JUDICIAL CONFERENCE OF THE UNITED STATES

ADVISORY COMMITTEE ON CIVIL RULES

Minutes, November 17-18, 1989

The meeting was called to order at the Federal Judicial Center at 9:10 A. M. Present were members Brazil, Grady, Holbrook, Linder, Nordenberg, Pfaelzer, Phillips, Pointer, Powers, Stephens, Winter and Zimmerman. Also present were Mr. Willging and Prof. Mullenix from the Federal Judicial Center, Mr. Charles Geyh from the House Judiciary Committee, Mr. Macklin and Ms. Gardner from the Administrative Office, Mr. Womack from the American College of Trial Lawyers, and three representatives of the Alliance for Justice.

Judge Grady first called on the representatives of the Alliance for Justice, a group that had asked to be heard on the topic of Rule 11. Miss Nan Aron spoke for the Alliance and introduced Alan Morrison of the Public Citizen Litigation Group and Professor Laura Macklin of Georgetown University.

Mr. Morrison expressed approval for the reasonable inquiry test as expressed in Rule 11 and as a constraint on responsible attorneys. He noted, however, that there are problems with the rule that need to be addressed.

Mr. Morrison observed that one important problem has to do with the timing of motions under the Rule. He noted that in many cases the motion for sanctions is filed automatically by the defendant to intimidate the plaintiff and to create a conflict of interest between the plaintiff and plaintiff's counsel. He argued that that the motion should not be entertained at the outset of litigation, especially on summary judgment motion.

Mr. Morrison also expressed doubt about the adequacy of procedures for the imposition of sanctions. He favors a requirement that the sanctioning court state reasons for its action, that factual issues with respect to alleged sanctionable conduct be resolved on the basis of evidence, that such findings be subject to appropriate review, and that that there should be an opportunity for independent representation of counsel and party.

Mr. Morrison also questioned the appropriateness under the Rules Enabling Act of any fee-shifting provision that imposes burdens on clients as distinguished from lawyers. He expressed the view that sanctions on lawyers should be measured to deter inappropriate professional conduct, not

necessarily to compensate the adversary for an injury, to avoid sanctions so great as to over-deter.

Finally, Mr. Morrison urged the need to coordinate the sanctions provisions of the Civil Rules with those in the Appellate Rules, notably FRAP 38.

In response to questioning from Judge Grady, Mr. Morrison acknowledged that sensible results can generally be reached within the present text of Rule 11. He also acknowedged that late motions for sanctions can appear as a trap for the unwary, but preferred that sanctions not be considered before the court has resolved the issue with respect to which sanctions are sought.

Judge Winter pointed out that *Christiansborg Garment* imposed liability on parties on the basis of an objective or product test. Should party be liable for unprofessional conduct for which the attorney is not? Morrison disfavors liability for clients to which lawyers are not exposed. He pointed out there are many one-way fee shifting statutes not covered by *Christiansborg Garment*.

Professor Macklin recommended that the Committee hold hearings on Rule 11. She noted Congressional interest in the rule. She noted a difference in the standard between Section 1927 as amended in 1980 and the Rule 11 standard as interpreted by the courts. The statute sanctioned conduct on a finding that attorney acted "solely for the purposes of delay." The 1983 rules express a different standard that has been broadly interpreted to frustrate the aim of the House Committee of 1980.

Judge Winter asked whether Rule 11 discussions should not better be conducted at the Circuit Conferences. Professor Macklin thought Committee hearings superior, referring to the 1984 hearings on Rule 68. Judge Zimmerman pointed to the absence of consensus as to what should be done and to the absence of empirical data, and asked what could be gained by hearings except anecdotal information. Professor Macklin thought that there is a range of information between anecdote and empiricism, that the Committee should be concerned with a wider range of matters than big commercial cases. Judge Stephens asked what textual provisions should be reconsidered; Professor Macklin thought the fee-shifting provision most troublesome. Magistrate Brazil questioned whether an unstructured public hearing would not invite unwelcome politicization of the rulemaking process. Professor Macklin thought that the Committee can be open to such hearings without involving the Committee in matters best left to Congress. In response to a question from Judge Zimmerman, Professor Macklin suggested the model of the rulemaking agenda as used by administrative agencies.

Judge Grady inquired whether sanctions were imposed more frequently in any particular class of cases, e.g. civil rights cases, and whether there as reason to suppose that any such impositions were unjust. The Alliance will seek such data. Meanwhile, the Committee considered Tom Willging's memo on the subject, which Judge Grady offered as an example of the kind of data that needs to be examined.

Mr. Willging, Federal Judicial Center, has examined the most recent 200 appellate cases involving sanctions. This produced 41 civil rights cases; 13 affirmed sanctions, 12 reversed, 3 were divided, others none were imposed. 4 of the affirmances involved *pro se* claimants. The category included prisoner cases, Section 1983, and Title VII. About the same proportion of reversals was experienced in the non-civil rights cases. There being no base line for the frequency of sanctionable behavior, one cannot say how many sanctions would be disproportionate. For example, there can be no sanctionable conduct in student loan cases.

The Reporter presented his memo. He noted that the memo overstated the likelihood that civil rights cases are overrepresented in the sanctions cases. The Burbank study suggests to the contrary. Also noted by Judge Winter is the importance of distinguishing Title VII from Section 1983.

The Committee turned to the question of whetner there is a way to slow down motion traffic under the rule. Proposals by Judge Schwarzer, Professor Burbank, and others were identified. Judge Pfaelzer thought traffic differed greatly from one judge to the next. Judge Pointer thought that a lot of routine motions are attached to motions under Rules 12 and 56. Judge Grady sees many fewer motions than a year or so ago. Judge Stephens thought "knee-jerk" motions are not an administrative problem. Mr. Linder thought there was a downward trend in the flow. Mr. Powers thought that the level of civility in litigation was continuing to decline without regard to the number of motions. Judge Zimmerman shared the view that its effect is corrosive.

Judge Stephens and Judge Winter advocated hearings at the circuit conferences on the general subject of sanctions. Judge Zimmerman favored this if questions were squarely posed. Judge Pfaelzer was uncertain what the questions were, but was clear that the rule is not quite right.

Judge Grady asked whether more information was needed on the question of whether fees should be used as a sanction. Mr. Willging noted that there would be few reversals on this issue because of the range of discretion conferred on the district court. It was generally agreed that an amendment to eliminate the language on fee-shifting was not likely to attract support from the Committee.

Judge Phillips spoke in favor of public hearings on a specific agenda. He would like a volume count, and some assessment of how energy and litigant expense is invested in Rule 11 motions. Dean Nordenberg also supported the idea of a rule-making agenda for possible hearings. It was agreed that the Committee does not wish to hear old lost Rule 11 motions or appeals. Magistrate Brazil favored making a list of questions first, before considering what should be done with the list. Ms. Holbrook returned to the issues in the Reporter's memo; she thought that there was so much smoke that there should be an investigation of whether there is a fire. Judge Winter urged that any consideration of Rule 11 should also contemplate fee-shifting statutes, Rule 26(g), and Rule 37. The Reporter suggested that Rule 54 could also be viewed as related. Judge Grady expressed concern that the response might then be viewed as too narrow to be responsive.

The sattelite litigation issue was again considered. Is there more to be learned about the cost of motions? The problem of securing data on unpublished cases was reviewed in connection with pending replications of the Burbank data. Magistrate Brazil favored putting some energy behind the effort to secure such replications. Judge Grady questioned the utility of the results of such a study. Judge Winter expressed a desire to know the opinions of district judge about the rule.

Mr. Willging undertook to prepare a study proposal for the Committee's consideration. The Reporter and Magistrate Brazil offered to assist in preparing such a plan. The plan will include something like a "rule-making agenda." It will also include a questionaire for district and circuit judges.

Judge Phillips recommended that the Committee set a date for consideration of possible amendments of Rule 11. Judge Zimmerman favored this proposal. Judge Pointer also favored a timetable. Judge Grady and Ms. Holbrook doubted the feasibility of a timetable. Magistrate Brazil and Judge Pfaelzer thought it a useful discipline for the committee. Judge Zimmerman moved that the Chair set a date in the future for a review of proposals for the amendment of Rule 11. Judge Phillips wanted also to say that we will not consider an amendment until a fixed date.

Mr. Geyh affirmed that the Judiciary Committee had received many comments on Rule 11. Oversight hearings were a possibility, but Congressman Kastenmeier would be served by having a date and a plan. In light of this comment, Judge Zimmerman amended his motion to set Spring, 1991 as the tentative date on which revision would be considered. The motion carried by a vote of 6 to 4.

Judge Grady called on Professor Linda Mullenix of the FJC to report on local rules employing informal disclosure devices. Her preliminary report was based on discussions with attorneys in SDFla. There is a similar rule in CDCal. The Florida rule is popular with lawyers. Discovery motions were not being heard because of the criminal docket. Rule was written around a practice that had developed. Best lawyers comply. They are required to report on their meeting to work out discovery issues, which must be held within 90 days after filing of answer to exchange documents and witness lists. Some compliance may be literal, not spirited; some information is not disclosed. Formal discovery is still needed to control lawyers who want to conduct trial by ambush. Attorneys supposed that sanctions could include striking of pleadings; rule also provides for exclusion of undisclosed information.

The Committee discussed the problem of the Reporter's circulation of drafts and meetings with bar organizations and academic observers. No objection was voiced to the Reporter's activities to date. Magistrate Brazil asked how we can let people know sooner what is on the Committee's agenda so that they can plan to attend and comment.

The Committee next discussed the proposal of the 7 cir district judges to authorize dismissal of paid pro se complaints before service or answer. Judge Winter notes that the party has a right to amend under Rule 15. Judge Pfaelzer agreed that the Ninth Circuit would require that pro se litigants be counseled on amendments. Judge Pointer compared the NDAla practice. Judge Grady emphasized that the proposed rule does not apply to ifp cases, but to paid cases. Judge Winter questioned how many cases are in this category. The Reporter was directed to advise Judge Bauer that the proposal had been considered and rejected.

The Committee next turned to Rule 54 and the Reporter's draft. Judge Grady expressed doubt that a rule is necessary or appropriate. There was thought that the time frame for the filing of the motion, especially with respect to the relation of the appeal to the ruling on the fees motion. Judge Pointer noted that the draft came from his court's rule and that it was a much-used rule; the draft leaves the trial court with discretion to link appeal and fees dispute or to separate them. Judge Zimmerman thought it worthwhile at least to cause the trial judge to consider the issue of whether the two should be linked. Judge Pointer also thought the reference to Rule 43(e) useful as a source of flexibility. Judge Grady questioned whether the word "hearing" required an oral presentation, the reference to Rule 43(e) to the contrary notwithstanding. Judge Pointer urged that "hearing" did not mean oral, but could include an opportunity to present written submissions. Magistrate Brazil supported Judge Grady's concern and proposed to

substitute "consider" for "hearing." It was argued that the reference to Rule 78 provided still more flexibility and ought be retained in the draft.

Judge Phillips and Judge Pointer urged that the caption should be *Costs; Attorneys' Fees.* Judge Grady thought that it was not necessary to authorize delegation to magistrates as a matter subject to review by the judge. Consideration was given to the question of whether a magistrate should be authorized to decide a fee dispute with review by the court subject only to clear error review. Judge Pointer favored a Rule 72(b) type of action by the Magistrate. It was agreed to omit the second sentence of draft (E).

Judge Winter noted that the sentence requiring disclosure of class lawyer fee arrangements did not respond to Judge Weinstein's concern. He favored an amendment to Rule 23 requiring prompt disclosure in camera of class fee arrangements. He favored retention of the provision in this rule as well. Judge Pfaelzer thought (D) to be an invitation to over-litigate a fee dispute; it was agreed that the provision should be stricken.

The relation to Rule 11 was considered. It was decided to substitute "these rules" in line 21. Comment should then refer also to Rules 37 or 45. Judge Winter expressed concern that reference to sanctions in this rule discouraged the judge from excluding a late sanctions motion and encouraged judges to use fees as a sanction. Judge Pointer thought it desirable to retain the application to sanctions to put a limitations period on sanctions motions. Judge Phillips thought perhaps the sanctions and fees should be kept together with respect to the procedure provided, but should be part of some other rule. Judge Pointer thought that the matter should be dealt with in the judgment rules. It was at length decided to remove the sanctions reference from this rule.

Judge Grady questioned the time schedule provided in (C) on page 22. He recommended that fee amounts be set as soon as possible while the case is fresh in the mind of the judge. Judge Pointer thought the schedule should be set only if court does not otherwise order, in order to provide a back-up. It was agreed that sequence provided in the draft is not correct. Judge Zimmerman pointed out that draft rule applies only to determination of amount, not to issue of liability. It was agreed at last to strike lines 38-51.

The Reporter made the argument for standardizing fees, for resolving fee disputes "wholesale" rather than "retail." It was agreed that the Reporter should give further study to the English system and advise the Committee with respect to it. Judge Pointer thought that a set of standard hourly

rates for each district might be useful. Judge Zimmerman expressed concern that the English system would disfavor plaintiffs. Judge Pfaelzer expressed the hope that greater predictability would be a great boon.

Discussion returned to the relation between appeal and taxation of fees. Judge Winter favored a presumption that fees questions be resolved prior to appeal. It was suggested that the time for appeal should not start to run until fees issue is resolved, unless the district court so orders. A problem arises when court of appeals remands for fees determination with respect to the appeal. It was agreed that the court of appeals ought to set fees for appellate work. It was concluded that Rule 58 should probably be revised to keep fees and appeal together unless the court determines that this should not be done, but the Reporter was authorized to bring back alternate drafts.

At this point, the Committee adjourned for the day.

The Committee returned to the discussion of Rule 4, with special attention to the concerns of the Department of Justice. The Santa Fe draft, a later Reporter's draft, and two department drafts were reviewed. Mr. Linder reiterated the department view that it needs double notice as a management tool and it should suffice to bail out litigants who were barred by the statute of limitations. Judge Grady pointed out that the department's draft also proposed to cut off people who failed to show "good cause." In response to questioning from Judge Zimmerman, the Department regarded the lack of sanction is a serious defect in the Reporter's draft. It is not the policy of the Department to use the failure to serve the AG as a defense. Judge Winter proposed that the "good cause" requirement should be stricken from the Department's draft. Mr. Powers questioned the utility of requiring a re-filing of an action not time-barred. Consideration was given to the Reporter's draft of Rule 4.2 that related Rule 24 to the problem of notice to the Attorney General. The Department draft was approved with the striking of the good cause requirement, the elimination of the re-filing feature, reading thus:

> *The court shall extend the time for service upon the United States for the purpose of curing the failure to serve the United States if the plaintiff has served either the United States Attorney or the Attorney General but not both as required by subdivision (i).*

It was agreed that the Note should specify that the case should not dismissed unless for persistent failure to serve both officers.

Judge Zimmerman raised the question of failure to make the third service required on officers, but the issue was

not pursued. He also called attention to the hiatus in subdivision (j). It was agreed that service on the SEC should be effective even if a party has not served both other fedral officers. Mr. Powers suggested that the principle just agreed to should apply as well to the three-officer service, and that a provision in subdivision (n) could be made to apply to both (i) and (j). In the alternative, Judge Pointer suggested that (i) and (j) be united as a single subdivision. This seemed to be the preferred approach.

The Committee then returned to the discussion of informal discovery. Joe Cecil of the Federal Judicial Center participated in this discussion. Judge Grady emphasized the importance of reducing discovery costs. He thought substantial progress had been made in the 1983 amendments, but more is needed.

The SDFla-CDCal rule was discussed. Judge Pfaelzer explained the system and reported a reduction in discovery costs because information was secured with less paper. The system puts pressure on lawyers to understand their cases early. Judge Grady expressed the fear that this will just create another layer of work for lawyers. Magistrate Brazil thought the idea needed serious discussion in the bar. Judge Phillips reported on an unsuccessful elaboration of local rules in the Middle District of North Carolina that did create an additional layer of work for lawyers. Judge Stephens argued for local option to meet local conditions. Judge Grady argued for the proposition that parties should be required to use inexpensive informal methods before using formal methods. Judge Zimmerman thought the disclosure approach would be useful, but mandatory conferences may be more questionable. Mr. Powers urged the need to impose a professional duty to disclose. Ms. Holbrook thought that the required early meeting of counsel was useful to the settlement process. She also favored the language of the California rule with respect to the documents that should be required to be exchanged.

Magistrate Brazil spoke to the two-stage discovery process, using early discovery to advance the prospects for settlement. He also urged that the client should be required to sign the discovery plan and that the plan should include cost estimates. Ms. Holbrook doubted that such an elaborate plan and cost estimates would be useful. Mr. Cecil reported again on Professor Mullinix's data confirmed that the role of the judge at the conference is important in making the rule work. Mr. Womack reported that some judges in SDFla and some lawyers make the system work "like a Swiss watch," and it does save some money, even though it does not often work smoothly. He favored the disclosure rule as a safe harbor against malpractice liability. Judge Winter questioned how this could work with notice pleading.

Perhaps there should be an exchange of factual premises to enable the adversaries to identify one another's evidentiary needs. Magistrate Brazil reviewed his ideas for a narrative account that would be amendable, somewhat in the manner of code pleading. Judge Grady disfavored putting this on paper if a conference was to be held. But Judge Grady and others were puzzled by the duty to disclose of a defendant who has not yet filed an answer.

The Reporter questioned why a delay in answer should be occasioned by a motion. Judge Stephens reported that the local role in WDMo does not allow delay in answer pending motion practice. Judge Pointer thought the delay for answer was related to the 20-day period, which is too short for contemporary cirumstances.

It was explained that the SDFlorida rule does not require disclosure of material other than that that the disclosing party intends to use. For this reason, it can be enforced by the exclusion of evidence not timely disclosed. The SD Florida system also employs some standardized interrogatories issued by the court.

Judge Pointer thought that discovery should be excluded until informal discovery or disclosure is complete. This will require some modification of the discovery rules. Perhaps some categories of cases should be excluded by local rule of court. Judge Pointer also thought that local option may be desirable with respect to the requirement of the Rule 16(b) conference. It was agreed that the rule to be considered should leave some room for local variation, as Rule 16 presently does.

The Committee next considered the proposals of the New York State Bar. Magistrate Brazil reported that there has been a comparable debate in California on the scope of discovery, and that the Civil Rules Committee resisted heavy lobbying on the same proposal in the 1970s. There was then strong opposition by the plaintiffs' and civil rights' bar. On the other hand, it is not clear that there is a real difference between "claims and defenses" and "subject matter." The Reporter noted that the "claims and defenses" approach implies fact pleading. Magistrate Brazil pointed out that the original discovery rules drafted by Sunderland assumed that discovery would be self-executing. Judge Winter was of the view that the change would not be consequential, except perhaps to change the pleading practices. Magistrate Brazil acknowledged that after the 1983 rules, especially Rule 26(g), the question of relevance is no longer more than a threshold question, and no real change could be effected. There was no support for the proposal to adopt the "claims and defenses" language.

The other proposals regarding "burden and expense" were also considered and provisionally rejected by the Committee, except that It was agreed that no one uses expert interrogatories, and that the NY State Bar is clearly right that rules should be conformed to practice. The Reporter was directed to prepare a draft effecting that change for consideration at a later meeting. Judge Winter urged that the opposing party be allowed to depose an expert with respect to the basis for any testimony. Also trial experts should be designated long in advance of trial. With respect to the latter point, it was noted that parties tend to postpone retention of the experts until the last possible moment because of the expense. There was general agreement that there should be an opportunity to depose a testifying expert. Judge Grady questioned the need for a rule to effect this result. Concern was expressed that the present practice encourages parties to hide their experts until the last possible moment. Judge Pointer thought that there was ample authority in Rule 16 to deal with the problem, but that a cross-reference in the expert rule might be useful.

The Committee then considered Judge Weinstein's concern about control of experts. It was thought that the specific proposal of the Reporter could be effected through the present Rule 26(g). It was agreed that the expert problem deserves broader consideration, and that revision of the Federal Rules of Evidence should be on the agenda for future thought. There was sentiment for revision of the "helpful to the finder of fact" standard to reduce the use of expertise. Judge Stephens and Judge Zimmerman favored revision of Rule 702 to reduce the use of expensive experts on both sides of many cases who do nothing for the quality of the decisions.

The Committee next discussed the Local Rules Project and the response to the proposed Administrative Rules or practice manual. It appears that those rules will not be promulgated by the Standing Committee. The Reporter reviewed the history of the concern over the proliferation of local rules. It was suggested that Rule 83 might be revised to assure that no case be decided on the basis of an ignorant failure to comply with a local rule. Judge Grady thought that protection should also be afforded for substantial procedural rights, e.g., right to jury trial. The Reporter was directed to draft a revision of Rule 83.

The Committee scheduled its next meeting for New York on June 6-8.