ADVISORY COMMITTEE ON CIVIL RULES

Minutes of the January 12, 1978 Meeting

The Advisory Committee on Civil Rules of the Judicial Conference of the United States met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D. C. The meeting convened at 9:30 a.m. on Thursday, January 12, 1978. The following members were present during the meeting:

Elbert P. Tuttle, Chairman
A. Sherman Christensen
Oren Harris
Shirley M. Hufstedler
Edwin F. Hunter, Jr.
Earl W. Kintner
Walter R. Mansfield
Louis F. Oberdorfer
Bernard J. Ward, Reporter

Others attending the session were, Judge Roszel C. Thomsen, Chairman, and Judge Charles W. Joiner, Member of the Standing Committee; Joseph Ebersole, Deputy Director of the Federal Judicial Center, and Joseph F. Spaniol, Jr., Deputy Director of the Administrative Office and Secretary to the Rules Committee.

Judge Tuttle explained the purpose of this meeting was to decide upon suggested changes in the Civil Rules in order to meet some of the criticism in the discovery area such as the recommendations presented to them by the American Bar Association in their Report of the Special Committee for the Study of Discovery Abuse. The suggested changes made by the rules committee will be distributed

to the bench and bar for comment and reviewed again at another meeting in June with a view toward submission to the Standing Committee in July and if approved, to the Judicial Conference in September.

Professor Ward referred to his paper on proposed changes in the discovery rules which has page references to the Report of the American Bar Association Litigation Section.

Rule 5(d). Service and Filing of Pleadings and Other Papers. The Section Report suggests the rule be amended by adding a provision that discovery papers need not be filed until used. Professor Ward agreed but felt the term "discovery papers" is too broad and recommended "depositions, interrogatories and requests for admission, and the answers thereto" be substituted. He also recommended Mr. Spaniol's suggestion to add "to those methods of discovery" in place of "thereto" explaining that the phrase is also used in Rule 26(a). Judge Hufstedler moved approval of the suggestion and the members agreed.

Professor Ward called attention to an amendment to the California Code of Civil Procedure to allow a person not a party to the litigation to be furnished with a discovery document upon order of court. He drafted a similar amendment to this subdivision should the committee members agree. After discussion, they decided it was not necessary.

He then suggested the fourth line be amended as follows:

> "but, unless filing is ordered by the court on motion of a party or on its own motion, depositions, interrogatories and requests for admission, and the answers thereto, need not be filed until used with respect to any proceeding."

Also, he suggested they explain in the note that the committee intends this to include in response to a person not a party. Judge Christensen moved approval as stated and the motion carried. Judge Oberdorfer requested a reference in the note to notice given when the motion is made by the court.

Rule 26(b). Scope of Discovery. Professor Ward did not recommend the Section Report's suggestion to change the scope of discovery from "anything relevant to the subject matter" to "anything relevant to the issues." He felt this is purely psychological and does not change anything. Their explanation is that it will narrow the scope of permissible discovery and will direct courts not to continue the present practice of erring on the side of expansive discovery. To alleviate this problem, he felt the answer seems to be in the judicial administration of bringing the parties together in a discovery conference. Judge Tuttle agreed that just changing the term for scope of discovery is not enough. Judge Christensen agreed that there is need for provision for a discovery conference and stated that he preferred Professor Ward's suggested language, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the claims or defenses of any party." However,

Judge Mansfield expressed his preference to the Section Draft's language since the purpose of the discovery conference should be to limit the scope of discovery to the issues at hand. Judge Joiner suggested they leave the term "subject matter" for the ordinary case and change the language of subdivision (c) regarding the discovery conference to limit discovery to the "issues" to take care of the problems which arise in the large complex case. Judge Hufstedler objected to the use of "issues" as suggested in the Section Draft as too limiting but added an additional phrase which she felt would not narrow the subject matter (subject to such conditions, if any, imposed in a discovery conference). Judge Mansfield pointed out that this would overtax the judicial resources and not follow the ABA's philosophy to make the lawyers do the work rather than the court. Judge Thomsen then suggested a slight modification of Judge Hufstedler's language as follows: "subject to such conditions as imposed by order of court." Judge Christensen agreed with this addition, however, after discussion it seemed that the members felt this would not give the parties any more than they have now so he moved approval of the language set out in Professor Ward's comments. He further indicated that the ending phrase makes it sound like the court must issue an order, but this could be left open until discussion of the discovery conference. The motion to delete the term "subject matter" and approve the rule as stated on page 4 of Professor Ward's comments was carried. At the

request of Judge Mansfield, Professor Ward was asked to include reference to the ABA draft in the advisory committee note.

Rule 26(c). Discovery conference. Professor Ward indicated he approved of the Section Draft's idea of a discovery conference but he suggested a few changes. Since "joinder of issue" has no modern meaning he recommended it be replaced by "after the commencement of the action." Judge Harris moved approval of this recommendation and his motion carried.

The third paragraph directs the court to enter an order "fixing the issues" at the conclusion of the conference. Since the court cannot fix the issues except under circumstances permitting entry of a partial summary judgment, Professor Ward suggested substituting language from Rule 16. Judge Hufstedler then pointed out that the court should not limit the issues, rather, they should identify the issues for discovery purposes. Judge Oberdorfer moved approval of this and the motion carried.

Judge Hufstedler objected to the wording of subsection (5) as not being strong enough. After discussion, Judge Oberdorfer suggested it be stated as follows: "a statement showing that the requesting counsel has made a reasonable effort with opposing counsel to resolve the matter set forth in the request." Judge Christensen moved approval with the addition of "without success," and his motion carried.

Professor Ward called attention to a letter from the Department of Justice commenting on the Section Draft. They recommended that the Advisory Committee include a provision which forbids all discovery until the responsive pleading is filed or a conference is held. Professor Ward felt the judge already has the power to issue a protective order and this could be mentioned in the note but he did not recommend adding this to the rule. The members agreed.

Professor Ward urged the members not to approve the Section Draft's renumbering of Rule 26 in order to add the discovery conference provision as subdivision (c). He stated that present subdivision (c) is too important and too often referred to to be renumbered. Also, it is hoped that the use of the discovery conference will be restricted to the complex case and therefore he recommended it be added at the end of Rule 26 as a new subdivision (f). Judge Christensen moved approval of this recommendation and the members agreed.

Judge Mansfield called attention to the provision that "the court shall enter an order identifying the issues for discovery purposes," and stated that many comments will probably include objections that this will cause added work for the district judge. Since it is appropriate for magistrates to handle routine discovery matters, Judge Hufstedler agreed with Judge Mansfield's point and stated that reference to this power should be included in the note. The members agreed.

Rule 28. Persons Before Whom Depositions May Be Taken. Professor Ward stated that in addition to the suggested changes by the American Bar Association, Mr. Spaniol pointed out that "dominion" should be replaced by the term "jurisdiction." Professor Ward then explained the purpose of the Section Draft's changes is to break the connection between the oath taker and the person who takes the testimony. Also, to avoid conflict with the title he suggested the addition of the following sentence at the end: "It is not necessary that the officer or person appointed remain at the taking of the deposition after the witness is put on oath, if the recording of the testimony is to be performed by another person." The members agreed except for the last phrase which they felt was too cautious. Judge Joiner felt they should reconsider this. He pointed out that the last sentence of the present rule is necessary for the court to have this power. Instead of deleting the provisions of this sentence as suggested by the ABA Section, Professor Ward suggested adding, "to administer the oath" after "specially appointed." Judge Hufstedler asked for a typed redraft after lunch. Professor Ward suggested "initiated" be included in the title, however, by eliminating the Section Draft's use of the term and going back to the original term "taken" it was agreed that the title is correct. The following language was approved:

> (a) Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person specially appointed to administer the oath by the court in which the action is pending. It is not necessary that the officer or person appointed remain at the taking of the deposition after the witness is put on oath.

Rule 30. Depositions Upon Oral Examination.

Subdivision (b). As a result of earlier discussions, Professor Ward stated the committee had approved of the Section Report's amendment to this subdivision to provide for the taking of testimony by telephone and amendment to provide for the taking of testimony by other than stenographic means before a court order. With regard to their proposed addition of a new paragraph (7), Professor Ward indicated that the cross-reference to Rule 45(d)(1) refers to the place in terms of the district, however, Rule 45(d)(2) fixes the place within a given district at which a witness may be compelled to submit to a deposition. Therefore, he recommended the cross-reference be to Rule 45(d) and that there be inserted after "district" the words, "and at the place." The Committee agreed.

Subdivision (c). Professor Ward stated that the changes proposed by the Section to reflect the fact that the officer who administers the oath is no longer to preside at the deposition, would eliminate the present second sentence. However, in doing so they have eliminated the oath require-

ment which is inconsistent with Rule 28. Therefore, Professor Ward recommended use of "The officer or person described in Rule 28 shall put the witness under oath." The member agreed.

The Section Report would add "upon the payment of reasonable charges therefor" to the end of the fourth sentence "If requested by one of the parties, the testimony shall be transcribed." To make this more explicit, Professor Ward suggested they include the words, "by the party making the request." Judge Mansfield moved approval and the motion carried.

The Section Report would change the final sentence of subdivision (c) to eliminate the use of the sealed envelope. Professor Ward recommended that the Committee not approve this change. After discussion it was suggested that the note to Rule 28 include a reference to this rule if there is a reason for the officer to remain.

Subdivision (e). Professor Ward explained that the Section Report proposes a number of changes. First of all, the introductory clause of the first sentence is lengthy and unnecessary. The rule means that if the transcription or recording thereof is to be used at any proceeding in the action such transcript or recording shall be submitted to the witness for examination, therefore, he recommended starting the rule that way. To avoid difficulty with the depositions, Judge Christensen stated they could require that every deposition be shown to the witness by deleting

the first phrase. The members agreed, but Judge Joiner had reservations as to whether this would change the law. Professor Ward pointed out that the Section Draft omits the language of the present rule, "the reasons, if any are given" for refusal by the witness to affirm. The members agreed that it should not be deleted. Judge Hufstedler suggested the phrase, "The witness shall affirm in writing" be changed to "The witness shall state in writing" to avoid confusion. The members also agreed.

Subdivision (f)(1). Certification; Exhibits; Copies; Notice of Filing. Professor Ward explained that the Section Report rewrites this subsection to transfer the duty of certifying as to the oath and the record to the stenographer or recorder operator from what is in the present rule. They require this certification under penalty of perjury. Professor Ward recommended that this be deleted. It was felt that the act of certification is enough. Professor Ward also recommended deletion of the last sentence regarding the deposition being considered prima facie evidence in the Section Draft because he felt it seemed to favor the stenographic transcript. After a brief discussion it was agreed to accept the ABA draft with the modifications recommended by the Reporter.

Professor Ward stated that the Section Draft proposes no major change in the rule but offers changes which they

feel are for clarification with respect to the marking, copying and retention of exhibits. Professor Ward pointed out their provision for affording each party an opportunity to make copies stating that he could see no justification for such a change in the present practice. Since the present rule is ambiguous in that it does not explain that if the witness offers copies they are to be regarding thereafter as originals, Professor Ward drafted revised language. Judge Hufstedler agreed that the ABA draft is awkward and requires more paper keeping than necessary. Her motion to approve Professor Ward's revision carried.

Rule 31. Depositions Upon Written Questions.

Subdivision (b). Officer to Take Responses and Prepare Record. Professor Ward explained that in trying to do away with the amount of discovery material which has to be automatically filed the Section Draft eliminates the officer's duty to file depositions upon written questions and strikes subdivision (c). Professor Ward felt this could complicate matters and could be costly. Since Rule 31 depositions are not frequently used and are usually not bulky, they cause no problem to the clerk's office and he recommended no change in the present rule. The members agreed. He also pointed out that he would have to include a clarifying change to Rule 5 as follows, "except as provided in Rule 31."

Rule 32. Use of Depositions in Court Proceedings. Professor Ward stated he felt two technical changes are necessary in this rule because of changes which have been

made in the discovery rules generally. This represents an overview of Rules 26 and 37. In the past a prior inconsistent statement could be used only to impeach and could not be used as substantive evidence. Now that the Rules of Evidence have been enacted, they provide that if the former statement was made under oath and is inconsistent it can be used as substantive evidence. Therefore, Professor Ward stated that immediately following this paragraph they should include the words, "authorized by the Federal Rules of Evidence." Judge Christensen questioned whether there is reference in the Evidence Rules to these depositions. Professor Ward suggested they may want to discuss using the term permitted rather than authorized because the evidence rules permit this procedure but do not specifically authorize it. Judge Hufstedler moved approval of the addition of "for any purpose permitted by the Federal Rules of Evidence" at the end of subsection (1) and her motion carried.

Professor Ward then recommended the deletion of "has been dismissed" from the second paragraph of Rule 34(a)(4) because the requirement that a prior action have been dismissed before depositions taken for use in it can be used in a subsequent action is pointless. The members agreed.

Professor Ward explained that in lines 4 and 5 the requirement of the present rule that the earlier action must have been between the same parties is not literally followed and the Evidence Rules have been changed. Now they do not

require, as the present rules does, that the party seeking to use the testimony have been a party to the prior action. Therefore, he suggested amending these lines as follows: "and when an action has been brought in any court of the United States or of any State and another action involving the same issue..." thereby adding "has been brought" and deleting, "has been dismissed." He also indicated the addition of a new sentence at the end as follows: "A deposition previously taken may also be used as permitted by the Federal Rules of Evidence." The members agreed but discussed the use of the term "issue." Judge Hufstedler moved that they ask the Reporter to draft language to include the concept of the word "issue" and that they approve the other modifications suggested by him. Her motion carried.

Rule 33. Interrogatories to Parties. Professor Ward called attention to the Section Report which changes the law as written 40 years ago to limit the number of interrogatories to 30 except upon a showing of necessity. He pointed out that their reason given in their comments refers to results of the Committee's questionnaire that Rule 33 causes the most discovery abuse. He expressed doubt about the reference to 30 questions and suggested they circulate an alternative draft to accompany the substance of the Section's proposal. In lieu of fixing the number of interrogatories he suggested: "A district court may by rule or order, limit the number of interrogatories that may be used without leave of court."

Judge Hufstedler stated she agreed with Professor Ward's recommendation to leave this permissive in order to obtain the national experience and she moved approval. Judge Tuttle asked if the Committee preferred that this be restricted to "by rule" rather than "by order" which means it would be desirable to have the district court adopt a standing rule specifiying a common limitation. Judge Christensen pointed out that in many districts the judges could never agree on this type of order and he suggested they change the language in order to key it to the discovery conference. Professor Ward pointed out if they agree that a discovery conference can result in a limitation of the nubmer of interrogatories this should appear in the note to Rule 26. Judge Christensen expressed disagreement with the suggestion to delete reference to order. He felt that if they say the number of interrogatories can be limited only by local rule that would mean that every judge would have to agree upon a local rule before a limitation could be accomplished in a particular case involving discovery. Mr. Kintner expressed his understanding of the proposed language as including a remedy and Judge Tuttle's problem could be taken care of in the note by explaining that the Committee feels it is desirable in the case of multi-courts to have a standing rule specifying a common limitation. Professor Ward pointed out that if they are going to delete, "the court" they should use the language of Rule 83 as follows: "Each district court

may by action of the majority of the judges thereof, limit the number of interrogatories that may be used without leave of court." Judge Christensen disagreed stating that if there is a limitation by local rule this may suggest that the judge has no power to change that limitation. He suggested the language include by rule or order in a particular case and provide for this in the discovery conference provision. Judge Hufstedler felt this is taken care of in the note. Judge Thomsen agreed that there should be reference to the rule in an individual case. Judge Hufstedler withdrew her original motion and restated it to approve the language on page 22 of the comments and modified by Professor Ward to follow Rule 83 accompanied by a note that nothing in this formulation prevents the district judge in an individual case from writing a specific order either raising or limiting the number of interrogatories that may be used without his leave in any particular case. Judge Thomsen felt the use of "court" in two places was ambiguous. After discussion, Judge Tuttle suggested a small style committee work on this with the Reporter. Judge Hufstedler's motion carried. Judge Christensen voted against the motion and suggested they revise Rule 26 to include a limitation of the number of interrogatories in Rule 33 because he felt the note as stated would not cover the problem. Judge Christensen's motion lost but Judge Tuttle stated this could be discussed again when the comments come in from the bench and bar.

Rule 37. Failure to Make Discovery: Sanctions. Professor Ward agreed with the new subdivision entitled, "Additional Sanctions" as proposed by the ABA Section Report. He explained it authorizes the imposition of sanctions, including reasonable expenses and attorneys' fees for failure to cooperate in connection with the new discovery conference proposed and for abuse of discovery generally. Rather than relettering the present subdivisions (e) and (f), he suggested that subdivision (e) be eliminated since it is covered by Rule 45 and is inappropriate in this rule. Judge Hufstedler moved approval and her motion carried.

Judge Tuttle appointed Judge Hufstedler as a subcommittee of one to work with the Reporter on style matters.

Professor Ward stated he would include in the draft for submission to the bench and bar amendments to Rules 4, 45 and 81 which had been approved for circulation at the last meeting. In addition, the members had approved a new subdivision (e) to Rule 23 that authorizes the district judge in making the determination under subdivision (b)(3) whether the class action is superior to the other available methods for fair and efficient adjudication of the controversy to consider whether the possible interests to be secured by the class would be worth the time and trouble. Judge Hufstedler strongly favored sending nothing on Rule 23 to the bench and bar now. If an explanation is needed they

could point out that the Committee has worked on recommendations but circulation is awaiting action by Congress or the Department of Justice, and she would rather not circulate anything on Rule 23 and make no mention of it. Mr. Kintner expressed his agreement. The other members concurred. Judge Tuttle pointed out that they must report to the Standing Committee regarding the status of Rule 23 so that they could in turn report to the Judicial Conference.

The meeting adjourned at 5:00 p.m.