negotiated in cases in which there is a serious imbalance of information. Judge Winter reiterated that it will produce a lot of traffic in the judges' chambers. The Committee voted 5-2 to eliminate the limit on length of depositions. It was agreed that local rules should be authorized.

Judge Pointer urged that the number of interrogatories be increased from 15 to 25. This was agreed to without dissent. Mr. Linder noted the problem of "per side" in limiting the number of depositions. No better solution to that problem was proposed. Ms. Fines asked whether the local rules could provide a different number. Judge Pointer volunteered an affirmative answer.

Judge Pointer asked if any change was needed in Rule 43. Mr. Powers expressed opposition to the revision. Ms. Fines thought the rule conferred too much authority on judges to restructure the attorneys' presentation. No decision was made with respect to alterations in this proposal.

Judge Pointer called attention to the correction of the glitch in Rules 50 and 52. No objection was made to these corrections. He also called attention to additional material coming from the Standing Committee on Rules 83 and 84.

Judge Pointer also noted the issue as to whether Rule 56 is discretionary or mandatory. Mr. Linder argued for mandatory language. Judge Phillips argued for retaining the discretionary language. Mr. Powers and Judge Winter argued that there are times when summary judgment should be denied simply because the cost of appeal on a close question exceeds the benefit of summary judgment

The meeting adjourned at about 4:30.

Paul D. Carrington
Reporter