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ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
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May 11, 1992

MINUTES OF MEETING, APRIL 13-15, 1992

The Committee assembled at 8:30 AM on April 13 at the Federal Judicial Center conference room. Present were Bertelsman, Carrington, Cooper, Fines, Keeton, Linder, Nordenberg, Phillips, Pointer, Powers, Spaniol, Stevens, and Winter. Observing were Barry Bauman (Lawyers for Civil Justice), Kathleen L. Blaner, Diane M. Butler, Joe Cecil (Federal Judicial Center), Alfred W. Cortese, Jr., Jack DiLorenzo (American Trial Lawyers Association), Ted Hurt, Department of Justice, Richard Leonard, Molly Johnson (Federal Judicial Center), Robb Jones (Supreme Court), Peter McCabe (Administrative Office), Ann Pelham (Legal Times), John Robiez (Administrative Office), John Romberg (Public Citizen Litigation Group), Randall A. Sanborn (National Law Journal), Scott Schell (Senate Judiciary Committee), Professor Charles W. Sorenson, Fred Souk, Esq., Beth Wiggins (Federal Judicial Center), Tom Willging (Federal Judicial Center), Mr. Witt, and Joseph Womack (American College of Trial Lawyers).

Judge Pointer called attention to the work of Bryan Garner as consultant to the style subcommittee of the Standing Committee, and to newly received communications from the British Embassy and the Department of Justice.

Discussion commenced with Rule 1. It was noted that the Garner memo suggested some changes. Judge Brazil noted that the memo came only from Garner and not from the committee. Judge Stevens noted that the memo went beyond the changes proposed by the Committee in the present package. The use of the word "must" was debated by Judges Pointer and Keeton. The Reporter suggested the need for republication of the Garner suggestions. Judge Brazil suggested a need to do all the rules simultaneously. Judge Keeton advocated the need for stylistic reform and urged that such reform could be effected as technical amendments not requiring publication. It was agreed to defer further consideration of style proposals. Rule 1 was approved unanimously.

Rule 4.1 was discussed. Professor Cooper suggested that the word "other" be relocated from line 10 to describe commitment. After discussion, it was agreed to revise the sentence beginning on line 9 to read: "Other orders in civil contempt proceedings shall be served..." With that revision, the rule was unanimously approved.

Changes in Rule 5 were suggested by the Judicial Conference to accommodate filings by electronic means other than facsimile. The proposal was unanimously approved.

Attention turned to Rule 11. Judge Pointer called attention to a drafting change in line 71 regarding monetary sanctions. Judge Brazil asked whether the sanction against a represented party was consistent with Rules Enabling Act and was reassured by reference to Willy v. Coastal.

Judge Phillips noted a problem in line 6. it was agreed that the reference should be to the signer's address. Judge Keeton suggested moving lines 17-19 up to the beginning of the sentence at the beginning of line 6. Judge Brazil urged that the commentary should say, if it is so intended, that a pleading should not be stricken for failure to disclose address and phone number unless the information was withheld upon specific request. No action was taken on Judge Keeton's suggestion.

Judge Stevens called attention to the problem raised on line 36 with respect to denials. It was agreed that a party should be permitted to put an adversary to the proof, as long as the denier does not know the allegation to be true. Discussion considered the relation to Rule 8 and to burdens of production of evidence. Judge Pointer argued for keeping denials in line 36 and making provision for pleadings on information and belief. Judge Winter argued for a separate provision dealing with denials. Professor Cooper argued against excess complexity in relating Rule 11 to burdens. It was agreed to strike denials from line 36 and to add a paragraph (4) dealing with denials. A denial should be "warranted on the evidence or if specifically so identified is reasonably based on lack of information or belief." This was approved by a vote of 7-2, Cooper and Nordenberg dissented.

Attention turned to lines 80-82. Judge Brazil suggested that a clause needed to be added at line 1: "Except as provided in (d)." Judge Pointer noted that this would also have to be done in (b). Judge Keeton suggested moving (d) to (a). Mr. Leonard suggested changing the caption of (d) to "Inapplicability to Discovery." This suggestion was adopted, but no other change was made.

With respect to lines 25-28, Professor Cooper suggested deletion of "until it is withdrawn or appropriately corrected." The Reporter suggested the possible wisdom of relieving signers of the continuing duty to correct in the absence of some event calling attention to the flaw in the paper. It was noted that the safe harbor made the breach of the continuing duty sanctionable only sua sponte. Dean Nordenberg argued for the continuing duty. This discussion led to reconsideration of the inapplicability of the safe harbor to sua sponte proceedings. Judge Brazil questioned the different standard for sua sponte; Judge Bertelsman defended it. Judge Phillips argued for a return to the snapshot approach, abandoning the continuing duty. Judge Brazil picked up the Reporter's suggestion that a sentence be added imposing an undertaking to withdraw allegations on request if and when they appear to be unfounded. Judge Keeton suggested language imposing a duty to withdraw upon a written request.

> *Discussion of following bracketed matters is not recorded on the tape, the second side of tape 2 being silent. Actions are reconstructed from contemporaneous notes and confirmed by Judge Pointer's review of changes to be made, as that is recorded on tape 3.*

[It was decided to strike affirmatively from line 25 and the until clause beginning on line 27. The sentence indicating that a claim is pursued if not withdrawn upon appropriate request is to go into the commentary.

[Removed actions were next considered. It was decided that lines 40-43 were not needed, but that the matter should be similarly addressed in the commentary.

[Chief Justice Holmes again expressed opposition to the use of the term "shall" in line 45. Judge Stevens joined in this opposition and the reasons for the term were reviewed. The Committee adhered by a vote of 7-2 to the draft as proposed, but the dissents were to be noted.

[The Reporter suggested that "if requested" in line 77 caused some concern. It was unanimously agreed that the term could be deleted. It was also agreed to insert the words "shall be served, but" after "It" in line 51.

[At the suggestion of Mr. Linder, it was agreed to modify the commentary on page 35 providing for a reference to the Attorney General in the event of misconduct of a Department of Justice lawyer. It was also agreed that some change in the commentary was needed to address the problem of lawyers who are merely following orders, although the Committee, at the suggestion of Professor Cooper, with support from Judge Phillips and Judge Keeton, was resistant to different standards for government lawyers in this respect.]

Mr. Leonard questioned the date for voluntary dismissal or settlement sufficient to limit sua sponte proceedings as provided in lines 73-76. The Reporter suggested a need to explain in the Notes the absence of a safe harbor for sua sponte sanctions. It was agreed to address this matter more carefully in the Notes. With the changes agreed to, it was further agreed that Rule should be approved for transmission to the Standing Committee.

Attention turned to Rule 12. Judge Pointer observed the need to make a separate paragraph of the sentence beginning on line 18. Mr. Leonard pointed to the uncertainty of the availability of the 90 day period for answer if a person who has waived is thereafter served. The problem giving rise to concern is that the defendant would then be in possession of two instruments setting different deadlines for answer. It was agreed that the committee notes should address the issue. Judge Stevens questioned the word "this" in line 8. It was agreed that line 8 should read "and within 90 days if..." With these changes, the rule was unanimously approved.

The correction of the reference in Rule 15 was unanimously approved.

Rule 16 was next considered. Judge Pointer suggested a revision of the timing provision appearing in lines 16-18. He also called attention to the language added in lines 64-67 conforming the rule to the present statute authorizing the judge to compel a party to be available by phone. It was noted that as revised in light of February discussion, the court was not to be authorized to compel ADR participation.

Judge Bertelsman noted that many districts are requiring participation in ADR; by weakening the published draft, the Committee is weakening the judge. Many judges would want to be heard on this change, he urged. Judge Pointer emphasized that the rule does not foreclose the exercise any existing power such as that exercised in the *Heileman* case. Judge Winter thought the bracketed language might limit the power of the judge. It was suggested that the bracketed language should be dropped entirely, leaving the matter to case law. Judge Keeton noted the need to salvage the power of the trial judge under district court rules and plans.

Side B of tape III also failed to record the discussion. The bracketed material below reflects contemporaneous notes.

[A motion to authorize the court to determine whether a person should be present by person or by phone was defeated by a vote of 6-3. It was agreed, by a vote of 7 to 2 to retain lines 63-65, but to delete the clause appearing on lines 66-67. It was also agreed to revise the Notes to assure to the party the power to determine who is the appropriate representative.]

Judge Bertelsman argued for approval of mandatory ADR to the extent that it presently exists in conformity with legislation. The Reporter cautioned that there is a question whether the rules can provide sanctions for failing to participate in ADR. Judge Brazil moved that the Notes be explicit that the rule does not limit existing powers to compel ADR. Judge Stevens argued against mandatory ADR, urging that it is unconstitutional. Judge Winter argued for mandatory discussion of voluntary ADR. He proposed to modify paragraph (9) to accommodate "special procedures provided by statute or local rule"." Professor Cooper suggested that the words "the possibility of" were stricken. He also suggested that line 22 be revised to say "the court may take appropriate action with respect to." With one dissenting vote, Judge Winter's motion was approved.

The Reporter called attention to the concern about summary judgment at pretrial as a hazard of surprise. The role of paragraph (1) was considered as an authorization for summary judgment. Judge Brazil moved to strike the language of paragraph (5) appearing after the reference to Rule 56. It was agreed that the Notes should call attention to possible waiver of procedural provisions of Rule 56.

It was noted that some persons objected to the text of (15). Judge Pointer argued that the power was conferred by Evidence Rule 403, and urged that it was better to make such rulings at pretrial to the extent possible. Ms. Fines questioned the feasibility of deciding the matter at pretrial. On Judge Winter's motion, it was agreed to strike the language appearing on lines 57-58 after the word "evidence."

Returning to the timing of the scheduling conference, Judge Pointer urged that it should occur within 90 days after appearance or, if earlier, within 120 days after service of the complaint. After discussion, this was unanimously approved.

[Again, Side B of Tape IV failed to record.]

Attention turned to Rule 4. Mr. Linder presented the position of the Department of Justice. Justice and State oppose the use of invited waiver outside the United States as friction-causing because it creates a duty to accept service. He presented the Justice view that a judgment based on jurisdiction obtained by waiver might be less honored abroad and that service under the Convention is inexpensive. The Reporter responded that service of process abroad is not cheap and can be expensive when there is needless translation into a foreign language. He argued that it was not inconsistent with the treaty to impose on foreign litigants, as we impose on domestic litigants, a duty to avoid needless cost, a principle applicable not only to Rule 4, but also 11, 26, and other provisions as well. The proposal does assure that a party insisting on formal service who has any reason at all to so insist. The Reporter suggested that the issue was one best left to others, notably Congress; if it believes that there is a problem, then indeed there is, but it seems unlikely that Congress intended to give a benefit to foreign defendants that it would not give to domestic defendants. The 8th circuit decision on the necessity of translation under the Convention was discussed. Judge Pointer suggested that the

British Embassy objection could be resolved by eliminating the cost-shifting provision He expressed concern that the Executive branch of the federal government had switched side. Judge Phillips questioned whether the Committee ought to be heavily influenced by such political considerations and favored maintaining the integrity of the process. It was noted that no objection had been heard from the Executive until the British Embassy complained. The Court's opinion in Schlunk was considered; the Reporter urged that the opinion had no bearing on waiver. It was speculated that the cost would be taxable in any event. Mr. Leonard noted that the translation cost in a case he had managed had run into thousands of dollars. The Reporter suggested that the Notes acknowledge that there is little need for the device in suits against litigants in some countries, e.g., the United Kingdom. Judge Brazil concluded that the Justice-State-British Embassy position is basically unfair, and undeserving of Committee support. He moved to send the rule forward in its present form, but with an alternate draft that allowed Congress to delete the waiver service in international litigation, and with additions to the notes. His motion passed, with the dissent of Mr. Linder.

Mr. Linder also objected to the provision for service in violation of foreign law, and argued for the Justice Department provision that the old (e) was as much as should be said on discretionary means of service abroad. The Reporter noted that the provision had been circulating for 8 years and was intended to limit the practice of courts in violating foreign law, but there was no purpose to authorize violation of a treaty. Foreign law should be violated only if there is no practicable way to avoid it; other nations cannot be permitted to immunize their citizens from American litigation. Mr. Linder thought the provision too explicit in authorizing foreign law. Judge Pointer thought the provisions needed to identify the conditions under which foreign law can be violated to effect service. Judge Brazil noted that candor is inappropriate in foreign relations. Mr. Powers suggested deleting the clause beginning with "including" on line 150. This was agreed to, with revision of the introductory clause to read "by other means not prohibited by international agreement as..." The vote on this motion was unanimous.

At the request of the State Department, lines 148-49 were deleted without dissent.

Judge Pointer noted the need to add "or (j)(1) to line 298.

Attention was given to Professor Cooper's point with respect to lines 303-07. It was agreed that "in the district where the action is brought" should be inserted after "obtained" in line 304. It was also agreed to delete "the person of" in line 303. In line 305, the text was rephrased to refer to "any of the defendant's assets." Judge Keeton questioned the need for "with reasonable efforts;" this led to a discussion of possible issue preclusion, but the phrase was retained.

Judge Brazil raised the question of time for service and the possible collision of some of the CJRA plans and lines 289-298. Can local plans or rules require earlier service? Judge Pointer suggested the possibility of adding "such other period provided by local rule" in line 291. The Reporter resisted the shortening of time as a trap for unwary lawyers moving among districts. He questioned whether there is any real public interest in getting a case off the docket that is not causing anyone to engage in effort. Judge Stevens noted that it was injurious to the judge because the computer would report the number of cases retained on the judge's docket. The Reporter questioned whether this was not undue attention to bureaucratic requirements imposed on judges that give little service to the public. Judge Brazil noted that Congress wanted case management to be front-loaded, and that it is the wrong message to treat the case as not having started until there is service. Judge Pointer noted that anyone using the invited

waiver has lost 30 days up front. Judge Bertelsman questioned whether a CJRA plan can override the Federal Rule; the Reporter and Judge Brazil opined that they cannot. It was noted that premature dismissal has statute of limitations. The Reporter noted that this was intended to make "kinder and gentler" rules, as enjoined by Judge Winter. Judge Brazil agreed that cases should not be dismissed for failure to comply with an early service requirement imposed by local rule or plan. No action was taken, but the problem should be addressed in the commentary.

Line 104 was revised to read "a defendant who before being served with process returns the waiver..."

Judge Keeton suggested moving lines 296-97 up to line 292: "The court if..... shall extend." This syntax change was agreed to.

Judge Brazil questioned line 244: "in a specific application." It was noted that the purpose was to reach not general constitutional standards, but particular applications.

Professor Cooper raised the question of supplemental jurisdiction to federal claims brought under this rule. It was noted by the Reporter that elaborate provision was made for pendent jurisdiction both in the text and notes in the 1988 draft that was set aside in light of the changed in the federal venue statute. Judge Pointer argued against supplemental jurisdiction where there is no state with jurisdiction over the defendants. The facts of Omni International were discussed. Mr. Powers thought that supplemental jurisdiction would be a can of worms. Judge Winter noted the relation to claim preclusion and compulsory counterclaims, and argued that there should be supplemental jurisdiction. Professor Cooper noted the relation to foreign law claims that may be given a hostile reception by American courts, but thought that 13(a)(2) protected the putative counterclaimants. He also noted, however, that if the rule is silent, there will be some pressure felt to characterize counterclaims as compulsory. Judge Winter suggested possible revision of Rule 13; Judge Pointer noted that this was not possible at this time, there having been no publication. Judge Brazil argued that the revision of 13(a)(3) could be effected because of its close relation to what has been published. Judge Phillips argued that there could be no claim preclusion of a claim for which there was no jurisdiction. The Reporter suggested deleting the language in the Note. Judge Brazil so moved. Judge Winter opposed the motion, urging that the issue be resolved one way or the other. He also argued that the usual rules of supplemental jurisdiction should apply. Professor Cooper moved revision to add his language in line 246: "and any other claims arising out of the same transaction or occurrence." The motion passed with some dissent.

Judge Keeton suggested a revision of lines 243-47: if jurisdiction is permitted by the Constitution and laws of the United States..., service is also effective to establish jurisdiction. It was noted that this failed to deal with the Omni problem; it was suggested: "if not prohibited.: Judge Keeton expressed concern about making rules to extend jurisdiction, but was reassured by reference to the Court's opinion in Omni.

It was unanimously agreed to send Rule 4 forward with the foregoing changes.

The agenda moved to Rule 26. Judge Winter argued against awaiting experimentation, and urged that some proposal should be made. He suggested that the rule should reconcile notice pleading with disclosure, that the rule should reward good pleading by providing for disclosure of matters that every lawyer has to ask his or her client to produce for the adversary. He also noted the need for the notes to assure that disclosure does not waive objections to

relevance. Mr. Powers wanted a resolution of the general question whether a lawyer should be required to disclose adverse information. Dean Nordenberg favored disclosure, but wished to preserve local option during the period of experimentation. Judge Stevens spoke in opposition to delay in putting forward the best rule the Committee can devise. Judge Bertelsman reported on his own experiment with the California Central District rule and the Committee's previous draft; there appeared to be no serious problem with either approach and the bar drew no distinction between the two in regard to what was disclosed.

Professor Cooper, in the interest of simplicity, suggested severing disclosure from the proceedings, and suggested a demand for disclosure. He acknowledged that this would resemble discovery, but would avoid overdisclosure. Judge Phillips noted that the evils of code pleading were not brought into play by the Winter proposal as long as we do not return to disputation over the sufficiency of the pleading to withstand demurrer.

Judge Pointer called for a fresh division on the question of whether any required disclosure should extend to those materials that might be adverse to the party's position. Mr. Powers moved for the broader form of disclosure. Ms. Fines spoke in opposition to the motion, urging that disclosure be introduced by a narrower obligation in order to minimize opposition by the practicing bar, who will otherwise feel some conflict of interest, and who may be called to risk the trust of clients. Mr. Powers spoke in favor of a professional duty to the process. Judge Stevens and Judge Winter spoke in favor of the motion. Judge Winter emphasized that the rule did not require disclosure of the smoking gun document. Judge Bertelsman noted that experience had changed his mind. Dean Nordenberg and Judge Brazil emphasized that there was no risk to attorney-client privilege. The motion carried by a vote of 8 to 1 (thus reversing an equal division of 5 to 5 on the issue when presented in February).

Discussion then turned to the separable question whether such a standard should be sent forth as a proposed national rule. Judge Pointer argued for local variation. The Reporter argued for a national rule, with an opportunity for local variation. Dean Nordenberg noted that considerable local experimentation was underway. Judge Phillips urged that the Committee had a duty to provide leadership in light of its study and hearings. Mr. Linder joined in this view. Judge Winter also opposed a 5-year delay in beginning to draft a national rule on this subject, pointing to the reality that 1999 would be the earliest effective date for a national rule. Judge Brazil emphasized that none of the data available in 1994 would be more than descriptive and would afford no basis for empirical evaluation. He also argued that the cultural change that the committee sought to effect required a statement in the form of a national rule. Dean Nordenberg acknowledged that some of the change has already occurred. Judge Brazil thought it not unlikely that much of the experimentation would be more apparent than real, that much discretion would be vested under the local plans to diminish the obligations to disclose. Mr. Linder noted that since February, many local plans had begun to back away from disclosure requirements. Judge Phillips moved that the Committee go forward with a national plan. Ms Fines expressed her preference for a national plan, but not one that put attorneys in a conflicted position. Judge Brazil urged that the national plan be subject to local variation. Judge Phillips accepted this qualification. His motion was approved by a vote of 8 to 1.

Discussion returned to the question raised by Professor Cooper as to whether the pleadings should be the triggering event. Judge Winter spoke for the use of the pleadings. Judge Pointer questioned the use of "non-conclusory" in the Winters draft. Judge Bertelsman favored the Pointer draft as simple. Judge Phillips spoke in favor of using the pleadings as the triggering event, but would be willing to consider a Cooper draft if prepared. Judge Pointer questioned whether a separate demand would anything more than another paper. Professor

Cooper acknowledged his own doubts about that, but favored no disclosure where no party wanted it. Judge Pointer noted that this could be accommodated under the published draft. It was agreed that the pleading would be the triggering event.

The Reporter suggested the use of the 9(b) standard as a term to be employed in Rule 26. There would be no duty to plead with particularity, but facts so pleaded would require disclosure. Judge Winter accepted this suggestion. Judge Pointer expressed some concern that we might push pleaders to excessive length. Judge Brazil favored rewarding disciplined pleading. Judge Keeton shared Judge Pointer's concern: one should not have to admit or deny 88 pages of surplus allegation. Judge Pointer thought that the meet-and-confer requirement might address the concern for excess pleading. Judge Bertelsman and Judge Brazil urged that lawyers meeting could bring common sense to bear on the 88-page complaint. Ms. Fines and Judge Brazil argued for a conference to precede disclosure. Judge Phillips gave assurance against the risk of encouraging unduly particularized pleading. Judge Keeton suggested that disclosures should be made at times agreed upon or at times designated by the court.

The question was raised by Judge Brazil whether the parties should be expected to agree on a statement of the issues. Judge Pointer thought that this was asking too much. Judge Keeton agreed that lawyers cannot agree on the issues. Professor Cooper thought perhaps they could be asked to agree on subjects of disclosure. Judge Bertelsman thought there could be a non-binding statement of issues. The Reporter suggested that the parties might create as much of a discovery agenda on which they could agree, and report their differences to the court. Judge Keeton urged "subjects of discovery" as the first item on the form supplied for a conference report. Judge Brazil thought it advantageous to get away from the word "issues." The Reporter thought that the object should be to get a party-agreed scheduling order in most cases. Judge Brazil thought that the report should contemplate coordination of disclosure with settlement efforts and suggested the possibility of a change in line 208 to effect that.

It was unanimously agreed that there should be an early meeting requirement. It was suggested that disclosure should be made at or following the meeting.

Judge Keeton asked if local variations were required to be adopted pursuant to the CJRA, and whether the variations could require more rather than less disclosure. Judge Pointer argued for local rules whether or not enacted in conformity to CJRA. Judge Brazil thought that local rules were subject to more control than are CJRA plans.

It was agreed to use lines 193 to 232 of the Pointer draft as the basis for revision. There was no dissent.

Judge Brazil moved that identification of subjects of discovery be made a part of the report of the meeting. It was agreed that the report should "tentatively identify subjects as to which disclosure and discovery seem appropriate." Judge Bertelsman commended the language of the Central District rule; Judge Pointer urged that some of its provisions were redundant to (a)(1). He questioned the need for the additional language proposed by Judge Brazil. Ms. Fine thought that some notion of the subjects of discovery was needed to decide what documents are pertinent. The Committee approved Judge Brazil's motion by a vote of 7 to 2. It was noted that this has implication for the text of lines 202-205.

Mr. Leonard wondered about the timing of these events. The Reporter noted that there is an unresolved set of issues bearing on sequence. Judge Pointer suggested a need to get the report before the date for the scheduling conference or order. Judge Brazil urged that the judge

needs the report 5 days before the order. Judge Cooper urged that this problem needs to be integrated with Rule 16(b). Judge Brazil thought that "whichever occurs first" needs to be lifted from commentary to text in line 199. He also reviewed the options for the triggering events from which the schedule could proceed.

Mr. Linder raised the proposal of the Justice Department to limit discovery, but allow more discovery for parties bearing the costs and fees. This was advocated as a source of discipline against excess discovery. Ms. Fines questioned the fairness of this rule when one party has all the information. Dean Nordenberg thought it better to engage the court in enlarging discovery. Judge Brazil noted that the idea had not been published and could not be considered at this time.

It was agreed to change 10 to 15 in line 198. It was also agreed, on Judge Brazil's motion, to modify lines 207-08 to coordinate disclosure with settlement. His motion carried with two negative votes. At the Reporter's suggestion, it was agreed to put in the notes a statement that the meeting report should identify points of disagreement. The Reporter also noted the suggestion of some critics that there should be a right to transcribe meetings. Judge Brazil opposed creating a right to transcribe. It was agreed to remain silent on the issue.

Professor Cooper questioned the location of lines 27-31. It was agreed that the automatic requirement of a report should apply only to the retained expert, and not to the regular employee, except those regularly giving testimony. Judge Pointer explained the purpose to be to distinguish those witnesses likely to be testifying to facts as well as opinion. Judge Keeton gave the example of the truck driver estimating speed. Design engineers who testify regularly would be required to give a report, but not those who do so only occasionally. Judge Brazil expressed concern that some parties or lawyers may view this as an entitlement to withhold a report. He urged that the notes should affirm that even employees giving occasional testimony may be required to make a report. The Reporter suggested that doubts be resolved in favor of the report requirement. This suggestion did not find favor.

Judge Pointer called attention to the provision for sequential filing of expert reports. Judge Stevens questioned the meaning of "ready for trial." Judge Brazil suggested adding "or the trial date" in lines 21-22. This suggestion was accepted. Dean Nordenberg questioned the references to the Evidence Rules; it was agreed that the reference to 704 in line 9 should be 705, but it was decided to retain the reference to all three rules.

Attention turned to the British Embassy's concerns. Mr. Linder spoke for the opposing view of the Department of Justice. The Department urged that the Aerospatiale case is being overruled by a first use requirement; in contrast, the British Embassy favors precisely that result, that the treaty should be used when available. The Department favors the deletion of lines 61-65. The State Department takes a third position that the distinction between foreign and domestic discovery may create difficulty. The Swiss Embassy has also protested the articulation of the principle of Societe Internationale v. Rogers, requiring under special circumstances production of materials in violation of Swiss secrecy law. The proposal before the Committee goes a bit beyond the Supreme Court opinion in providing standards for the use of the Convention. The original purpose of the revision was to call attention to the Hague Convention. The Reporter noted that there had been consideration by the Committee with a first-resort requirement, resulting in strong opposition from different government offices. The result is a bland statement of Aerospatiale, and is reactive to all the diverse views presently being pressed upon the Committee. The Reporter noted that Congress could not possibly have intended the result favored by the British Embassy because it would create a large and unjust

advantage for foreign litigants. The notes to the 1990 draft had been out of sync with the text; this flaw has been corrected with the present draft. There being no support for Mr. Linder's position, this provision was left in the form set forth in the agenda material. Judge Keeton suggested that the Committee record the view that if the Court or Congress disapprove this provision, the balance of the revision of the rule could go forward. Judge Pointer noted that this would require a change in the introductory clause of Rule 28.

Judge Pointer asked if the Committee favored Form 35 as proposed. The form has not been published. Judge Keeton suggested that the form should be put out even if it is not an official form until it is made official by operation of Rule 84. Judge Pointer noted that Rule 84 was about to be amended to facilitate that process. Or the Standing Committee could waive the requirement of publication. Judge Phillips argued that a form adhering to published text should not need to be published. The matter of how best to solve this problem was left to the Standing Committee with the recommendation that this form be promulgated. It was decided to send the form forward for promulgation without further publication.

The proposed revision of Rule 28 was approved.

The proposed revision of Rule 29 was approved.

Attention turned to Rule 30. The mechanics of protective orders sought during deposition was considered. The concern about non-stenographic transcripts was reviewed. Judge Winter expressed the view that the change in rule will do little to reduce the demand for court reporters, and that even if the Standing Committee were prone to serve the court reporters, there should nevertheless be a right to videotape a deposition.

It was agreed that "other" in line 59 should be "another." It was agreed that the sentence on lines 58-59 should be part of the preceding paragraph. "By" in line 80 was stricken. "Transmit" in line 168 was changed to "send." The Reporter asked whether the limit on the number of depositions is needed in light of changes in Rule 26(f). Ms. Fines thought the limit useful as a default provision. Mr. Leonard again reported successful experience with the limit. The Committee adhered to its recommendation. Judge Phillips expressed willingness to reconsider the abandonment of the six-hour rule. Judge Winter renewed the argument that the limit may encourage filibustering. Judge Pointer thought that experimentation with the limit will proceed and that local option would suffice. With the minor textual changes notes, the rule was unanimously approved.

The proposed revision of Rule 31 was approved unanimously.

Rule 32 was reviewed and attention was directed to the use of expert depositions at trial. Judge Pointer spoke in favor of the proposed revision. Mr. Powers expressed concern that the rule would require cross-examination of deponents. It was noted that this may be required by the present practice. Judge Pointer also noted that most treating physicians are presently allowed to testify by deposition. Ms. Fines confirmed this. The Reporter expressed the purpose of discouraging depositions of experts who have prepared reports. It was observed that 26(a)(2) has been changed so that treating physicians don't prepare reports. Judge Keeton noted that attorneys are concerned about losing their ammunition at deposition; he suggested that the rule be limited to depositions taken at the initiative of the party using the deposition. Professor Cooper suggested modifications in (b)(4) clearly to cover all experts whether report is required or not. The Reporter supported the Keeton proposal, but wondered whether the party taking the deposition should not then later be permitted to bring the witness to trial, the other

party having already spent his ammunition at the deposition. All sides agreed to the aim of reducing game-playing in discovery. Judge Keeton noted that the examination at trial is usually done by lead counsel; by moving the hard questioning into the deposition, the depositions become more expensive. Judge Brazil expressed concern that chilling the discovery deposition might affect settlement rates. He moved to delete line 12. The motion carried without objection.

Complaints regarding lines 28-34 were considered, but no action was taken in response to them. Rule 32 as revised was approved for transmission to the Standing Committee.

The Committee returned to Rule 26 to consider the draft prepared overnight. Judge Brazil suggested that the timing should proceed from the date of the scheduling order. It was noted that the parties would not know that date. Judge Keeton suggested that there should be an alternative - 30 days before the scheduling conference, if held, or an appropriate time after appearance of a defendant. Judge Brazil suggested that line 207 should refer to "additional disclosure" as well as discovery. Judge Pointer resisted this suggestion. Judge Brazil took comfort from the notes. Final action on the draft was momentarily withheld.

The proposed revision of Rule 33 was unanimously approved in the form presented in the agenda draft.

The proposed revision of Rule 34 was unanimously approved.

The proposed revision of Rule 36 was unanimously approved.

The Committee reviewed concerns about the Rule 37 draft. Judge Pointer in drafting had removed the spoliation sanction from the rule, but had suggested in the notes its use on motion by a party seeking the spoliation instruction. Judge Winter thought the spoliation provision should be in the text, not the rule, but agreed that it should be on motion. Otherwise, the duty to disclose adverse information is sanctionless insofar as the text appears. Judge Winter moved his suggestion and it was approved without dissent.

Judge Brazil questioned the reference to Rule 56 in line 66. Mr. Linder supported the concern. It was suggested that the provision should apply to any evidentiary hearing. Judge Keeton questioned the need for "evidentiary." Professor Cooper suggested, with help from Judge Keeton that line 66 read: "permitted to present as evidence at trial, or at a hearing, or on any motion any information not so disclosed." Judge Keeton suggested "proffer," but it was decided to substitute "use" for "present." This change was agreed to.

It was noted that 37(g) would be restored. The Reporter suggested the possible need for a sanction to impose on those who refuse to participate in a discovery plan. Judge Pointer thought it unwise to create a new sanction that has not been published. Mr. Linder argued for creating a presumption that expenses will be paid, deleting "substantially justified" in lines 46, 54, and 98. Judge Pointer made the same objection to this suggestion.

Judge Keeton suggested that a reference to FRE be included in the Notes, to emphasize that the spoliation instruction is not new. Rules 402 and 403 were identified as the appropriate citations.

Judge Phillips questioned the use of witnesses not identified in a disclosure. It was agreed to add "or witness" to line 66, the provision previously revised. The agreed change was

"permitted to use as evidence at trial, at a hearing, or on a motion, and witness or information not so disclosed.

Rule 37 was unanimously approved as modified.

Objections to the revision of Rule 43 were reviewed. Ms. Fines argued that the attorney should control the form of a presentation, whether written or oral. Judge Pointer thought the revision unnecessary. Judge Keeton noted that he has not required written submissions. Ms. Fines urged that the revision be abandoned. Judge Brazil so moved. The Reporter questioned whether the Committee did not want to strike "orally" to protect the adopted statement presentation. Judge Pointer thought that the evidence was oral as long as the witness is in the courtroom when the statement is submitted. He noted that the rule would soon need revision to allow video live transmissions. It was unanimously agreed to take no action on Rule 43 at this time.

Revisions of Rules 50 and 52 were unanimously approved as technical corrections.

Objections to the draft Rule 54 were considered. Judge Pointer said that he had been persuaded that the language providing for fee schedules created more problems than it solved. The Reporter suggested that reference to fee schedules, citing the Supreme Court, should be in the notes. With this condition, (i) on lines 30-32 was deleted. Judge Brazil questioned "expressed" in line 28. Judge Keeton urged that the language of Rules 52 and 58 be employed. He suggested that the sentence was rewritten: "The court shall set forth its findings and conclusions as provided in Rule 52(a) and shall set forth its judgment on a separate document as provided in Rule 58." Professor Cooper suggested the passive voice: "and judgment shall be entered in a separate document." Mr. Powers and Judge Brazil suggested "separate" should also appear in front of "judgment;" but Professor Cooper noted that the judgment on fees may sometimes precede the judgment on the merits. Judge Keeton feared that "set forth findings and conclusions" implied the necessity of a writing. The Reporter suggested going all the way with the language of Rule 52, to wit: "The court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58." Judge Pointer supported this suggestion. Mr. Powers was concerned that this left it unclear that two judgments are ordinarily required. It was at last agreed that the provision should read: "The court shall find the facts and state its conclusions of law thereon and judgment shall be set forth in a separate document as provided by Rule 58."

Mr. Leonard asked whether the 14-day requirement makes it impossible to use Rule 11 on post-trial motions. Judge Brazil suggested that the problem could be handled in the commentary. Judge Keeton thought the problem could be solved by adding "or rule" in line 16, which does allow reentry of judgment. Judge Pointer preferred clarification in the notes. It was suggested that "order of" replace "directed by" in line 16. This was agreed to. Mr. Leonard suggested the insertion of "for prejudgment conduct" in line 12. Judge Phillips and Judge Keeton questioned the operation of this provision; Judge Phillips emphasized that parties suppose that prejudgment sanctions are interlocutory and not appealable until a final judgment has been entered. Professor Cooper questioned whether the insertion should not be made in Rule 11. This was resisted by Judge Pointer as making the term applicable to fees shifted to a party because the party prevailed. It was suggested that the best solution was to leave fees-for-sanctions out of the rule.

Rule 26 was at last subject to final vote. The Committee unanimously recommended the draft developed over the previous day and a half.

Judge Brazil questioned the timing provisions, but was persuaded that the present proposals are sound. He also questioned "of" in line 10, suggesting that an article should be used. Mr. Powers questioned the need for "material." On his motion, it was agreed to strike "material" from the text and to address in the notes any concern about its absence. There was one dissent.

Mr. Linder questioned "may" in line 6 and in line 7. He feared that the signal is being sent that the court has no duty to respond to summary judgment motions. It was noted that "may" served usefully in connection with multiple motions for summary adjudication of particular issues. The argument against a mandatory rule is stated in the draft Notes. Acknowledging that there should be room for exceptions, Mr. Linder argued that the norm should be that the motion ought to be granted when a party is entitled. Professor Cooper argued against shall as a word unmeant, but thought the notes could be improved. Mr. Linder's motion failed by a vote of 3 to 6. The notes will be revised to reinforce the obligation of judges to make appropriate use of the rule. Mr. Linder proposed language to be used for this purpose" "The rule contemplates that the motion should be granted if the standards are met" to be inserted at the beginning of the Notes.

Professor Cooper called attention to a dozen court of appeals cases holding that self-serving affidavits cannot suffice to defeat summary judgment. It was decided that the text of the rule ought not address the issue beyond what is said in (g)(4).

The Reporter called attention to the word "admissible" in line 19 as one that had caused concern. He suggested that line 19 should read "basis of the evidence shown to be available for use at a trial." Judge Winter suggested inserting after evidence: "subject to consideration under subdivision (e)." It was decided that the latter suggestion was unhelpful, but the line was amended as suggested by the Reporter.

The Reporter called attention to complaints about the length of the rule. He suggested possible deletions, but none found favor with the Committee. He also suggested some inclusions for the Notes, which were generally acceptable. The word "express" as used on page 120 was dropped.

Professor Cooper questioned lines 119-120 and sought to remove the double negative. Judges Winter, Pointer, and Keeton, made attempts to draft around the negative. It was at last agreed that the line read: "reasonable period why summary adjudication based on specified facts should not be entered."

Judge Winter urged that the notes to (c) should state that a motion may be denied solely because the moving party has failed to specify the materials on which the motion is based. Judge Pointer accepted the suggestion, but preferred to make the insertion in the notes to (d). The Reporter asked whether the phrase "Without argument" could be more fully explained and justified' it was concluded that enough was said on the subject.

As so revised, the draft was recommended without dissent.

There is no recording of the discussion immediately following the lunch break on Wednesday. The bracketed material is based on contemporaneous notes.

[The word "has" was added to line 12 on page 125. With this change, Rule 58 was approved without dissent.

Attention returned to Rule 54. Judge Pointer proposed the deletion of the "including" clause in line 12 and add a subparagraph (E) stating that the rule will also apply to the matters referred to in the including clause insofar as feasible. Judge Brazil suggested deletion of the cause without replacement. Professor Cooper inquired about the applicability of the provision to fees shifted in the exercise of inherent power. Judge Brazil proposed to limit the provision to fees shifted pursuant to any statute other than §1927. Judge Pointer proposed that (E) recite that the rule is not applicable to the provisions identified in the "including" clause, leaving the rule applicable to all other fee shifts. Judge Brazil so moved. This was agreed to without dissent.

With the foregoing changes, Rule 54 was unanimously approved for transmission.

The comments on Rule 56 were considered. Judge Phillips spoke in favor of the revision. Judge Pointer thought some of the adverse comments reflected "lurking suspicion" that any change in the rule would result in mischief.

Attention was directed to the provision authorizing the court to control the timing of motions. The Reporter explained that the provision was added to meet concerns expressed about the 1988 draft. Judge Pointer proposed to delete "preclude, or" in line 114. This was agreed to without dissent.

Mr. Linder argued that the revision was viewed as too radical, but did not reach the right problem, which is that motions are frequently not ruled on. Judge Phillips responded that the views that the change is either too radical or too inconsequential are uninformed views. The process will work better with the discipline imposed by the revision. Judge Pointer emphasized that there are many local rules addressing the gaps in the rule to which the proposed national rule is addressed. He noted that many Rule 56 motions are made on a single page, leaving the court to figure out from briefs what the non-issues might be. Judge Phillips noted that some lawyers and judges reporting that the present rule is working beautifully are just wrong, in their very districts many judgments are entered only to be reversed on appeal. The Reporter urged that the Committee Notes should emphasize that a purpose is to supersede many local rules. Mr. Powers noted that the Arizona District Court has a complex rule that would be usefully superseded. Judge Pointer also emphasized that the present rule is unreadable except by one informed by substantial case law. Judge Winter suggested that the present revision did not go far enough in stressing that motions should be denied when the moving party has not adequately specified the basis of the motion.

Judge Brazil asked whether the rule should not require that copies of all materials relied upon should be attached to the motion. It was noted that the draft requires copies of unfiled material. Judge Pointer argued against replication of the file. Mr. Leonard noted that his district did not allow copies of parts to be refiled because there will often be two sets of pages presented by the adversaries. Brazil moved to substitute "attach a copy" in lieu of "cite" in (c)(1) and (c)(2), The motion was defeated, five votes to two.

Judge Winter questioned line 97, wondering whether a verified denial ought to serve in some cases where the movant says there is no evidence. Judge Pointer noted that the purpose of the provision did not require such a moving party to produce evidence; hence reliance on pleadings is not necessary. Professor Cooper supported the view that no change was needed to accommodate Judge Winter's concern.

[The revision of Rule 71A was approved, it being agreed that no further publication of this technical revision was needed.

[The word "otherwise" was inserted in line 14, and as so revised, the draft of Rule 83 was unanimously approved.

[Rule 84 was considered. The words "to conform to statutory changes" were deleted from line 6, and "or" was substituted in line 7. As so revised, the draft of Rule 84 was unanimously approved.

[Form 1A was revised to provide for the signature of the plaintiff or the plaintiff's attorney.

[Form 1B was revised to provide for the name of the pro se plaintiff or the plaintiff's attorney as addressee. The fourth paragraph was revised to read " I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after the date your request was sent (or within 90 days after that date if the request was sent outside the United States)."

[The first sentence of the third paragraph of the appendage to be printed on the reverse side of Form 1B was revised in conformity with the suggestion of the Reporter.

[With the foregoing changes, the forms were approved for transmission to the Standing Committee.]

Rule 702 was addressed. The Federal Judicial Center survey of judge's reactions to the proposed revision was noted. The opposition of the Evidence professors to any action by the Civil Rules Committee was noted. Judge Stevens noted that there is substantial opposition in the Judicial Conference to the creation of an Evidence Rules Committee. Other objections were also reviewed. The Notes have been revised to deal more fully with the Frye rule and acknowledging that the Rule does not proposed to deal with all the issues.

Judge Bertelsman noted that some critics seemed to want everything to go to the jury, while others thought the rule did not go far enough to constrain bad science. Judge Winter and Mr. Linder favored "will" to "may" in line 3. Judge Brazil expressed opposition to the addition of the word "substantially," fearing that it may inspire some judges to invade the province of the jury. Judge Keeton suggested the insertion of "will if credited." Judge Winter thought that the insertion of substantial and shift to "may" was inconsistent. Judge Pointer supported the replacement of "may" with "will if credited." The Reporter explained the purpose of the term as narrowing the standard of relevance for opinion testimony. "Materially" and "significantly" were considered as alternatives to "substantially." It was noted that the draft was consistent with Rule 403. Mr. Linder thought the rule was still too permissive for civil cases, but the Department of Justice disfavors the use of any such restraint on the use of opinion testimony in criminal cases. Judge Winter reasserted his view that the greatest abuse of opinion testimony is in criminal cases and is committed by the Department of Justice.

Judge Winter moved to substitute "will if credited" for "may." The motion carried with Judge Brazil dissenting. Mr. Linder moved that the restrictions set forth in the first sentence of the rule be made applicable only to civil cases. Judge Winter opposed the motion. Judge Stevens also felt that the case had not been made for a different rule in criminal cases. Judge Pointer thought the rule should apply in criminal cases as well. Mr. Linder's motion failed by a

vote of 2 to 7.

Judge Brazil suggested that the Notes should encourage judges to consider research procedures. On discussion, he was satisfied that the change was not needed. The Reporter asked if alternate drafts were needed. Judge Keeton thought not.

Judge Winter asked whether the Committee favored its recommendations if it were not applicable to criminal cases. Judge Keeton noted that the Criminal Rules Committee favored the revision if it applied only to civil cases.

As revised, it was agreed to send Rule 702 forward, with Judge Brazil dissenting.

The proposed revision of Rule 705 was approved unanimously.

The question was raised in conformity with the Judicial Conference rules whether the Civil Rules Committee should be continued. It was decided that it should be.

The meeting adjourned at 3:30 on Wednesday.