ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
DURHAM NC 27706
919-684-5593
919-489-8668 (HOME)
FAX: 919-684-3417

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MINUTES OF CIVIL RULES COMMITTEE MEETING

New York City, June 6-8, 1990

Judge Grady called the meeting to order at 9:25 AM.

Present: Grady, Linder, Miller, Nordenberg, Pfaelzer, Phillips, Pointer, Powers, Stephens, Weis, Winter and Zimmerman. Absent: Brazil and Halbrook. Magistrate Brazil's comments were circulated to those present.

Observers present were James Macklin of the Administrative Office, Joe Womack, Esq. of Miami, representing the American College of Trial Lawyers, Professor Linda Mullenix and Joseph Cecil representing the Federal Judicial Center, Professor Marc Arkin of Fordham University, Charles Sorenson,Esq. from the Department of Justice, and Woody Wega (?) from the National Shorthand Reporters Association.

It was agreed to drop Rule 30 and 56 to the end of the agenda, with the prospect that those rules probably cannot be included in the package of rules to be sent to the Standing Committee. This seemed so because they would require sufficient revision in light of comment that republication would be in order.

Discussion commenced with the published draft of Rule 4.1. It was agreed to revise line 5 as suggested by Professor Clermont. The reference to Rule 4, it was agreed, should be to Rule 4(1). At the suggestion of Judge Pointer, a comma was added after "process" in line 1. As so revised, the rule was approved for promulgation.

[The remainder of Tape 1A and the beginning of Tape 1B are not audible; discussion of Rules 5, 12, and 14 was not effectively recorded.]

Rule 5 was revised to delete the withdrawal of authority to use FAX service. "Equally reliable means" was replaced by "or private courier." "Instrument" was replaced by "paper." The Committee adhered to its view that clerks should not be authorized to enforce local rules by refusing to file papers. The words "or practice" were added at the end of the rule. As so revised, the rule was approved for publication.

Rule 12 was next discussed. It was decided not to enlarge the time for answer at this time, and to stick with the published draft in eliminating the reference to state law. Punctuation changes in lines 31, 33 and 37 were approved. As so revised, the amendment of Rule 12 was approved for promulgation.

The published draft of Rule 14 was revised to limit the obligation to circulate pleadings to those that are "current." With this change, it was also agreed that the pleadings could be served with the third party complaint.

Rule 15 was next considered. Professor Burbank's concern regarding the Rules Enabling Act was acknowledged, but not shared by the Committee. The several comments were reviewed, but none moved the Committee to revise the draft. Discussion was held regarding the concern that "prejudice" was inadequately explained, but it was concluded that the term was clear in context. Mr. Powers questioned whether the Supreme Court might be offended by the Committee's efforts to overrule *Schiavone*. It was noted that all the Justices voting in *Schiavone* expressed dissatisfaction with the result. As so revised, the rule was approved.

Mr. Waga made a presentation with respect to Rule 30. He observed that almost all the judges in America had rejected electronic recording. He objected to the FJC study on the ground that his group had not been invited to participate in the study. He noted that electronic recording or videotape can fail. Why can't we leave the rule the way it is? Mr. Waga guaranteed that the recording of this meeting would not be of sufficient quality to reveal who said what. The Reporter was assured that the tape being made would be of appropriate quality for the making of minutes. [It wasn't, entirely.]

Rule 16 was next considered. The time for the scheduling order, although questioned, was left as it appears in the published draft, with Judge Weinstein's suggestion. Judge Pfaelzer argued successfully that the conference should be held as soon as possible. Professor

Miller and Judge Grady supported this view. It is important to get the case on the track and this is the means to do so. Mr. Linder argued unsuccessfully that premature scheduling is a waste of lawyer time.

It was agreed to retain the references in Rule 16 to Rules 42, 50, and 56. At Judge Winter's suggestion, it was agreed to move the cross-reference to Rule 56 up to (5) in the order and to avoid the use of the "establishment language" in the cross-reference. The clause was first drafted thus: "disposition of any issue, claim, or defense under Rule 56" with the proviso essentially as published in the 1989 draft. Judge Winter questioned the need for the proviso: Professor Miller noted that a similar provision is set forth in Rule 12(b).

It was decided that language authorizing reference to a Magistrate was not necessary or desirable. It was agreed to add a sentence to the Notes to explain the reason for adding the cross-references to Rules 42, 50 or 52. As so revised, the rule was approved for promulgation.

Rule 24 was modified to adopt the suggestion of Tigar et al. As so revised, the rule was approved for promulgation.

Rule 28 was approved. Magistrate Brazil's question regarding the effectiveness of international means was weighed, but no response was deemed necessary.

Rule 34 was approved.

Rule 35 was discussed. It was agreed that the Reporter's draft was vague, as it was intended to be. It was decided to add a sentence in the note to explain the term "suitably." Professor Miller observed that there was a problem with the "law of the place of the examination" where the doctor travels to the patient or trial. Judge Winter questioned whether it was necessary for the examiner to be licensed or certified so long as the expert is qualified to testify under the Federal Rules of Evidence. Judge Weis questioned whether it was necessary that the testimony of the "expert" be admissible. Professor Miller emphasized the privacy interest in Rule 35; the court should not subject a person to an intrusive examination that will be useless or marginally useless. Judge Phillips questioned whether the rule might be invalid if the examiner is not a physician. Judge Stephens suggested that the matter could be left to the discretion of the court by authorizing any appropriate examination. After discussion, it was decided in light of public comment not to authorize the use of examiners other than physicians or psychologists. "Physician or suitably licensed or certified psychologist."

Rule 38 was next discussed. It was decided to withdraw the proposal as published. Judge Pfaelzer noted that the revision would change the law of the Ninth Circuit. Judge Grady observed that many cases are not tried by jury despite an early demand, that early indications are not reliable. Judge Pointer argued that absent a timely demand communicated to the court, there should be no jury. Professor Miller argued successfully that there was no latent inconsistency between subdivisions (b) and (d) of the rule, and agreed that the party demanding a jury should notify the court of its demand as well as the adversary. If a change is to be made, the revision should be to Rule 5 or subdivision (b) explicitly to require filing of the demand. Meanwhile, the rule was taken off the agenda for revision.

Revision of Rule 41 was approved as published contingent on approval of the change in Rule 52.

Rule 44 was discussed. With the suggestion proposed by Judge Weinstein being adopted, the rule was approved. The text of the added sentence was also polished as suggested by Judge Pointer and Professor Miller to read: "The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which both the United States and the foreign country in which the official record is located are parties."

Rule 45 was discussed. The issue raised by the Public Interest Litigation Group regarding contempt of a lawyer was discussed. Mr. Powers thought the concern expressed raised a question regarding the term "in whose name," that personalized the court's identity. Judge Zimmerman argued successfully that the question raised is not an issue and should not be made one.

The question of the seal was discussed. Judge Grady argued for the national seal with the attorney filling in the name of the court. It was decided in accordance with Judge Zimmerman's suggestion that there should be no requirement of a seal on the subpoena.

In response to Mr. Powers' concern, "by whom" was replaced with "by which." A comma was added, and a requirement that the name of the action in which the action is pending and its civil action number be disclosed. It was also decided that the attorney should sign any subpoena issued by her or him, but that a filing of the subpoena should not be required in anticipation of possible enforcement proceeding.

It was agreed that the reference in the note to the *Cates* case should be stricken as requested by the Department of Justice. The addition to the Note to respond to the

Department of Justice's concern about local licensure was approved. The addendum on line 55 to respond to Professor McFarland's suggestion was also approved.

It was agreed to retain the mandatory language in the provision for sanctions against lawyers who abuse the subpoena power. It was agreed that the Note should specify the possibility of fees on fees as a sanction. It was decided to omit lines 160-165 of the Reporter's draft as unnecessary; Rule 34 was thought to provide adequate protection against premature subpoenas. It was decided not to extend the text of the rule to provide sanctions against a witness who makes an unjustified attack on a subpoena.

An addendum to the Committee Note to deal with cross-motions as requested by the New Jersey Bar was considered; it was decided that such an addition is not needed. It was decided that it is not necessary to notify all parties of the issuance of a subpoena as suggested by the NJ Bar, line 61 of the Reporter's draft being adequate to meet the need.

It was decided to take no action on the SF Bar suggestion numbered 10 in the Reporter's draft. Judge Weinstein's proposal to add the words "or modify" in lines 170 and 208 was accepted. The Committee retained the word "shall" in that sentence.

In lines 208-209, the Reporter proposed to add the words "to protect the person subject to the subpoena;" the term "affected by" was inserted. A corresponding addition to the note on page 128 was approved.

No action was favored to respond to item 13 or 14. The Department of Justice proposal with respect to lines 200-204 protecting unretained experts was considered. It was decided to make the text explicitly applicable only to the unretained expert's opinion, or to information not describing specific events in dispute. With respect to compensation of the unretained expert, it was decided at Judge Phillips suggestion that the rule should not provide a measure of compensation; the text was revised by striking the words "for the burden imposed."

It was decided that no action could be taken responsive to the proposal of the securities lawyers, the aim of the revision being to protect non-parties from excessive costs of disclosures. The Committee reaffirmed its decision to require witnesses to travel across the state to attend trial, provided the full expense is borne by the party requiring the testimony.

Despite Magistrate Brazil's suggestion, the word "significant" was retained in line 175 to forestall trivial motion practice resulting from an excess of objections.

Professor Miller argued that the expense should be paid in advance in the manner that the witness fee is tendered in advance. Judge Winter argued that this is not feasible, and would require republication of the rule. Judge Phillips thought that most persons required to produce documents can read the back of the subpoena.

Attention was directed to (d)(2). Judge Pfaelzer voiced the opinion that the published draft overdid the requirement imposed on those who assert privileges. Judge Zimmerman spoke for the position that the process of disclosure should be staged, leading to a Vaughn index. It was noted that Ms. Halbrook and Magistrate Brazil had been the chief advocates for this rule, and that the published draft was based on local rules in SDNY and EDNY. Judge Grady advocated deletion of (d)(2). Professor Miller joined in this view. Judge Winter argued that at least some information regarding what is being withheld. Mr. Powers also thought there was a need for a disclosure requirement. As Judge Zimmerman proposed, it was decided to delete the specific provisions set forth in the Notes as proposed by the Reporter, and to retain a requirement of a generic description. Mr. Linder joined in this proposal. Judge Grady suggested that the assertion of a privilege should be made expressly; this was agreed to. "Trial preparation materials" was substituted for "work product protection." Judge Pointer suggested an additional sentence to explain the purpose of the disclosure requirement. These views were in due course synthesized thus: "A claim of privilege or to protection of trial preparation materials shall be made expressly and supported by a description of the nature of the documents or things not produced that is sufficient to enable the demanding party to contest the claim." Corresponding changes in the Notes were directed.

As so modified, Rule 45 was approved for promulgation.

Rules 47 and 48 were next discussed. Judge Pointer argued successfully that there should be a limit of twelve on the size of the jury. Consideration was given to setting a fixed number of eight, ten, or twelve. Judge Pointer argued for flexibility. It was decided to allow local option to prevail. A limit of twelve was inserted in Rule 48 and the provision for alternate jurors was not reinserted. The comment on subdivided juries in the Note to Rule 48 was stricken. At the suggestion of Judge Pfaelzer, the word "cooperate" was replaced by "refusal to join." The last sentence on page 150, being an addition to the Note made in response to public comment, was stricken at the suggestion of Judge Grady. Judges Winter and Zimmerman argued successfully for deleting all advice to judges on the size of the jury. As so modified, both rules were approved for promulgation.

Judge Phillips questioned whether Rules 50 and 52 should proceed without Rule 56. It was decided to proceed independently with these revisions. It was decided not to add the sentence proposed by the District Judges in Maryland. "On its own initiative" was deleted at the suggestion of the American College. "Upon specifying the fact" was deleted as unnecessary and confusing. Judge Weinstein's suggestion regarding the requirement of an early motion as a predicate for a late motion was considered and the former position of the Committee was maintained. The text of lines 45-50 were considered in light of the public comment; Judges Phillips and Pfaelzer favored the text as published, while others favored the proposed draft. Dean Nordenberg and Judge Pfaelzer argued for deletion of the word "reasonable," but were persuaded by Judge Winter that "a reasonable jury" is the appropriate word of art. Judge Grady's suggested that this text is not needed; Judge Phillips affirmed that this is so inasmuch as the motion is a renewal of a motion adequately explained in subdivision (a). Dean Nordenberg emphasized the hazard of restating the same test twice. Lines 44-50 were accordingly deleted.

Judge Pointer pointed to the problem that a Rule 59 motion must be timely served but not filed, whereas a Rule 50(b) motion should be timely filed, although the present rule does not so provide. A filing requirement was inserted into the text of line 36. Concern was expressed that this addendum might require republication, but it was concluded that the addendum was not a material change in light of Rule 5(b). At the suggestion of Judge Zimmerman, the paragraph quoting Cooper was deleted.

There was discussion of parallel revision of Rule 59, subdivisions (b) and (e). It was decided that such a revision would be appropriate in connection with a general revision of 10-day periods to 14-day period. It was resolved that this change would be made with the next package of amendments. There should be a caveat in the Note about filing the Rule 59 motion, with a cross-reference to FRAP 4(a)(4). As so modified, Rule 50 was approved for promulgation.

Rule 52 was modified with the syntactical change proposed by the Public Interest Litigation Group, substituting "the court" for "it." Judge Pointer suggested the relocation of "trial without a jury" in the sentence, and this suggestion was approved. Judge Phillips urged use of the word "issue" in lines 15 and 19 in place of "fact." Professor Miller cautioned against the unnecessary use of the distinction between law and fact. This revision was approved and the same revision was made in Rule 50. The last paragraph in the draft note to Rule 52 was deleted, or relocated in the note to Rule 16. As so revised, the rule was approved for promulgation.

Rule 53 was revised to substitute "serve on" for "mail to." As so amended, the rule was approved for promulgation.

Rule 4 was next considered. Judge Pfaelzer argued that the addendum for additional summonses is not needed; it was decided that this provision could be deleted without consequence. The Committee resisted the Public Interest Litigation group for reorganizing the rule.

The Reporter proposed additional Note material to explain the legislative history of the service-by-mail enforcement mechanism; this was approved. Magistrate Brazil's argument for duplicate provisions was considered but rejected.

Service on the government was considered. Mr. Linder reported that government officers fear the choice of accepting service. It was at length resolved to extend the immunity to liability for the cost of service when waiver is requested not only to federal officers in whatever capacity sued, but also to foreign, state and local governments, but not officers of state or local governments, there being no provision of the rule bearing on service on such officers. At Judge Pointer's suggestion, the text was revised to exclude from the waiver subdivision those subdivisions bearing on service on governments and officers, making it applicable only to individuals, corporations, and associations served under subdivisions (d), (e), and (f). Dean Nordenberg suggested that the notice should contain "a copy" of the request, and that the notice should be required to disclose the date on which the notice and request was sent. Such information is in fact set forth in From 1A as published. Subparagraph (E) was revised accordingly.

It was decided to retain the requested waiver device for use in private international litigation. It was decided at Magistrate Brazil's suggestion to extend the time for return of the waiver to 30 days in order to encourage defendants to consult lawyers who will advise them to waive. A similar revision is made in line 52, and in Rule 12, line 8 as well. The SF Bar suggestion to substitute "if" in line 125 was approved. The phrase "other reliable means" was retained despite concern about FAX that prompted its non-use with respect to Rule 5, but with "equally" stricken.

It was decided to strike the language in lines 189-194 of the published draft codifying *Schlunk*. The reference to the case was retained in the Notes. It was decided not to add a provision precluding "tag" service of international litigants. Judge Stephens objected to retention of the word "abroad" in the Notes; "in a foreign country" was substituted except insofar as reference is to the Hague Convention that is so-captioned.

"Internationally agreed means" in line 192 was left as published. Insertion at lines 197 of "if the applicable treaty allows other means of service" was approved. The addendum for emergencies suggested by Mr. Born was approved as a fit to the Hague Convention, although Judge Grady and Judge Winter questioned the need for such a provision. Attention was turned to lines 215-223 drafted by Reporter in response to concerns expressed by those commenting. Judge Pfaelzer supported the draft as a response to SEC concerns. Judge Weis questioned whether the SEC should be protected inasmuch as their proceedings are quasi-criminal. Mr. Powers was concerned that the Rules propose to authorize service in violation of a treaty, but it was pointed out that some signatories do not obey the treaty, and the present rule permits such deviance. The text was approved as presented in the Reporter's draft.

Attention was given to subdivision (l) as published, or (k) as it appears in the Reporter's draft. It was agreed that Congress had undermined the published proposal by its revision of the venue law. What is retained is the provision responding to the *Omni International* case. Disclosing an interest, Mr. Powers questioned whether the provision would not overextend the reach of United States courts. Professor Miller argued that the text was very narrow. but questioned whether this change should be effected by rulemaking. The Reporter's draft was approved, but with a reorganization of the sentence in conformity with Judge Pointer's suggestion, with substantial elision of Committee Notes pertaining to pendent jurisdiction and with a reinstatement of the introductory note explaining the provision to Congressional overseers.

Judge Pfaelzer raised a question about subdivision (m) on lines 432-441 as to whether the intent was to reverse Ninth Circuit law directing judges to dispose of cases in which service is not timely effected. The Committee agreed that it was so intended to protect plaintiffs against dismissal when service cannot be effected despite reasonable efforts. Judge Grady questioned whether this subdivision was needed; could the matter not be left with Rule 41? The Reporter's draft was approved, but with the final sentence substantially reinstated in the form enacted by Congress in 1983.

Lines 442ff were reorganized as suggested by Professor Clermont. Judge Grady expressed concern about a negative implication of this text, but the Committee was satisfied that Rule 64 adequately provided for provisional remedies in cases in which process has been served.

As to revised, Rule 4 was approved for promulgation.

Rule 26 was next considered. Judge Pointer suggested an addition at line 11. Judge Zimmerman point to a revision suggested on page 5 of the Reporter's letter of April 30. Judge Weis supported the Reporter's draft based on Mr. Born's suggestions and urged that Mr. Collins argument was lost in *Aerospatiale*. Judge Pointer expressed the view that *Aerospatiale* did not necessarily resolve that question. Judge Zimmerman argued for a level field in discovery. Judge Weis argued that the United States had agreed to make the playing field unlevel in order to induce international cooperation. The problem of blocking statutes was again reviewed. Judge Grady questioned whether the sentence could have any application. Dean Nordenberg urged that there may be methods neither authorized nor prohibited that may be employed in this situation. The sentence was in due course revised to read "Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty."

Paragraph (b)(5) was revised to become a duplicate of the text approved for Rule 45(d)(2). As so revised, Rule 26 was approved for publication.

Attention turned to Rule 30. It was decided to postpone conversation of most of what is proposed in the published draft, but the revision of Rule 30(a) was considered in its relation to Rule 4. An additional 10 days was allowed in light of the revision of Rule 4. Lines 11-15 are added. This revision was approved.

The revision of Rule 41 was again approved as published. Rule 56 was deferred for further discussion as part of the next package of amendments.

Rule 63 was next discussed. Judge Weis suggested a reference in the notes to videotaped trials. Judge Pfaelzer urged that demeanor evidence is the concern, but that there is a diminishing availability of such evidence in any case, and she doubts the value of it in any case. Judge Stephens argued that a party wishing to recall a witness whose credibility is disputed. Judge Pfaelzer pointed out that the result will be to allow counsel to re-examine a witness who may produce quite different testimony. Judge Winter urged that background testimony should not be re-heard. He also urged inclusion of a sentence in the note to explain that a witness beyond reach of a subpoena is "unavailable." Judge Pointer suggested a cross-reference in the Notes to F. R. Ev. 804. "Undue burden" was substituted for "undue expense." Judge Pfaelzer expressed satisfaction with the principle that the contact with living witnesses should be

maintained when reasonable under the particular circumstances.

Judge Zimmerman urged that the Note should specify that the rule is discretionary with the court, that a new trial is always permissible. Dean Nordenberg thought there was merit to the point that the rule may be too open with respect to the reasons. It was agreed to drop by "for any reason." As so revised, Rule 63 was approved for promulgation.

The amendment to Rule 71A was approved.

Rule 72 was discussed. It was agreed that the times should be changed to 14 days, but this should be done at the time that all 10s are changed to 14s. The rule was approved in its published form.

Rule 77 was approved subject to the approval of the Appellate Rules Committee.

The Admiralty Rules C and E were again approved.

Forms 1A and 1B were approved, with the insertion of "at least" in Form 1A.

Gender-neutralizing of the Forms was approved. It was also agreed to revise Form 2 to conform to the jurisdictional amount change effected by Congress.

The Committee next turned to Rule 11. Mr. Cecil reported on the progress of Tom Willging in his FJC study. It was agreed that the Reporter's draft statement should be modified in several respects and then published as a call for written comments to be submitted by November 1. Judge Grady proposed that the public be invited to comment on the Willging study when available. The Committee agreed that this should be done, but resolved also to seek other written comments this year. Judge Winter expressed the aim to consider amendments to Rule 11 soon. Judge Zimmerman urged that it was important to let off some political steam sooner than the Willging study will be available. It was reported that Professor Vairo believed that the over-sanctioning had abated. Judge Winter observed that the supporters of Rule 11 were generally unaware of the level of hostility to the rule. It was also reported by Judge Winter that Gary Joseph, the author of the book on Sanctions now favored repeal of Rule 11. Professor Miller reported that he had read all the recent cases and believed that the rule was settling down, that the appellate decisions in 1986 and 1987 have closed down the number of ambiguities, and the courts are reacting against any over-sanctioning civil rights claimants. In response to a request from Judge Pfaelzer,

Professor Miller agreed to identify a few leading cases on Rule 11 that have contributed to the settling of the field.

Judge Phillips suggested that the call for comment might refer to the forthcoming Willging study. It was agreed that not too much weight should be imposed on the Willging study.

Judge Winter agreed with Judge Grady that the invitation for comment should issue after the fall meeting. Mr. Powers emphasized that this would be too late, that people were expecting the Committee to show some signs of activity at this meeting. Judge Pfaelzer supported this view. Judge Zimmerman urged that if we want empirical work, the invitation should be issued as soon as possible. Mr. Powers argued that empirical data would not change anyone's mind.

Judge Winter then endorsed the idea that the Committee should hold a meeting to hear oral presentations from selected authors of written comments. Professor Miller reported that the Committee had not held such hearings in response to equal or greater concerns over Rule 23 or discovery. He also reported that a conference on Rule 11 at NYU was in prospect. Judge Winter was concerned that NYU would then control the event. Judge Pointer recalled the discovery conference held at the University of Texas by the Litigation Section in the late 70s. Judge Winter argued that such an NYU conference should not be regarded as an alternative to hearings that a lot of people want. Judge Zimmerman urged that the Committee could and should attend such a conference to see what can be learned. Judge Grady renewed his view that any amendments should be rooted in the Willging study and that it would be a waste of time to have hearings before that study is available. It was agreed that the hearings should not precede the publication of the FJC report.

Mr. Powers proposed that the Committee publish for comment a proposed amendment requiring leave of court to file a Rule 11 motion. It was decided not to publish any specific proposals at this time, but to adhere to the schedule given to Congressman Kastenmeier in 1989, which calls for action in the spring of 1991.

It was agreed that comments should be invited now, with a request for submission by November 1. The fall meeting will then be devoted to a review of those comments and preparation of an agenda for a hearing to be conducted in Washington in February, with a further meeting of the Committee in April or May to consider proposed revisions of the rule. Judge Pointer suggested a need to limit the length of submissions. Instead, it was agreed that the invitation should contain a summary of comments already

received, along the lines of the instrument prepared by the Reporter, with a bibliography attached. The invitation should seek specific proposals responsive to the problems identified therein, or other problems that commentators might separately identify. The invitation will be sent to bar groups, especially those known to have an interest in the subject and will also be published. Specific judges will also be asked to comment in writing.

Professor Miller emphasized his concern that the Committee will hear only one side on the issues because proponents of the rule are silent. He is also concerned that the Willging study will not and cannot measure the frequency and effect of denials of sanctions. Judge Phillips was also concerned with the difficulty of finding spokespersons for the rule. Judge Phillips moved to ask that the Willging study interview judges. Judge Stephens urged that the Federal Judges Association might be employed for this purpose; it was agreed that the Association should be invited to encourage judges to respond to Willging's questions.

It was agreed that the document should be as neutral as possible. Judge Winter and Mr. Linder spoke to the need to retain a list of objections that have been voiced. Consideration was given to making the listing of issues a mere reporter's note, but it was decided that it should be included in the Committee's invitation. Judge Grady was concerned that the issues may be stated as leading questions. Judge Zimmerman suggested that the problem would be helped by a disclaimer of a committee position. It was agreed that the draft of the invitation would be circulated in July.

It was agreed that the next meeting would be in Durham on November 29-30, and December 1. It was also agreed that the February hearings will be conducted in Washington, and that the spring meeting would be held in Los Angeles.

Judge Stephens noted in the context of the Rule 11 discussion that the Committee meets too infrequently to respond with appropriate speed to suggestions and criticisms. Judge Zimmerman and Mr. Powers supported this view. Professor Miller observed that the Committee used to meet more frequently and emphasized Judge Zimmerman's point regarding continuity in the membership of the committee.

Discussion turned to the Reporter's draft of Rule 25.1. Judge Stephens suggested inclusion of the "Golden Rule" requiring that any discovery motion must be supported by a certification that the moving party has tried to resolve problems without a motion. It was generally agreed that such a provision might be added to Rule 37.

Judge Pointer questioned whether prompt disclosure should be limited to disputed facts, and whether disclosure of privileged documents should not be excluded. He also suggested that the rule should call upon attorneys to identify primary witnesses, distinguishing secondary witnesses, so that the other side knows who to depose. People do abuse this rule, but it does bring out some useful information.

Judge Pfaelzer suggested the need to preclude the use of undisclosed information on a dispositive motion under Rule 56. Mr. Powers noted that there is no effective sanction for the non-disclosure of inculpating documents. Judge Grady questioned whether rebuttal material should be required to be disclosed, especially the materials of impeachment, surprise being in some circumstances a healthy thing. Judge Zimmerman thought that impeachment material should be left to discovery. It was agreed that the party would be required to disclose the existence of documents and witnesses, but even at pretrial disclosure, it is not clear whether one would not have to disclose that particular material would be used for impeachment. Judge Pointer suggested that many pretrial orders now forbid the use of undisclosed material for "substantive purposes."

Judge Zimmerman questioned how the advocate was expected to respond to these requirements. Judge Phillips noted that the advocate should respond just as he or she would respond to a direct interrogatory in the same terms. Dean Nordenberg thought this could work for disclosures of routine information. Mr. Powers thought it would be helpful to liberate lawyers from a sense of duty to establish every possible roadblock to discovery by the adversary. There was agreement to this general idea as a means of toning down the adversariness of discovery.

It was suggested that the prompt disclosure of documents should require some categorization, but it was noted that a requirement of sorting or earmarking would increase the hazard of later disputes over the performance of the duty imposed.

Professor Miller noted the problem of disclosure of materials by the plaintiff bearing on a third party complaint to which the plaintiff is not a party. He also noted the unwisdom of requiring disclosure in cases in which the adverse party would not seek discovery. In many cases, there is no discovery. In 50% of civil cases, there is no discovery revealed in court files; but Judge Grady observed that much information exchange is not on file. It was also noted that many cases raise only legal issues or are presented pro se. Judge Pointer suggested the possibility that a category of cases might be excluded as is allowed

under Rule 16; also there should be an opportunity for parties to stipulate against disclosure.

Judge Pointer urged that 25.1 is the wrong number for this rule and it was agreed that numbering is a problem to be resolved. Judge Phillips suggested that the court might be empowered to decide early in a particular case that there should be no discovery, but that trial should proceed at once in the pre-1938 manner.

Professor Miller noted that the present draft does not trigger disclosure until the filing of the answer, which may be long postponed. It was agreed that this was too late. It was noted that Rule 33 presently allows interrogatories 45 days after service of the complaint.

Professor Miller also noted that reference to "facts alleged" endangered the return of fact pleading. "Relevant to the subject matter of the action" was suggested as the proper scope under Rule 26. Judge Pointer was concerned that disclosure not be required with respect to matters not in dispute. But it was noted that this requires pleadings by the defendant or admissions that narrow the dispute. There seemed no way open to the Committee to avoid the dilemma of deciding when discovery should commence in an action in which defendant is engaged in prolonged efforts to secure dismissal.

The relation to Rule 36 was discussed. Could that rule be more effectively employed in the disclosure process? Judge Phillips suggested that this involved a substantial shifting of the burden of issue narrowing or cabining the range of dispute. It was noted that this was also the issue in the Committee's efforts to revise Rule 56. Professor Miller noted that the pleading process as defined in 1938 had also been an impediment to discovery reform a decade ago: you can't restrict discovery to specific issues, as some advocated then, unless you can identify issues earlier than the pleading system allows. The earlier the obligation is imposed, the more effective it is, but the more likely we are to hear from a party that he or she did not know what the case is about yet.

On the other hand, it was noted that most contemporary pleading is quite full, and goes beyond the requirements of Rule 8 and the official forms. Whether this is because lawyers are paid by the word or because judges would today throw out a Form 9 complaint.

The failed idea that Rule 12(b)(6) be abolished was reviewed briefly by Judge Winter. It was argued that no disclosure should be required before discovery would otherwise commence. Judge Pointer suggested that a change in practice under Rule 12 might be effected because the

disclosure rule may give a reason to require a party to answer. It was noted that the prompt disclosure can be linked to the Rule 16(b) scheduling conference. Judge Grady noted that answers are seldom informative; if they were, there would be more 12(c) motions. It was seemingly agreed that some burden of disclosure could be imposed without an answer, but perhaps the present draft requires too much disclosure too early.

The connection to Rule 11 was noted by Judge Grady. Early answers may require immunity from Rule 11 liability. Consideration was given to possible revision of Rule 12(a), but it was thought that this was not appropriate at this time. Judge Zimmerman suggested that the Committee may not yet be thinking sufficiently broadly about solutions, perhaps toward preference justice as distinguished from rights justice. Judge Stephens thought perhaps the system is not so broken that it needs to be fixed.

It was suggested that the number of lawyers attending a deposition should be limited. The number of lawyers may be used as an intimidation device. The competing concern is that we may be micro-managing in response to the latest abuse.