ADVISORY COMMITTEE ON THE CIVIL RULES
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OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
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MINUTES

MEETING OF NOVEMBER 29-DECEMBER 1, 1990

DURHAM, NORTH CAROLINA

Present: Bertelsman (Standing Committee), Brazil, Eldridge (FJC) Holbrook, Leonard (representing clerks and magistrates), Linder, Macklin (AO), Miller, Hnatowski (AO), Nordenberg, Pfaelzer, Phillips, Pointer, Powers, Stevens, Willging (FJC), Williams (FJC), Winter, Womack (ACTL), and Zimmerman.

Chairman Pointer called the meeting to order at 9 AM. Introductions of those present occurred first. The Chair called attention to the rules of the Judicial Conference Committee bearing on meetings and memberships of committees. Members were cautioned not to speak against policy of Judicial Conference without appropriate disclaimer. Mr. Macklin also commented on the policy, emphasizing the expectation that members will be rotated. He also pointed out the Marshals' Service would be present throughout the meeting.

Chairman Pointer called attention to Judge Keeton's memorandum as new chair of the Standing Committee. Judge Keeton hopes to emphasize positive incentives in rules. Chairman Pointer also reported that the Committee's recommendations on revisions approved at the last meeting in New York have been substantially approved by the Standing Committee, and was also approved by the Judicial Conference. They now pend in the Supreme Court and will, unless derailed, will become effective on December 1, 1991. Chairman Pointer and the Reporter noted that there was some concern among the representatives of international litigants about the draft of Rule 26(a) as it emerged from the Standing Committee. It was also noted that the gender-neutralized Forms as amended were turned down by the Standing Committee.

Chairman Pointer noted that Rules 30 and 56 had been withdrawn by this committee and the Reporter noted that Rule 38 had also been withdrawn by the Standing Committee. The revision had been prompted by the Local Rules Project, but the Standing Committee regarded the resolution of the issue to be incorrect and wanted a draft coming out the other way.

There was general discussion about the time lag in rulemaking. It was observed that the time lag, turnover, and learning time for members create a serious problem about the quality of the committee's work. Justice Zimmerman observed that the turnover schedule was not realistic. There was general agreement and assent to the suggestion of Mr. Macklin that the chair raise the issue with the Chief Justice.

Judge Winter asked why Rule 11 was on the agenda. It was explained that the discussion was limited to preparation for the hearings, not to work out a new Committee position.

The Chair moved the committee to discussion of the discovery proposals. Does the Committee favor a duty of disclosure without request? The Reporter observed that the only real issue is whether it can be made to work: are the incentives sufficient to induce compliance to a somewhat indeterminate duty? Will people just use this device as another weapon. Judge Stevens thought it might be very difficult to police. Judge Bertelsman asked if the proposal reflected the aims of the Biden bill. He shared the concern expressed by Judge Stevens. Justice Zimmerman urged that these concerns point in the direction of making the requirements as explicit as possible. Mr. Powers hopes that the revision would change the atmosphere in litigation, to create a more cooperative attitude. Judge Pfaelzer agreed. As did Mr. Linder.

Magistrate Judge Brazil had tried the idea out on some San Francisco lawyers who approved the idea. The Reporter reported discussions with lawyers that were generally sympathetic. The Chair reported on comments from ACTL and ABA Litigation Section that were generally favorable, although the latter had concerns. Prof. Miller compared this to the old Bill of Particulars. The Chair noted that this is an amalgam of existing local rules. Judge Pfaelzer reported that the CD Cal rule had not produced motion practice. Ms. Holbrook thought the critical thing was case management by the judge. Judge Winter thought it was a good idea, but feared that it would excite opposition from the plaintiff's bar, and hoped that we could think of some "carrots" to encourage disclosure. Judge Pointer noted that one who discloses does get the benefit of a presumption of admissibility. Judge Phillips said the pressures have been mounting against discovery, and this is the only and best idea we have, to create a different environment.

Judge Bertelsman asked about the "smoking gun" disclosure problem. The Chair said that Rule 37 is the best we can do; we can't solve all the problems, but at least you know where all the documents are. Debate was conducted as to the identities to be disclosed. Prof. Miller made the point that if 4000 witnesses know something, they could be described by category. Judge Pfaelzer thought it enough to disclose the witnesses supporting the party's contention. Magistrate Judge Brazil emphasized that this is an important issue, and favored a more ambitious disclosure. Judge Winter noted that the less ambitious plan may encourage parties to hold back. It was agreed that there is a relation between the breadth of the language identifying the degree of information required to make a prospective witness disclosable and the range of issues with respect to which disclosure is required.

The Chair suggested waiting until the answer is in to disclose information bearing on the answer. Prof. Miller suggested that this is not realistic given the unlikelihood of an answer being timely filed. Dean Nordenberg thought the dimension of what is required is much clearer if it pertains to a party's own contentions. The Reporter noted that this bears on the equity of the disclosure; the idea was that simultaneous disclosure would be equitable. Magistrate Judge Brazil thought that broader disclosure is needed to change the culture of adversariness. Ms. Holbrook urged that there is a limit to how far you want to change the culture. Mr. Powers thought this argument justified hiding the ball. Justice Zimmerman argued that only important witnesses should be identified, but not all witnesses bearing on any issue. Magistrate Judge Brazil noted that one purpose to be kept in mind is that disclosure should assist expeditious settlement. The Chair concluded that disclosure should extend to both sides.

Ms. Holbrook suggested that all information bearing on material to any allegations in any pleading filed. Judge Pfaelzer noted that the rule ought not require the plaintiff to disclose material on an answer before it is filed. Judge Winter expressed concern that some defenses might be lost because the defendant never got the pertinent document; Judge Phillips noted that this risk inheres in the process.

Chairman Pointer suggested that the right language is "matters in dispute" which might be disclosed by answer or by motion. Magistrate Judge Brazil cautioned against building an incentive to delay an answer. Ms. Holbrook noted that if a 12(b)(6) motion is pending, maybe disclosure is a waste of time. Prof. Miller questioned whether you want this process to proceed if any Rule 12 issue is pending. Chairman Pointer noted that the judge has some discretion as to whether to defer disclosure. The Reporter suggested that Rule 12 could be modified to make the presumption run the other way, requiring an answer unless the court orders otherwise. Magistrate Judge Brazil pointed to the proposal of Judge Schwarzer, which is more radical, which aims to force the judicial officer to deal with the core of the case much sooner.

The Chair pointed to lines 24-25 of draft and suggested that it be tied to the answer. Magistrate Judge Brazil thought this would produce motion practice by defendants seeking delay. Judge Pointer thought Rule 11 might deter excess delay motion practice. Magistrate Judge Brazil thought this not a sufficient response, that too many Rule 12 issues are too close. Judge Winter renewed the thought that requiring an answer while a 12b6 motion is pending, to say that opposition to that had been insurmountable. Magistrate Judge Brazil acknowledged that 12b6 motions sometimes reshape the case. The Chair called for a vote on whether the disclosure should be linked to the answer; an affirmative vote was taken. It was decided to hold the issue of whether an amendment to Rule 12(a) should accompany this decision.

The Reporter noted that the disclosure process was keyed to the beginning of discovery. Prof. Miller argued that postponing until after answer might result in some parties never getting information. He reflected on having cycles of disclosure, with an additional round of disclosure for each pleading. Judge Pfaelzer supported that suggestion. Judge Winter expressed concern that disclosure be required despite the pendency of 12b6 motions; especially in many pro se cases, this would be a waste of time. Professor Miller called attention also to the pendency of motions to enforce the special pleading requirements of Rule 9.

Judge Bertelsman asked about the relation to Rule 16 conferences. Judge Pointer noted that Rule 16 requires an early order, but not a conference; the disclosure needs to come before the order. Judge Phillips observed that it is necessary to force earlier definition of issues. Judge Winter emphasized that defendants should be able to get out of the case without disclosure if it can be terminated on a 12b6 ruling. Magistrate Judge Brazil responded that the discovery reform should not be impeded by concern for pro se cases. Mr. Linder noted that most government cases are disposed of on 12b6 or 56 motions. It was asserted and not denied that most 12b6 motions are granted. Magistrate Judge Brazil thought that categories of cases might be excluded by local rule, viz. §1983 cases.

Judge Pointer thought that there would be motions either way, and that the norm should be linked to the filing of the answer or the Rule 16 event. Magistrate Judge Brazil thought this would defeat the purpose of holding off disclosure for the motion practice. Justice Zimmerman urged that the disclosure should occur before discovery in any event. Judge Winter agreed that disclosure could be linked to 16b order or the answer, whichever comes first, because no judge would hold a 16b proceeding in the cases that were his concern. Mr. Linder feared that the

court would postpone consideration of his motions until the 16b conference, leaving the government to make disclosure.

The option of requiring each party to disclose at the time of filing a pleading was explored, and it was quickly agreed that this would be unfair to plaintiffs. Judge Stevens thought it hard to ask defendant to disclose early. Judge Pointer thought disclosure often needed to inform the scheduling order. Professor Miller suggested that it is possible to schedule the disclosure pursuant to 16b, that such an order could be entered before disclosure. He agreed that in many cases preemptive issues should be resolved before disclosure if it seemed plausible to the district court. Justice Zimmerman thought that any party might be authorized to jump-start the disclosure-discovery process. Judge Pointer again emphasized that if keyed to answer, there will be motions to shorten the time and proceed to disclosure, and if keyed to 16b, there will be motions to extend the time for disclosure.

Echoing Justice Zimmerman, the Reporter asked whether the key is not the beginning of discovery rather than any pleading event. Judge Pointer thought this might work. Justice Zimmerman again noted that the government would be protected under that rule, as now, by the passivity of plaintiffs in initiating discovery. The idea would be that no discovery would be allowed until there was mutual disclosure with respect to matters pleaded at the time. Mr. Linder expressed fear that this would make it too easy for plaintiffs to force government disclosure in non-meritorious cases. Magistrate Judge Brazil noted that a cost is that the 16b action would be less well-informed, but that this would not be a big enough interest to prevent this resolution. Judge Pointer also had the concern that the system needs to speed up the process. Justice Zimmerman thought this can be done under 16b consistent with the proposed rule.

Mr. Linder again voiced his concern. Justice Zimmerman thought that responding to his concern with respect to the discovery key, this would give the government more protection than it has now. Magistrate Judge Brazil entertained the thought perhaps the government, all governments, should be exempt from the rule. Judge Bertelsman thought that the discovery key would solve most of the problems.

Judge Stevens suggested that each party should commence discovery with a disclosure: no disclosure, no discovery. Dean Nordenberg noted the incentive effects of that scheme. Justice Zimmerman argued that you should secure the other party's information simultaneously. Judge Pointer was concerned that there be something in the rule to trigger the disclosure, that it not be left wholly to party initiative, on account of the delay that can result from passivity. It was thought that the time for disclosure should be pegged to the answer as a deadline: mandatory within 28 days after filing of answer.

Judge Phillips wondered whether the notice or demand for disclosure can be served with the complaint. It was noted by Judge Winter that the plaintiff will also have to disclose. Judge Pfaelzer thought that the defendant might call for disclosure very soon after receiving the complaint. It was agreed that 28 days notice would be generally appropriate, but with perhaps an additional 14 days when the demand is made at the time of filing of the complaint. Judge Pointer noted that all the disclosure required is whatever may be the information at hand. It was agreed that the starting date for interrogatories and depositions could be deleted in light of the 42-day period created.

The Committee then turned to the question of what information should be disclosed. It was agreed that the word "substantial" should be dropped. Judge Pointer argued for retention

of the requirement that "personal knowledge" witnesses be those whose identities would be disclosed. Judge Brazil thought that some witnesses have other kinds of knowledge should be disclosed. Ms. Holbrook noted that there would be access to additional information, and what is wanted is the core fund of information then available to the adversary.

Ms. Holbrook favored pertinence to "material allegations." Prof. Miller emphasized that all that is being sought is "what you now know." Dual standards add complexity and should be avoided if possible. He suggested "all persons reasonably believed to have discoverable information." Judge Pointer thought this too broad and would evoke excessive responses. Prof. Miller thought that larger groups could be described categorically. Judge Winter thought it troublesome to ask the responding party to anticipate objections. Prof. Miller noted that the trouble inheres in the existing standard. Judge Winter thought he preferred to retain "substantial" and strike "personal." Judge Brazil thought the categories could not work if the responding party could define very broad categories. Judge Bertelsman suggested that the issues addressed might be narrowed to reduce the number of persons to be listed. Judge Pfaelzer lent support to the broad Miller proposal. Justice Zimmerman worried about the disclosure of privileged information. Magistrate Judge Brazil noted that "discoverable" now included a concept of proportionality. The Reporter asked whether a list of names could be disproportionately costly. A solomonic compromise of retaining "substantial" and "discoverable" was considered. Magistrate Judge Brazil was concerned that too flexible a standard would feed cynicism. Dean Nordenberg urged that the disclosure of names should be sufficient that no one should ever have to use an interrogatory to get a name.

Judge Pointer thought some indication of the kind of information possessed should be provided. Magistrate Judge Brazil concurred. Ms. Holbrook and Justice Zimmerman shared concern that a mere list of names would place too great a burden on the party receiving the disclosure. Judge Bertelsman argued for cutting back on the concept to prevent motion practice about the sufficiency of the disclosure. Judge Winter noted that the disclosing party might often be uncertain what particular persons know. Judge Pointer observed that we need something to induce parties to work this out at their meeting.

Judge Phillips suggested a disclosure of "persons known to have information.." The Reporter suggested that an objective norm would be preferable to a subjective one. Judge Pointer thought it important to be inclusive. Justice Zimmerman thought the information would not be helpful without some indication of what the persons might know. Otherwise no economy in discovery will be achieved. Judge Pfaelzer favored a meeting to disclose; Magistrate Judge Brazil agreed, calling attention to a telephone meeting. He reminded the committee of the broad language of the SDNY rule requiring disclosure of the "subject matter" of the persons' knowledge. It was noted that the meeting or conversation will not serve without a requirement. Justice Zimmerman thought a written disclosure may be needed for the purpose of informing the later sanctions decision, if a sanction should be necessary.

Judge Pfaelzer suggested deletion of "any," and this was agreed to. Judge Winter was troubled that the disclosing party might be relied upon by the disclosee. The Chair took a vote and the committee tentatively concluded that some written explanation of the listing is necessary. The Committee also by a narrow vote accepted as a standard "persons to known to have substantial discoverable information." Ms. Holbrook and Mr. Powers objected to "discoverable", and Judge Phillips to "substantial." Judge Pointer was prepared to concede "discoverable." Magistrate Judge Brazil preferred no modifiers, but authorization of counsel to agree that some persons might be listed by category. The Chair then took another vote and

secured 7 votes for "reason to believe to have substantial discoverable information about the claims and defenses."

The discussion turned to documents. Magistrate Judge Brazil raised the question whether the disclosure should be limited to documents supporting the disclosing parties contentions. He thought not. The special designation requirement was dropped by general agreement. "Tangible evidence" was changed to "tangible things."

The discussion moved to line 24 of the draft. Judge Pointer asked whether the multiples-of-7 rule should be employed, noting that over longer periods, the rule was not helpful. It was agreed to use 14 days in lieu of 10, but otherwise to use the round numbers.

The Reporter asked about the inclusion of indemnity agreements to be discoverable along with insurance coverage. Judge Phillips endorsed the idea. Mr. Powers thought this unnecessary. Judge Pointer thought that it might facilitate settlement, and is discoverable. Magistrate Judge Brazil favored mandatory disclosure of the policy itself. Professor Miller questioned the need for production of insurance and indemnity contracts. Mr. Powers observed that indemnity agreements are seldom a factor in the settlement, because typically both the indemnitor and indemnitee are fully solvent. Justice Zimmerman thought the provision is unnecessary. Professor Miller thought the only thing in the policy that ought to be discoverable should be the amount of coverage. The Committee agreed to require the production of the policy, but not to include indemnity agreements.

It was agreed to drop part of Rule 26(b)(2) as unnecessary, as will be reflected in the Committee Notes.

Ms. Holbrook questioned what is required for a damages computation. After discussion, no change was made in the text.

Judge Pointer next referred to problem of timing of disclosure in relation to pending motions. Mr. Linder favored a revision to stay pending resolution of pending motion for protection. Judge Pfaelzer supported this position. Magistrate Judge Brazil favored a presumptive time of notice prior to deposition. Judge Pointer thought that unless the court so orders, no extra time should be allowed for disclosure on account of a pending order. It was agreed that the rule should be explicit on the point.

The committee then turned to the matter of experts. The Reporter noted that the additions to expert disclosure were responses to popular demand. Judge Bertelsman thought the requirement of expert experience as a witness was long overdue. It was noted that some changes in the Federal Rules of Evidence may be indicated; Judge Winter in particular noted the conflict with FRE 705. Judge Pointer noted the FRE 705 controls only the right of the proponent of the expertise to use the material without prior notice. Judge Winter nevertheless thought some reconciliation to be necessary.

Consideration was given to the timing of the exchange. Mr. Powers favored mutual exchange to prevent the defendant's expert from using the plaintiff's as a tackling dummy. Magistrate Judge Brazil questioned whether the provision bearing on late disclosure of experts was properly phrased; many experts are not identified until late to avoid the expense. He also noted that a requirement of earlier disclosure might induce earlier settlement. The idea of measuring the time for disclosure from the beginning of the action rather than from the end was considered but not adopted.

The Reporter noted the problem of doubling the cost of experts by deposing before trial and requiring a written report. The expenses incurred can be substantial. Judge Pointer reflected that some shifting of deposition costs might be indicated, but this would not be satisfactory where the resources of the litigants are uneven. The Reporter suggested that the report might be presented in the form of a videotape of the direct examination as it will be offered at trial. Mr. Powers thought that most lawyers will want to depose important experts regardless of quality of report. Ms. Holbrook thought better reports might make longer depositions. Judge Stevens suggested that a good report should preclude a deposition. It was noted that there is no right to depose an expert under the existing rule, although in practice such a right is often conferred. Magistrate Judge Brazil explained that he required experts to be deposed because their writings were not very helpful. Judge Pointer said that the hope of the proposal was to make reports more helpful. Justice Zimmerman thought the deposition the most effective means of getting the information.

The Reporter reviewed the problem of the party desiring to rebut an expert whose report was not anticipated. Judge Pointer described it as problem of supplementation. The Reporter described the report as a means of assuring the parties of a preview of expert testimony. Magistrate Judge Brazil thought that in some cases the requirement of a writing will add expense to the use of the experts.

The Committee agreed to require disclosure of the experts' record over a four year period. It was decided to require disclosure of all trial or deposition testimony, but not retained reports.

The Chairman raised the issue of whether the term "expert" should be abandoned. The Committee was divided on the issue, but decided to leave the word expert in for the time being.

The Committee then discussed the pretrial disclosure to be required by paragraph (3). Judge Bertelsman wanted assurance that this was a minimum requirement, that the court can order more disclosure. "Unless otherwise ordered" was inserted. "Fair summary of each witness's testimony" should perhaps be required. The primary-secondary distinction was abandoned. It was concluded that the very limited protection of impeachment material from disclosure was appropriate and adequate, insofar as it conforms to existing law. A document must be disclosed, but the intent to use it for impeachment need not. Justice Zimmerman objected to "descriptive of;" it was replaced with "regarding."

It was decided that 20 days before trial was the right time for the pretrial disclosure, unless otherwise ordered. The Committee considered specific authority for local rules on the time and extent of disclosure, and concluded that this was not necessary where discretion is conferred on the court.

Judge Pointer raised the 7-day provision. Judge Pfaelzer supported the idea of the requirement. It was agreed that the listing of materials to be used at trial should be taken as a signal for objections so that as many issues as possible may be ruled upon *in limine*. Ms. Holbrook questioned whether 7 days is enough. It was agreed to change the time for disclosure to 30 days, and time for objections to 14 days.

The Committee decided not to require conference, but to leave the term "if feasible." Judge Pfaelzer noted the relation between Rule 11 and the certification required. Dean Nordenberg suggested the striking of the first sentence as redundant to (g). Justice Zimmerman thought (g) was the proper location for the provision in question; Magistrate Judge Brazil and

the Reporter questioned whether it was not hidden there. Judge Pointer suggested a relocation of language within (a). It was decided to include a cross-reference to (g) in (a).

The filing of disclosure material was considered. It was agreed that such material should be treated in the same manner as if subject to discovery.

Judge Pfaelzer suggested that disclosure should not be subject to Rule 11 inasmuch as other sanctions are provided in Rule 37. Judge Pointer thought this implicit and agreed to make the point in the Notes. It was agreed that the two obligations might overlap, but that they are independent.

Judge Phillips asked if the proposal goes beyond present good practice under Rule 16(b). Judge Pointer thought the draft employs ideas that are in use, but probably not all in one place.

The Reporter raised the question of discovery of materials already subject to a disclosure obligation. How far should one be permitted to probe with redundant discovery. Judge Pointer suggested that the use of a limited number of interrogatories in a redundant way might not be a great evil, and that the parties will need to explore at a deposition matters that have been the subject of disclosure. Magistrate Judge Brazil thought that closing off discovery would excite political opposition and generate motion practice on the sufficiency of disclosure. The restrictive phrase was deleted from line 79 of the draft.

However, there was concern about interrogatories used to try to accelerate the disclosure under paragraphs (2) and (3). Judge Winter thought that this could be managed by permitting delayed response. A companion deletion was made in line 66 of the draft. It was agreed that discovery should follow disclosure, and that a party not having completed disclosure under (1) should not proceed with discovery. Judge Pfaelzer emphasized the continuing nature of the disclosure duty. It was agreed that the party seeking discovery must make disclosure first, and must allow the time prescribed for disclosure by the other side. Justice Zimmerman noted that a party failing to make disclosure is often exposed to summary judgment because they would have no proof to offer.

At this point, the Committee adjourned for the day.

The Committee considered the Committee notes on the matter of scope and adopted several revisions of the text, including a reference to proportionality.

The draft text of the limitations sections at lines 88-93 was considered and approved. Lines 123-126 were thought to raise a question of change from the present practice with respect to payment of costs of expert time. Judge Pointer noted that the problem is most acute where there is imbalance of resources between the parties. The Reporter called attention to the relation between the merits of cost shifting and the use of the expert deposition at trial. It was agreed to make no change in the present law.

Paragraph (b)(5) was next noted and agreed to.

Paragraph (e)(1) was next noted. Magistrate Judge Brazil wondered whether a large institutional client could deal with this obligation. Mr. Powers questioned whether the continuing duty should be imposed on the parties as well as the lawyers. Judge Stevens asked if there would be a duty on lawyers to inquire from time to time. Judge Pfaelzer thought that

lawyers understand their own continuing duty. Judge Pointer referred to lines 169ff as equating the continuing duty with knowing concealment. The Reporter noted that the duty is imposed on the signer of the disclosure. Magistrate Judge Brazil argued for clarity as to who has the responsibility. Professor Miller observed that there is no doubt that the responsibility falls on both and argued for retaining as much as possible of the familiar language. Magistrate Judge Brazil agreed, noting that otherwise lawyer or client would hide behind one another. Judstice Zimmerman argued against linking the continuing duty to the use of discovery. Judges Bertelsman, Brazil, and Pfaelzer expressed acute concern about sandbagging disclosures and the need for additional pressure on attorneys and parties to come forward with the information to be disclosed. Judge Bertelsman favored an update every six months. Mr. Linder argued for retaining "seasonably," and this was agreed to. It was noted that lines 25-27 also supposed a broad duty to supplement, not an exceptional one as the present rule provides. It was suggested that the continuing duty might be limited to documents and proof existing at the time of disclosure. Judge Pointer suggested retaining lines 163-168 and adding a provision to complete disclosures. Dean Nordenberg suggested a reference back to lines 25-27. It was agreed that lines 152ff would be fit into lines 163ff, and that documents generated after the disclosure would not be subject to the continuing duty to disclose although they might be discoverable.

Judge Pointer raised the issue of lines 170-171 with respect to corrections of depositions. Professor Miller explained the limited duty to correct as a result of the 1970 revision. Mr. Powers noted that lawyers cannot be expected continuously to review deposition testimony with deponents. Ms. Holbrook observed that most depositions are headed for oblivion, and many corrections will result from desire to avoid impeachment. It was agreed that any change in expert testimony should be corrected, but it was agreed otherwise not to require corrections of depositions.

Judge Winter suggested that it be explicit that exclusion should be the normal sanction for non-disclosure. He suggested that the trier of fact should be informed if a document or witness was not properly disclosed, and should be permitted or encouraged to draw an inference from the failure to disclose. The Reporter conceded that there was an overlap between Rules 26 and 37, and it was agreed that the sanctions provision should be set forth in 37, with only a cross-reference in 26.

Magistrate Judge Brazil suggested that the note pertaining to multiple defendants was unclear. Judge Pointer thought the draft provided for a single disclosure to be made to multiple adversaries. Magistrate Judge Brazil thought the note should deal with the disclosure required by late counterclaims and the like. Judge Pointer agreed to revision of the note.

Judge Phillips suggested an inaccuracy in the last sentence of the paragraph dealing with interrogatories. Magistrate Judge Brazil suggested other ambiguities in the proposed note, such as the excessively strong statement of work product protection that may make it more fixed than it is.

The Committee discussed citations in committee notes. Judge Phillips noted that one purpose of the Notes is to guide the profession, but that citations are also helpful in explaining the rules to those concerned with the process of promulgation.

The Committee moved on to Rule 30. Revision will be needed to conform Rule 30 to Rule 26 on the point of beginning. Judge Pointer then asked for responses as to how many depositions should be permitted and for how long. The problem of officers was discussed and it was concluded that parties and officers of parties should not be counted. Judge Bertelsman

asked whether the parties should be permitted to agree to take unlimited depositions, or whether there is a public interest to control that activity. Magistrate Judge Brazil thought that the courts should not police lawyer overuse that wastes client money, if the lawyers agree. Justice Zimmerman noted that the function of the limit is give the lawyers a position from which to negotiate for a control. It was agreed that a party agreement on the issue should be in writing and filed.

The problem of multiple parties was then considered. If each co-party is entitled to a full share, the constraint falls much more heavily on a single adversary. Judge Pointer noted that the proposed Note treated all persons having an identity of interest as a single party for purposes of counting depositions. It was agreed that too firm a rule would lead to odd results in many cases, there being degrees of identity of interest. If litigants have different lawyers, perhaps the presumption should be that they are different sides, each entitled to pursue a separate investigation. Judge Bertelsman observed that if party depositions do not count against the limit, there is an incentive for the plaintiff to join everyone as a party. Judge Pfaelzer noted the obverse possibility of co-directors retaining separate counsel to increase their number. Judge Pointer reminded all that one could get the number increased by motion. Judge Pfaelzer affirmed that she wished to avoid such motion practice. Justice Zimmerman thought the solution might lie in a tougher limit with no exception for party depositions, which might force counsel to make reasonable stipulations. Judge Winter noticed the problem of multiple plaintiffs.

Mr. Leonard reported the local rule to be a limit by "sides," leaving it to the parties to work out the right number, and they generally do. Judge Pfaelzer supported that idea. Mr. Powers thought Mr. Leonard's local rule number (10) was so high as to be of little consequence. Judge Pointer thought the issue to be a minor burden at a 16b conference. Judge Winter thought a local rule controlling the number would be appropriate. Dean Nordenberg thought the number proposed should be low, in part to get a real response from persons commenting on the draft. Justice Zimmerman urged that the rule should be rigid as an incentive to deal so that no one need inquire into who is represented by whom, who does or does not have an identity of interest. Judge Pfaelzer agreed. Judge Brazil wanted the note to affirm that no motion would be entertained without a pledge that the lawyers tried to work it out. He thought the number should be high to avoid political objection. Mr. Womack reported the unanimous view of the ACTL was to support narrower limitations on discovery. Mr. Powers and Judge Pointer emphasized that many cases require very few depositions, and regretted if the rule did not operate in those cases. Judge Stevens supported Magistrate Judge Brazil's concern for lawyer reaction.

Judge Winter adverted to the practical mechanical problem of operating discovery where a party has no absolute right to discover. Ms. Holbrook suggested the filing of a stipulation in multi-party cases at the time of serving notice of the first deposition. Judge Winter thought the carrot of discovery for those who disclose was diminished by the need to secure assent of co-parties. Judge Phillips agreed that the race among co-parties should not go to the swift. It was suggested that the rule might wait for an objection from a co-party. Mr. Linder thought the proposed rule would not work in a finger-pointing defense among co-defendants. Justice Zimmerman thought that difficulties can be worked out by the court if necessary under 16b, and that there was benefit of forcing judges to manage cases in which the lawyers were not working together.

It was agreed that the number should be limited by "side" excluding experts. The number selected was 10.

After a lunch break, the Committee turned to the Rule 11 comments and hearing. Judge Pointer asked if the suggested drafts of the chairman and reporter would be useful to discuss at the hearings.

Mr. Willging, Ms. Williams, and Mr. Eldridge made a progress report on the FJC study of the rule. They reported a heartening response rate for his questionnaire. A brief general discussion of the aims of Rule 11 was stimulated by the discussion of the FJC study of appellate opinions.

The Reporter summarized responses to the Call for comments on Rule 11. Few new issues were raised by the commentators. Judge Winter thought the circulation of a draft was not a good idea, nor a checklist of ideas that might deserve comment. Judge Stevens agreed. Ms. Holbrook thought that they should see one another's comments. It is also possible that the FJC report may be available for comment. Judge Winter expressed the desire to question those appearing.

It was agreed that the chair would appoint a subcommittee to decide who to invite, and that some "experts" might be invited even if they have not previously submitted written comments. Judge Phillips urged that the time and place should be published, even though not all in attendance would be permitted to speak. It was agreed that the hearing should be conducted at New Orleans in February. Committee members were encouraged to attend, but not required to do so as part of its meeting, which would be held immediately following.

The Committee returned to the discovery rules. The question was raised whether the notice of deposition should contain some notion of the subject of the deposition. Judge Pfaelzer and Ms. Holbrook argued against this idea as not congruent with the limitation in the number of depositions, and as a source of dispute at the deposition. The requirement was deleted from the draft.

It was agreed that the notice should designate the means by which the deposition is to be recorded. Magistrate Judge Brazil expressed concern that the court reporter opposition would remain high. Mr. Powers wondered how many depositions would be recorded on a tape recorder. Magistrate Judge Brazil reported his recent mistake in tape recording, to which Judge Zimmerman responded with a report of a botched job by a court reporter. Mr. Macklin reported a high degree of success where a back-up tape is made; Judge Stevens questioned this report.

Judge Winter reminded the committee of his initial concern had been to authorize the use of videotape, and indeed to require it when available. He urged that on no account should his idea be obstructed by opposition of court reporters. Magistrate Judge Brazil reported that he and others routinely grant motions to videotape depositions. Mr. Eldridge noted that six courts are about to use videotape as the official record of trial; this appears to be the law of Kentucky. Judge Pfaelzer reported that lawyers often insist on playing the whole videotape. Judge Zimmerman questioned why the same lawyer would not require reading the whole deposition. She suggested that once the demeanor evidence goes in, lawyers want to show it all. Mr. Macklin emphasized the merits of audiotape. Judge Bertelsman emphasized the recent technology and cost advances in videotape.

The Committee first agreed that the party taking the deposition certainly should be able to use both videotape and stenographic record. The Committee then also agreed without dissent to let the party use non-steno means to record. The Committee next agreed that it was sufficient

to provide a transcript of the parts of the deposition 28 days in advance of trial so that the other party can study whether more of a record needs to be presented. Judge Winter thought perhaps court-reporters should be used to provide a neutral transcript, but the argument was made that the transcript was only an aid to lawyers while the audio or videotape is played for the jury or court. Judge Pointer reported on his successful experience with this system, even in support of summary judgment motions.

The Committee examined and approved with minor textual changes the provisions regulating the performance of the camera person. The Committee also acceded to minor textual changes in the provisions bearing on the correction of deposition transcripts. The Committee discussed the proposed provision bearing on persons in attendance at a deposition and agreed to the proposed draft. It was agreed that the press would be entitled to attend unless excluded by court order.

The committee next considered the proposed time limit on the length of depositions. Judge Bertelsman and others were concerned that timekeeping would become a problem if the rule were too explicit. Judge Winter suggested leaving the length of depositions to the discretion of the court. Judge Pointer thought a rule on length was useful to discourage spinning out depositions. Judge Zimmerman and Dean Nordberg agreed that it created a bargaining opportunity. The Committee agreed that proportionality between direct and cross was not necessary. The Committee considered possible restraints on "speaking objections" that prolong the deposition. Judge Pointer observed that the proposed Note calls attention to possible sanctions for dilatory objections or others not protecting parties' rights. Judge Winter feared micromanagement of depositions. Mr. Powers noted that a rule on length also protects non-party witnesses who may be burdened by excessive lawyer activity. Dean Nordenberg questioned whether the witness's bill of rights in Rule 45 should be revised to protect in this way. Mr. Linder doubted that the length of depositions is commonly an abuse. The Committee agreed to a one-day limit on depositions, applicable to experts and parties as well as others, leaving it to the parties to apportion the time.

The Committee examined and approved the proposed committee notes.

The proposed revision of the process for review of transcriptions were next considered. It was decided not to require witness review, but to authorize it if the witness or party requests. The review process as proposed was not applicable to an audiotape or videotape record. Mr. Linder thought the witness should be permitted to review a garbled record, and the suggestion was accepted. It was decided to allow the deponent to make revisions. Judge Brazil noted that some deponents never testify and should be permitted to correct. Ms. Holbrook thought it better to learn sooner than later if the deponent is going to withdraw a statement made.

Judge Winter questioned whether the attorney should be permitted to retain the only copy of a videotape. Justice Zimmerman noted that the rule presumed that there is another copy, as there always is with respect to the transcript. The question was raised as to whether the Rule 28 person was sufficiently neutral to be the custodian of the videotape. Magistrate Judge Brazil emphasized the importance of having a neutral person keep the audiotape. While this service resembles that of a court reporter, it was considered that the neutral would be less expensive. The term "para-reporter" was used to describe the role. Mr. Womack thought the attorney of record might be a better custodian in some cases than a Rule 28 person at the other end of the country. Justice Zimmerman noted that the Rule 28 person, wherever located, would be obligated to provide copies on request. It was agreed that the parties should be able to stipulate to other arrangements.

The Committee turned to Rule 32. It was agreed that medical expert depositions should be usable. Judge Bertelsman noted that the Kentucky law allowed lawyer and public official depositions to be so used. It was suggested that all Rule 702 experts should be permitted to appear by deposition. Mr. Powers questioned whether the examiner would be prepared to cross an expert on deposition. Judge Winters thought the expert might not be adequately crossed at deposition. Judge Pointer acceded to the addition of other Rule 35 witnesses. It was noted that many experts appear by deposition because of distance from place of trial. If the deposition is to be used at trial, Magistrate Judge Brazil thought the adversary should be notified prior to the deposition. Judge Winters thought the expert's witness should be deposed by the party who hired the expert.

Dean Nordenberg thought that the appearance of the witness by tape was desirable as an economy and might produce a superior trial, but worried that parties might prefer to use depositions to avoid cross-examination. Judge Pointer thought the cross would be adequate if the preview report is properly done. Judges Pfaelzer and Brazil feared that the broadening of the rule to allow other experts might diminish the effectiveness of cross. Magistrate Judge Brazil suggested limiting the exception to treating physicians.

Judge Winter urged that the videotape should be used if available. Judge Pointer argued for discretion to avoid using time in finding the right place on a long tape, noting that the Evidence Rule so provides. It was agreed that the demeanor evidence should be used unless there is a good reason not to, and the Notes should so prescribe.

The Committee turned to Rule 33. It was observed that the 45-day rule would be obsolesced. The number 15 was after discussion agreed to. Magistrate Judge Brazil suggested that the rule should proscribe subparts. Dean Nordenberg questioned the concluding clause of the provision beginning on line 8 of the proposed text and it was agreed that it should be deleted.

Judge Pfaelzer questioned lines 16-18 of the proposed draft. It was agreed that they should be stricken. Other textual clarifications were suggested and made. The Committee discussed the appropriate sanction for non-response to an interrogatory. It was agreed to adopt the "unless relieved by the court for good cause shown" as a limited valve, but otherwise to impose on the slow respondent a disability to make objections to interrogatories.

The Committee next considered the proposed text in line 27 of the draft that would constrain "contention interrogatories" except by leave of court. Ms. Holbrook thought that such interrogatories have a place as a means to discern the nature and content of the adversary's case. Judge Stevens (remembering his law practice) and Mr. Linder acknowledged their occasional use of the device. Judges Brazil and Pfaelzer observed that most interrogatory disputes pertain to this device. Judge Pointer observed that it was a very inefficient device in most cases, although he conceded in some cases it might be justified. Judge Stevens registered a mild dissent. Judge Phillips supported Judge Pointer's proposal. After discussion, it was decided by a narrow vote not to approve the proposal. Further discussion was directed at the timing of such interrogatories, but no additional change was approved.

Justice Zimmerman raised questions about the Notes to Rule 33. Textual changes were approved. Judge Pointer raised the question of possible revision to limit the use of Rule 31. It was agreed that Rule 31 should be synchronized with the revision of Rule 30. It was agreed not to limit the use of Rule 36, it being agreed by most that the use of the device should be

encouraged, although Magistrate Judge Brazil expressed reservations based on a California report.

The Committee moved on to Rule 37. Revision to require consultation prior to discovery motions was approved. Magistrate Judge Brazil questioned whether the language was sufficiently direct to compel real interaction between the lawyers. Judge Phillips and Dean Nordenberg were concerned that the rule no overburden the party needing to get the attention of the court. Judges Pfaelzer and Stevens thought it necessary to require the lawyers to confer, at least by telephone. Ms. Holbrook noted that the requirement can be onerous if one must draft an agreed statement of the facts regarding the efforts to confer. It was agreed to require a conference.

Dean Nordenberg questioned lines 28-29 of the proposed draft. The Committee considered the relation between objections and response to motions to compel answers, and decided not to approve the proposed change.

Judge Pointer pointed to line 41 and noted that "disclosure" should be "non-disclosure." Justice Zimmerman questioned the style of the text. Judge Phillips questioned the term "compel discovery" to apply to compulsory disclosure. Textual modification was made in response to these concerns.

Judge Winter thought that there is a need to impose a sanction on the party who refuses to confer, or on one who refuses to disclose until the motion is made and the paper responding to the motion is due. Judge Stevens supported the suggestion. Justice Zimmerman affirmed that it is routine in Salt Lake City to do as Judge Winter described. It was agreed that a cost should be imposed on the practice of imposing needless motion costs on adversaries. It was agreed to modify the draft to effect that result.

Judge Stevens proposed to eliminate the hearing requirement from lines 36 and 43. It was suggested that the rule refer to Rule 43(e) as a prescription of the kind of "hearing" required. The relation to Rule 78 was also considered. Judge Pfaelzer reminded the Committee that the issue might be a question of sanctions. It was agreed to provide for "an opportunity to be heard," with a reference in the Notes to Rule 78.

Lines 55-62 of the proposed draft were next discussed. Judge Pfaelzer questioned the need to reiterate the harmless error. Judge Winter shared her question. Judge Pointer emphasized the severity of the sanction. Justice Zimmerman questioned the requirement of mens rea. Ms. Holbrook and Magistrate Judge Brazil joined in this concern. Textual changes were made in response to this concern to impose sanctions "unless there is substantial justification." Judge Pointer favored making the exclusion sanction as the sanction of choice when a disclosure is not made, and the committee acceded to the choice of making it presumptive.

Judge Winter emphasized the need for sanctions on the party who fails to disclose material that is harmful to the disclosing party's case. It was agreed that the court would presumptively instruct the trier of fact to take into account the hiding of hurtful evidence, although Ms. Holbrook expressed concern that it would distort the fact finding process. It was noted that the sanction proposed is less draconian than those imposed on persons who fail to call a witness or who fail to respond to discovery.

Judge Pointer asked if there were any research issues for the FJC in the discovery proposals. No one seemed to have any questions to propose.

The draft of Rule 56 was discussed very briefly, and it was decided to consider at the next meeting the draft as proposed. The proposals regarding Rules 54 and 58 were also briefly considered. It was decided not to consider the standard of compensation in the Rule, except to authorize the establishment of local rates. Judge Winter and Justice Zimmerman questioned the power of the committee to modify the lodestar rule. Mr. Willging emphasized the need to provide guidelines if a taxing master is to be used. The Committee considered and rejected the insertion of text to deal with interim fee awards; Ms. Holbrook and Judge Pointer thought such a provision unnecessary.

It was agreed to revise the rules to acknowledge the title of Magistrate Judges, and that change in Rule 73 to make it correspond to recent legislation.

The proposed revision of Rule 38 was considered and approved without discussion. The proposal for Rule 47 was considered and it was decided not to amend the rule. The draft of Rule 83 was discussed briefly. Judge Pointer expressed the view that local rules will have substantive effects; the concern should be for sanctions imposed on counsel for failure to conform and the present proposed draft may go too far.

It was agreed to take up Rule 23 to enlarge the opportunity for mass tort litigation, to provide for defendant class actions, perhaps to specify the fiduciary duties of the class representative, and to consider the ABA Litigation Section report. Mr. Macklin urged moving forward promptly with this.

The mail bag was considered. None of the other items were placed on the agenda. It was agreed that the New Orleans meeting would be held on February 22-23, following the hearings on February 21. The following meeting was scheduled for Washington on May 22, 23 and half day on the 24th, this being midweek.

The meeting adjourned on Saturday at noon