MINUTES OF THE FEBRUARY 1965 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

A meeting of the Advisory Committee on Civil Rules was convened in the Supreme Court Building on February 25, 1965, at 9:40 a.m. for the purpose of considering the topic of DISCOVERY. The following members were present during the session:

Dean Acheson, Chairman
George Doub
Shelden D. Elliott
John P. Frank
Abraham E. Freedman
Arthur J. Freund
Albert E. Jenner
Charles W. Joiner
David W. Louisell
W. Brown Morton, Jr.
Louis F. Oberdorfer
Roszel C. Thomsen

Benjamin Kaplan, Reporter
Albert M. Sacks, Associate Reporter

Judge Charles E. Wyzanski, Jr., was unable to attend the meeting.

Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Professor Charles Alan Wright, member of the standing Committee on Rules of Practice and Procedure; Will Shafroth Secretary

to the Committee on [illegible] and [illegible] Professor Maurice Rosenberg and Miss [illegible] representing the Columbia University Law School for the Project for Effective Justice and William W. Foley Deputy Director and Joseph F. Spaniol Jr. Administrative Attorney of the Administrative Office of the United States Courts.

The meeting was called to order by the Chairman Honorable Dean Acheson, and the first order of business was the presentation of the Columbia University study by Professor Rosenberg. The Chairman was unable to be present for the full day and Judge Thomsen presided during his absence.

Professor Rosenberg introduced the study entitled "Field Survey of Federal Pretrial Discovery" and gave a general description of how it originated and what their sources of information were. He stated that discovery rules are supposed to prescribe norms of action with regard to the interchange of information between the parties of a civil litigation

and the federal courts and try to regulate disputes that may arise in the course of this interchange. Each member had been furnished a copy of the report prior to the meeting.

The Committee discussed the following agenda items during the session:

RULE 37 - Refusal to Make Discovery: Consequences (Topic II- page II-1 of the Deskbook)

Professor Sacks stated that he felt this rule should be discussed on the assumption that the other rules would remain as they are and in its relationship to the existing rule. He stated that the general framework of the rule is that it distinguishes first between sanctions for violation of a court order and sanctions for a refusal to make discovery where there is no court order. Rule 37(c) and (d) deal with the situation where there is no court order. Rule 37(c) being limited to the request for admission problems under Rule 36 and 37(d). Rule 37(b) deals with impositions of sanctions where you have a court order and includes the problems that may arise under Rules 34 and 35 where you must obtain a

court order before you are entitled to any discovery in the absence of any informal agreement and in connection with partial noncompliance with deposition requests or Rule 33 interrogatories. He placed subsections (a) and (b), as drafted in the Deskbook (pages II-2 and II-3) before the Committee for discussion. One point raised was why Rule 37(a) began with "If a party or other deponent" while 37(b)(1) began with "If a party or other witness." After lengthy discussion of these sections, the Committee asked the Reporter to draft another revision in consideration of all suggestions from the floor and which would include jurisdictional limitation.

The next topic for discussion was the Reporter's draft on page II-12 of the Deskbook concerning "The Confusion Between 'Failure' and 'Refusal'". Professor Sachs pointed out that in (b)(1) and (3) it should be clear that the way the proposal now reads is to provide for (b)(1) sanctions by the court in the district where the deposition is taken

The language remains the same insofar as the reference to the court. It is a reference to the court where the deposition is taken and continues the language of contempt. In (b)(2) the caption is changed to read "Sanctions by Court in Which Action is Pending" and is limited to the court where the action is pending in the existing language and would assume that in doing it this way that the language referring to an order directing the arrest of any party or agent of any party was the equivalent of the contempt and it would be a duplication to put it in somewhere else.

It was suggested that the clause "court in which the action is pending" should be placed in (b)(1). Professor Sacks stated that 37(b)(1) refers to the court in which a deposition is taken and does not refer to the court where the action is pending in the present language. 37(b)(2) refers at present to the court where the action is pending and does not refer to the court where the deposition is being taken. He further clarified this to say it is with reference to the party. Rule 37(c) includes a reference to

refusal in (a) a reference to refusal in (b) and reference to refusal in (c) but in (d) there is a reference to failure and to wilful failure in one place and to ordinary failure in another although this has been interpreted to refer to wilful failure in both. Professor Sachs stated that the various references to refusal and failure have caused some courts in the past to think that there was some distinction between the various terms and they had tried to find one meaning for refuse and another meaning for fail. He felt that in order to bring this section into harmony with the Societe case and eliminate any further possibility of judges being confused by seeing different words used in the different places that the proposal substituted the word "refusal" or "refused" for the words "failure" or "failed".

Judge Thomsen called for a vote of the Committee on whether to accept the wording of the Reporter for subsection (c) by retaining the word 'fail' and not adding the words 'or refused." The motion carried by a vote of 8 in favor and 2 opposing the motion.

[illegible] suggested that [illegible] be substituted in subsection ( ) [illegible] the words "there were good reasons for" [illegible] suggestion was accepted by the Committee.

[illegible] that for Rule 7.1(d) there was a series of related suggestion [illegible] desirable to bring in the problem of costs. [illegible] section. After lengthy discussion [illegible] to have the word "wilfully" stricken and [illegible] adequate excuse." It was further [illegible] that the Reporter should redraft this section putting heavy emphasis with weight on the financial sanctions and submitting it to the Committee for approval.

Subsection (f) - Expenses Against United States was discussed and the question was raised as to expenses to be imposed on the United States in such litigation. The suggestion was made that a draft be submitted by the Reporter to Mr. Oberdorfer to study by the Department of Justice. This was mutually agreed upon by the Committee members.

Proposed Subsection (h) - (Rule 37(c): Sanctions to Enforce a Request to Admit) (Page II-20 of the Deskbook)

Professor Sacks explained the important point, stating that it makes it explicit that the sanctions imposed under Rule 37(c) would apply as well to the case of a party who, having been served with a request for admission, fails to admit and gives reasons why he may not deny or admit. This proposed subsection was discussed fully and it was moved seconded, and approved that the Committee adopt in principle the Reporter's suggestion for this section but to keep in mind the problem of overlapping relative to sanctions but in so doing not to create a more serious problem.

Meeting recessed at 5:10 p.m.
Reconvened at 9:40 a.m. - February 26.

The session was called to order by the Chairman and the first topic for the day was the discussion of Topic III - The Mechanics of Applying for Judicial Decision of Discovery Disputes: Some Proposed Changes (pages III-2 of the Deskbook). Professor Sacks outlined the basic facts in

his memorandum and stated that he was trying to deal with the mechanics by which requests or demans to discovery are made and either responded to, objected to, and then to the extent necessary to the ~~later~~ latter problem of applying for judicial resolution of any disputes that arise.

Discussion was heard on the redraft of Rule 33, Interrogatories to Parties, and a suggestion was made that in line 11 it would be better to insert the words "shall be stated" instead of the phrase "objections thereto may be stated in lieu of an answer." Also in lines 12 and 15 whether the word "or" should be deleted and "and" used therefor. The point was brought up that in line 11 the language is inevitable and can be interpreted as not requiring the reason for objection to be stated. It was suggested that in line 11 the phrase should be reworded to state "the reason for the objection thereto shall be stated in lieu of an answer."

The matter of whether the interrogatories themselves should allow reasonable space for the answers on the certified copy to eliminate un-

necessary clerical work was discussed. The question was raised as to whether this should not be left to local rule instead of Federal rules spelling out all the details. The consensus of the Committee indicated that insofar as possible only one piece of paper should be required. The matter of supplemental interrogatories was also discussed.

The question arose as to the 30-day period for the service of interrogatories. Upon motion of Mr. Doub, a test vote was taken and it was approved the the limitation of 30 days for this rule should be imposed.

Question was raised concerning line 7 where it provides "if service is made by the plaintiff within 10 days after such commencement leave of court * * * must first be obtained." The Committee felt that since the Committee had agreed upon 30 days for the service of interrogatories that the necessity of having any limitation at this point should be eliminated.

The matter as to the 30-day period for the service of answers or objection at line 22-24 was discussed. It was decided by the Committee that this should be left more flexible because of the burden it would impose on large institutions and that 30 days should not be stated. The Committee also decided that the first portion of the sentence beginning with the word "Within" on line 22 should be stricken through the word "court" so that the party may move anytime. The revised sentence will read:

> "The party who submitted the interrogatories * * *
> that answers be served."

It was further agreed that costs should be brought into Rule 30(b).

The Committee moved that in general principle the draft of the Reporter for this rule be approved but that the Reporter will consider the draft again in line with the discussion of this meeting.

Rule 34 - Discovery and Production of Documents and Things for Inspection, Copying, or Photographing (Page III-14 of the Handbook).

Professor Jacks explained the proposed redraft and stated the

and stated the problem [illegible] primarily because Rule 34 as it reads now, requires a motion before inspection of documents and other things can be obtained and that means that you have a judicial proceeding contemplated from the outset. He stated that the proposed revision of this rule has been drafted with a view to maintaining all of the "substantive" provisions of Rule 34 exactly as they now are, except for a change in the mechanics of discovery. Its purpose is to isolate those changes required by the shift in mechanics.

The terminology of lines 21-26 was questioned and a suggestion was made that the paragraph apply only to a situation where there is a refusal. Another suggestion was made that the draft should permit testing, permit this device for nonparty persons, inasmuch as relatively few cases come to court. Some of the members were opposed to the draft as they thought that a working rule was being changed to something that may be completely unsatisfactory.

It was the consensus of the Committee that the problems of this rule are mainly the issues of scope and procedural issues and that it was not feasible to resolve these at this meeting. The rule was tabled for further discussion at a subsequent meeting.

RULE 35 - Physical and Mental Examination of Persons (Page III-16 of the Deskbook)

Professor Sachs stated that he did not feel any particular changes in the mechanics of this rule was needed. He further stated that any change in the mechanics would result in objections that (1) there is no indication that a party would save any judicial time (2) would require a rather complex statement of the revised rule on an extrajudicial basis and (3) this is an area which the Supreme Court has indicated as one of special concern with respect to the privacy of persons. The Committee by consensus of opinion, agreed that no change in mechanics is necessary in this rule at the present time.

RULE 36 - Admission of Facts and of Genuiness of Documents (Page III-17 of the Deskbook)

Professor Sacks stated this rule is very similar to Rule 33 in many respects, and that many of the changes discussed at this meeting for Rule 33 would be appropriate for this rule. He touched on the problem of inadequate admission which is not provided in the present rule but does cause difficulty. The Committee decided to delay discussion on this subject.

TOPIC IV - Order of Discovery - The Priority Problem (Page IV-1 of the Handbook)

Professor Sacks briefed the Committee on the problems for subsection (b) of Rule 30. Afterdiscussion, the Committee approved the following additional paragraph for this subsection subject to the fact that the Reporter shall redraft the first sentence to make clear that the party has no authority to delay any other party's discovery:

"Unless the court orders otherwise, the fact that a party is conducting discovery by deposition or otherwise

shall not justify such party in delaying any other party's discovery. The court may regulate at its discretion the time and order of taking depositions and of any other discovery required to be made under these rules in such manner as shall best serve the convenience of the parties and witnesses and the interests of justice."

Topic V - Rule 35 - Physical and Mental Examination of Persons (Page V-1 of the Deskbook)

Professor Jacks stated that what had been said about the mechanics of Rule 35 could also apply to Rule 35.

After discussion of this rule in conjunction with the Schlagenhauf v. Holder case, Mr. Acheson called for a vote as to how many would be satisfied with the Illinois Rule which leaves out agents and servants and includes persons in custody and employees. The vote was divided and after further consideration Mr. Frank suggested that the Committee

contact lawyers in different states who are actively in this practice as to whether they feel abuses of this rule are occurring. This suggestion was agreed upon and Professor Sacks was told that the members would help him in this endeavor.

Professor Rosenberg told the Committee that he would prepare a mimeographed list, for distribution to the members of the matters he is working with and would appreciate suggestions from the members.

There being no further business the meeting was adjourned at 5:00 p.m.