ADVISORY COMMITTEE ON THE CIVIL RULES

Minutes

April 27-29, 1989

The meeting was called to order by Judge Grady on April 27 at 9 AM. Judge Stephens absence was noted with regret. Ms. Harvey of the local District Court staff was introduced as the person assigned to serve as staff to the Committee. Joe Womack, Esq. was recognized as the representative of the American Trial Lawyers Association.

Judge Grady reported on his testimony before a subcommittee of the House Judiciary Committee. He cautioned that Mr. Kastenmeier had expressed concern that the Committee not overstep the line between substance and procedure and had been given assurance that the Committee would be sensitive to this concern. Judge Grady expressed his concern to Congressman Kastenmeier regarding legislative intrusions on the Rules and was assured that the House was opposed to such interventions.

The minutes of the November meeting were approved. The Committee discussed the problem of minute-taking and agreed to leave the responsibility for the minutes with the Reporter without direction to elaborate the minutes beyond what has been the custom of the Committee, it being the sense of the Committee that it would be undesirable to create another level of legislative history to be explored by persons seeking to understand the text of the rule. It was also the sense of the Committee that negative actions of the committee should be recorded.

Discussion was conducted of the transmission of materials. It was agreed that we should aim to have materials as much as two weeks in advance, and that it would be desirable to have some copies on hand at the place of the meeting so that all members would not be required to bring their copies to the meeting.

Judge Weis reported on the activities of the Standing Committee. Judge Grady reported on the presentation made to that Committee on behalf of the Civil Rules Committee.

Rule 4 was discussed in light of the Standing Committee suggestions. The Committee accepted the suggestion of the

Standing Committee that the Rule permit service according to the law of either the state in which the court sits or the state in which service is effected. The Committee discussed the provisions of the draft Rule bearing on service within the United States on a foreign citizen and made minor textual changes in that provision. With these changes, the present draft was approved for publication.

Rule 15 was discussed in light of the Standing Committee's reaction to the Civil Rules Committee draft. It was decided not to strike the language in subdivision (c) that the Standing Committee had invited the Civil Rules Committee to delete. The present draft was therefore approved for publication.

Rule 45 was discussed in light of the Standing Committee's reactions to the previous draft. The problem of the length of travel required of a subpoenaed witness was reconsidered. Minor textual changes were made, but the Committee approved retention of the requirement that a non-party witness travel within the state.

A suggestion from the ACTL regarding the person who produces documents when no deposition is required; it was agreed that the rule should be explicit that no personal appearance is required when documents only are subpoenaed and that the provision should be relocated. The Reporter was directed to re-draft for later presentation at this meeting.

Next discussed in respomse to a comment from the ACTL was the problem of compensation of the non-party witness experiencing substantial expense in complying with the subpoena. The Reporter was directed to reconsider the text presented in light of the language of Rule 26(e), and to present another draft for approval on 4/29.

The question was next raised by Judge Pointer as to who is a non-party governed by Rule 45 rather than the discovery rules, Rules 26-37. The Reporter was directed to reconsider this problem in light of the discussion which tended to favor substitution of the term "person" for "non-party."

Another problem raised by ACTL is a concern for the timeliness of notice of a pretrial subpoena of documents. It was agreed that "effective prior notice" should be required. Finally, the ACTL proposal that enforcement of the new protective provisions be discretionary rather than

mandatory; this proposal was rejected subject to reconsideration in the light of any revision of Rule 11.

Magistrate Brazil asked whether the court enforcing the subpoena should be permitted to refer issues back to the issuing court. The Committee resolved not to amend the draft to so provide.

Judge Grady returned to the problem of statewide reach of the subpoena power to raise the issue of the applicability of state law in diversity cases. The discussion left the text substantially as it had been presented.

The proposed revision of Rule 32 bearing on the use of videotaped depositions was presented and discussed. This proposal was rejected.

The proposed revision of Rule 30 was viewed more favorably, but the Committee made numerous changes in the suggested draft. The requirement of a stenographic recording would be eliminated. It was agreed that the party noticing the deposition should be permitted the choice of the means of recording, and other parties should be permitted to use additional means of recording if they want. It was agreed that provision should be made for the witness to review the videotape, but the requirements of subdivision (e) should be relaxed with respect to the signature of the deponent. The possibility of giving priority to videotape as the official transcript when available was discussed, but it was decided to leave this issue to resolution pursuant to F. R. E. 611.

In light of the discussion of Rules 30 and 32, the Reporter withdrew the draft of Rule 43 from the discussion agenda.

Discussion moved to the draft revision of Rule 50. It was agreed that the elimination of the present terminology and anachronisms would be a positive step. It was agreed that the post-verdict motion should not be granted against a party who did not have notice of a specific deficiency in that party's proof, there being a trap for the unwary either way. It was further decided that such notice should take the form of a motion prior to submission, even if the moving party did not want the motion granted. There was then a question whether anything should be done with the rule. It

was decided to reconsider the rule in the light of the discussion of Rule 56.

Rule 5 was discussed with respect to the proposals of the Local Rules Project and of the New York State Bar. It was decided to authorize the use of fax; the change was recognized as requiring additional textual changes. It was decided not to amend the filing provisions of subdivision (d). Textual changes were suggested for the sentence to be added to subdivision (e).

The meeting was adjourned for the day at 5:25 PM.

On April 28, the Committee first took up the draft of Rule 56. The central idea of the proposed draft, to stimulate the use of the establishment of law or fact was approved. Its relation to Rule 16 was discussed. The limitation to situations in which the motion to establish is invited by the court was deleted. The words "genuine issue of material fact" were restored to the rule. Textual changes were made in several sentences in the draft. It was decided to stick with the term "establishment" in preference to other suggested terms. The provisions for summary establishment of law and fact were relocated as subdivision (a). It was decided to delete the clause providing explicitly for modification of an order establishing law or fact and the reference to Section 1292(b). The language of Rule 16(e) was borrowed to define the formality required for an order of establishment. Draft subdivision (d) was stricken.

The text of Rule 56 was revised to make it clear that a motion for summary judgment can be made simultaneously with an establishment motion, and that summary judgment may be an appropriate action at pretrial or in response to a Rule 12 motion, or perhaps in other circumstances. Text was added to make it clear that the court need not consider any material other than that presented to it by the parties. The text of draft subdivision (e) to extend the requirements of admissibility applicable to material submitted on a motion of the rule. It was agreed that a party should be assured a reasonable opportunity to use discovery with respect to issues surfacing in a Rule 56 motion, even though there had previously been ample opportunity for general use of the discovery rules. It was decided to retain the provision for compensation for the use of false affidavits.

Judge Weis reported on the Federal Courts Study Commission. An item bearing on the work of the Committee is the widespread dissatisfaction with local rules, a matter presently under consideration by the Standing Committee.

The Brookings-Senate proposal regarding early trial dates was next considered. It was agreed that the discovery schedule set pursuant to Rule 16 is linked to early trial dates, but that the scheme conflicts with Congressional policy embodied in the Speedy Trial Act. It was also agreed that early dates are no better than the commitment to stick to the date once set. All deplored the practice of requiring lawyers to stay ready for extended periods, or to change a date of trial once set. The plan was tabled pending further advice from Senator Biden or others interested in the matter.

The Committee also considered the proposal of the Local Rules Project to set a discovery period in Rule 16, as some local rules do. It was decided that this proposal was subject to the same objections as the Brookings suggestion.

Rule 50 was next discussed, the Reporter presenting a draft based on the previous day's discussion. It was agreed to unify directed verdict and judgment nov under the rubric "judgment as a matter of law." It was agreed that such a motion should be considered at any point in the trial, and that Rule 16 should be amended to encourage a schedule for trial that reaches first those issues on which a party seems likely to lose the case.

The two sentences beginning on line 18 of the draft presented were deleted. It was agreed to allow the court to enter judgment as a matter of law without a motion having been made. The Committee struggled with language to express economically and efficiently the requirement that the post-verdict motion can be made only as a renewal of a pre-verdict motion.

The requirement of pre-verdict submission, it was recognized, appropriately applied only to jury cases. This led in due course to the decision to limit the rule to jury cases. It was, however, also recognized that Rule 41 was an unsuitable vehicle for parallel treatment. The Reporter acknowledged that the overlap with Rule 41 had been disregarded in the hope that it would cause no difficulty. The Reporter was directed to reconsider this aspect of the issue with respect to possible revision of Rule 41

(including deletion of much of subdivision (b)) and to consider a possible revision of Rule 52 to deal with the non-jury problem.

It was decided that Rule 16 should be revised to reflect the changes in Rules 50 and 56, but action under 56 should not be restricted to "final" pretrial conference, although concern was expressed that Rule 16 is too elaborate and too long. The Rosenberg principle favoring "lean and hungry" rules was advocated, but it was concluded that persons attending pretrial should be forewarned about possible uses of new provisions of Rules 50 and 56.

Discussion centered on the time for the discovery schedule to be set. The relation between this subdivision of Rule 16 and Rule 4(j) was considered. It was decided to change the time to 60 days after appearance of a defendant.

The proposed revision of Rule 59 was deemed unnecessary.

Rule 11 and the related ferment was discussed. It was agreed that the Committee should not sponsor a conference on the rule at this time.

Rule 54(d) was discussed. Several problems were raised and it was agreed that it could not be polished in time to be included in the present package of proposals. In particular, the Committee was unable to resolve the issue of the effect of the fees motion on the appealability of the judgment. It was argued that the determination of fees should normally be reserved until the disposition of any pending appeal regarding the merits. The proposal with respect to Rule 58 was tabled because of its relation to Rule 54. There was a sense that the outcome for clients should not be delayed while the lawyers are taken care of. There was also a sense that backup materials for the motion should be provided separately and later. This rule should not apply to fee claims that are part of damage claims. The Committee was uncertain about the right to hearing. It did not desire to prevent some judges from imposing more rigorous standards than those embodied in the draft.

In light of the plea of Judge Clark on behalf of the Judicial Conference to avoid the appearance of extravagance, it was decided to have the next meeting in Washington on November 17-19. It was contemplated that the Committee

would then have comments on the present package of proposed amendments and could sign off at that time.

A revised draft of Rule 45 was presented, using the word "person" in subdivision (c). It was decided to revise the text to give additional assurance that the rule does not qualify notice provisions bearing on party depositions. Other textual changes were effected bearing on the compulsion to attend trial and compensation for travel related to that compulsion. It was decided that the language bearing on assertions of privilege should be included and should also be added to Rule 26. Textual changes were made in the language proposed to clarify the disclosure required with respect to the names of persons whose relation to the communication might have compromised the privilege. The text was also modified to make it clearly applicable to claims of work product protection. The provisions pertaining to oral and written communications were separated. With these changes, revised Rules 45 and 26 were approved for publication.

It was decided to retain the provisions of Rule 26(f), although it was acknowledged that there is considerable overlap with Rule 16, because this rule gives the lawyer an entitlement to cabin discovery.

A revised draft of Rule 30 was presented. Revision was effected to assure prior notice of the videotape deposition. Subdivision (e)(2) was elaborated. The manner of filing the deposition was made subject to local court rule. With other textual modifications, the draft was approved for publication.

Rule 50 was again considered in light of a draft reflecting previous discussions. Textual changes were made to clarify the time for making the motion and to be explicit with respect to the problem of judgment entered after the jury has hung. The period for filing the motion was set to run from the date on which the jury was discharged.

Rule 11 was discussed again. It was noted that the anger level in the bar is high. It was again noted that the criticism is impressionistic. It was also observed that the furor is different than that bearing on Rule 23 in 1966 with respect to the number and identity of persons involved. It was also urged that the Committee should strive to be sufficiently receptive to the concerns of others that people

will not generally think it necessary or desirable to go to Congress for help.

Returning to Rule 50, after further discussion and editorial revision, the draft was approved for publication. The proposed revision of Rule 52 to add subdivision (c) parallel to Rule 50 was also approved with minor textual change. And it was agreed to strike two sentences from Rule 41(b) that would be replaced by Rule 52(c).

The proposed revision of Rule 14, which came from the Local Rules Project, was considered and approved for publication, with the words "on request" deleted.

The proposed revision of Rule 24 was approved for publication.

The proposed revision of Rule 33 was tabled for further consideration at the next meeting.

The proposed revision of Rule 38 was approved for publication.

The proposed revision of Rule 51 was approved for publication.

The proposed revision of Rule 53 was approved for publication. The note was corrected to recognize that a master is not a magistrate. Textual changes were made in the draft to assure power in the court to relieve the master from having to transmit a huge report to large numbers of parties.

The proposed revision of Rule 37 was considered, but difficulties were encountered. Time being short, the matter was dropped.

The Conference of Chief Justices' proposal was again discussed, and it was again agreed that the proposal asked the Committee to go far beyond the limits of its competence.

The Reporter suggested that the Committee consider some revision of Rule 47 that would be responsive to Senator Heflin's concern. It was suggested that the authority to examine jurors be given to the Magistrate. The matter was put over for the November meeting.

Discussion returned to Rule 56. Textual changes were again made. "Burden of production of evidence or proof" was employed over the protest of those who thought the phrase redundant. "Or establishable" were added and "or otherwise" were stricken, making it clear that a unitary motion can sweep the whole case. Language was added to make it still clearer that the only materials to be considered on the motion are those accompanying the motion or the memorandum of opposition to it: "The court shall not consider...". A new sentence describing the motion and support was drafted and approved. "Where only a portion of such material is relevant" was added. Some further reorganization was agreed to. The problem of the party not having the burden was addressed and the text clearly conformed to the Committee's understanding that such a party should be able to point to the absence of probative material on the other side and thereby satisfy the requirements for a successful motion.

It was agreed that there would be a new rule written for administrative review. Summary judgment, it was agreed, is not applicable to review of administrative proceedings. Mr. Linder agreed to draft such a rule. It was agreed that the Notes should reflect the fact that Rule 56 is not intended to apply to such proceedings.