MINUTES

SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 20, 1991, 4 p.m.
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah
Alan L. Sullivan, Presiding

Present:

Alan L. Sullivan (Chair)
Samuel Alba
Brad R. Baldwin
Wendell E. Bennett
Professor Ronald N. Boyce
Elizabeth T. Dunning
Robert A. Echard
Glen C. Hanni
M. Karlynn Hinman
David K. Isom
Professor Terry S. Kogan
Allan L. Larson
Honorable Michael R. Murphy
James R. Soper
Francis M. Wikstrom

Staff:

Carlie Christensen
Jaryl Rencher

1. Welcome and approval of Minutes

Alan Sullivan welcomed the members of the advisory committee and explained that in July 1991 the term of membership expires for those members of the committee originally appointed in 1987. Mr. Sullivan expressed appreciation for those members of the committee who would be finishing their four-year term and suggested that they might consider further service to the committee and the bar by reapplying, through letter to the Utah Supreme Court, for another membership term.

Thereafter, the minutes of the November 20, 1990, meeting were unanimously approved.

2. Rule 65B

Mr. Sullivan explained that pursuant to the committee's request, he had made final changes to this proposed rule and it was now ready for the committee's final approval prior to being submitted for public review and the Utah Supreme Court's consideration. Specifically, Mr. Sullivan referenced that the rule had been modified on page 10 of the latest draft, allowing for "any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in [this paragraph]" to petition the court for the wrongful use of or failure to exercise public authority. Also, Mr. Sullivan explained that the advisory committee note attached to this rule had been modified to reference the elimination of the concept of the writ from extraordinary relief procedures and to reference the fact that other persons and governmental entities not required to be represented by the attorney general could seek relief under the rule where appropriate.

Thereafter, upon motion, Rule 65(B), with the proposed changes having been made and the committee minutes attached, was unanimously approved in by the committee for public review. Mr. Sullivan agreed to submit the rule for publication and the Utah Supreme Court's consideration.

3. Rule 17

Mr. Sullivan explained the history of the committee's modifications to this rule necessitated by the Utah Supreme Court's decision in Cottonwood Mall v. Sine wherein it held that unincorporated associations could sue in their own names, notwithstanding provisions of original Rule 17 which had not explicitly so provided. In prior meetings, the committee had approved modifications to this rule to incorporate the Utah Supreme Court's holding and had also considered whether the individual property of partnerships could be affected by suit brought in the partnership name. After research and review, the committee had decided to place language within the rule that the property of individual parties could not be made part of the judgment in a suit against the partnership unless the partners themselves were actually joined therein. Mr. Sullivan confirmed that such language had now been included within the rule and the rule was ready for the committee's final review.

Thereafter, Mr. Sullivan requested that the committee consider Rule 17 ready for publication and review by the Utah Supreme Court, after which, the rule and its advisory note were unanimously approved upon motion.

Alan Sullivan stated he would correct the typographical error on the committee notes regarding the citation to the Cottonwood Mall case and thereafter submit the proposed rule.

4. Rule 63A

As background regarding this rule, Alan Sullivan explained that the committee had revised this rule upon the Supreme Court's express request and that David Isom had been asked to prepare a draft of the rule incorporating committee suggestions at prior meetings. While the previous draft of the proposed rule had been sent to the Judicial Council for their review and Alan Sullivan had met with the Judicial Council and discussed the draft, the council had determined that the proposed rule should only be adopted on a trial basis in only a few districts and that the rule needed to be reworked to provide a definite time period within which the right to preemptorily strike an assigned judge by stipulation must be exercised.

In response to the council's discussion, Mr. Sullivan reported that he had suggested that the rule be utilized on a trial basis in both an urban and rural district, in order for the council and the bar to obtain a realistic view of the rule's application. Further, Mr. Sullivan had referenced to the council that this committee had previously discussed the idea of developing a process wherein the parties had to exercise their right under this rule within thirty (30) days of the last responsive pleading in any particular case, recognizing that later impleaded parties would have no rights thereafter. Mr. Sullivan related that the council questioned what the last responsive pleading might consist of in particular cases and what would happen with newly impleaded defendants. Thereafter the council had requested that Mr. Sullivan resubmit the rule to this committee for the re-drafting of a specific time frame for exercise of the right to strike assigned judges. Accordingly, prior to this meeting, Mr. Sullivan submitted four or five options in subparagraph 63A(b) of the February 7, 1991 draft.

In discussing the rule and Mr. Sullivan's proposed options, Judge Murphy suggested that the committee consider another alternative in proposing a time limitation, namely that

the rule provide that motions to peremptorily strike judges be made within 60 days after service upon the first defendant but in no event later than 120 days after commencement of the suit.

Professor Kogan suggested that the rule afford parties additional time in which to make such motions so as not to conflict with the 120 day requirement for service upon defendants. Committee members discussed the possibility of constitutional claims being raised by defendants brought into the lawsuit after such time period ran, and Professor Boyce noted that while there may be uniformity claims brought under the Utah Constitutional Equal Protection Clause, the Judicial Council was seeking an actual deadline and that therefore the committee should consider imposing a deadline as arbitrary as "180 days after the filing of the complaint." Professor Boyce also noted that there may be no constitutional problem since after-served defendants may not be viewed as "similarly situated parties" for purposes of the equal protection analysis.

Mr. Eckert queried whether the rule hadn't been suggested in the first place in order to assure that a judge lacking sophistication in a complex case would be removed therefrom, the fact of which sophistication could not be determined until later on in the case. In response, Mr. Sullivan confirmed that Bob Eckert's view had been previously raised by Francis Wikstrom in the last committee meeting, which approach was not supported by the Judicial Council. Judge Murphy agreed that such an approach would not be effective inasmuch as judges do not want to go through the whole process of pretrial procedure and get "bumped" from the case just prior to trial. He also suggested that any option pegging the deadline for the filing of such a motion to a certificate of readiness would likewise not be acceptable to the Judicial Council. Mr. Sullivan concurred in this approach by explaining that such an option would destroy the value in the individual calendaring system utilized by the courts.

Mr. Eckert posed the possibility of setting the time limitation to a date after dispositive motions are made; Professor Kogan referenced that it might be disturbing to the process if the rule allows the parties to wait until rulings on motions are made and that, instead, challenging decisions should be made on the past record of each judge. He also referenced whether this rule should allow the parties to wait until the last defendant is served in a case in order to move to strike a judge.

Professor Boyce responded by noting that sometimes originally named defendants are never served.

Francis Wikstrom suggested that the rule could provide for such motions to be made within 60 days after the last defendant is served but in no event longer than 120 days after the complaint is filed, and he suggested that perhaps Rule 21 governing later-added parties could condition such a motion on the right to reconsideration of whether a judge should sit on a particular case. Professor Boyce responded by noting that this suggestion could create interminable delay; and Mr. Eckert noted that some counsel may tactically wait to serve some defendants until after one defendant has been served who agrees to challenge an assigned judge. In response, Mr. Wikstrom noted that Rule 4(b) could be changed to require all defendants to be joined within 120 days, and Mr. Eckert noted that the rule could require certification by all counsel that they have tried to serve all parties of record before bringing a motion to challenge a judge.

Judge Murphy questioned whether, without defendants being served in the case, multiple plaintiffs could agree to challenge a particular judge; Mr. Sullivan questioned whether such a rule could have any application in circuit courts where cases could begin and end within the 120-day period.

Other committee members joined in discussing the merits of views requiring such motions to be filed 60 days after the last named defendant or within 120 days, or views requiring counsel to certify that his or her client is not intending to join other parties and that service has been attempted on all named parties. Professor Boyce noted that parties bent on manipulation can always get around any option chosen.

In sum, Mr. Sullivan suggested that the rule be modified to provide that notice shall be signed by all parties and shall state (1) the name of the assigned judge; (2) the date on which the action commenced; (3) that all parties have agreed to the change; (4) that no other persons are expected to be named as parties to the action; (5) that a good faith effort has been made to serve all named parties; and (6) that subparagraph b of the rule be modified to require that the notice shall be filed no later than 180 days after commencement of the action.

Thereafter, committee members discussed whether or not the term "parties" should be replaced with the term "plaintiffs and defendants" or "parties then joined"; and committee members

discussed whether unnamed ("John Does") would need to be served or attempted to be served prior to certification under such a rule; Professor Kogan also questioned whether subparagraph (5) would require an explanation as to why service had not been made.

Mr. Sullivan suggested that the rule be drafted as suggested and sent to the Judicial Council with a letter explaining the changes made.

Judge Murphy questioned whether there was any reason to exempt divorce, paternity and other domestic cases from application under the rule; and Mr. Eckert and Professor Boyce responded by indicating that there was no reason to treat these cases differently, especially since a judge's "personality" may often more likely exhibit itself in domestic relations cases. Professor Boyce also raised a question as to whether the rule would apply to commissioners.

5. Rules 64A-64C.

Mr. Sullivan reiterated the history regarding the committee's previous garnishment revisions necessitated by constitutional requirements of due process. Mr. Sullivan explained that after the committee had modified Rule 64D on garnishment, suggestions were made to incorporate changes to the other provisional remedies of Rule 64A, Rule 64B and Rule 64C. Accordingly, a subcommittee consisting of Brad Baldwin, Judge Murphy and Bruce Plenk had been formed to review these provisional remedies and suggest modifications to the same.

Mr. Sullivan also referenced that Bruce Plenk had recently filed a lawsuit regarding constitutional requirements under Rule 69 for execution of judgments, and that accordingly, that rule should also be considered by this subcommittee for modification.

Thereafter, Brad Baldwin discussed his review of the provisional remedies and the conceptual issues that needed to be resolved. Specifically, he addressed the question of whether notices of exemption rights and notices of rights to request hearings were appropriate for incorporation into Rule 64A, 64B and 64C. As to writs of replevin under Rule 64B, Mr. Baldwin noted that such writs are narrow in scope and limited to those actions to recover possession of personal property after the filing of a complaint and before judgment. The question was raised whether it was necessary to provide defendants with

further notices of rights to request hearings when, under the rule as presently constituted, the writ is only issued after a hearing is held or since a notice of a hearing must be served with a writ and a hearing held within ten days. Also, the issue was raised whether it was appropriate to provide the defendant with further notices of rights to claim exempt property when writs of replevin, by their nature, already involve actions by the plaintiff to recover possession of property which the plaintiff must claim he or she already owns or in which he or she has a special interest.

Similiarly, Mr. Baldwin explained the nature of writs of attachment under Rule 64C and queried whether additional notices of hearing rights and notices of rights to claim exempt property were likewise required under this rule given the protections already included therein.

In sum, Mr. Baldwin suggested that the committee should perhaps concentrate upon rule 69 regarding execution, which rule was more amenable to application of the committee's previous Rule 64D modifications to incorporate due process protections. Mr. Sullivan concurred in this approach and suggested that the subcommittee might also consider any minor problems existing in Rules 64A-64C or whether any additional notice requirements might be acceptable. The subcommittee is to provide its recommendations at the next committee meeting.

6. Discovery Rules

Mr. Sullivan updated the committee on proposed modifications to civil procedural discovery rules. Mr. Sullivan explained that a subcommittee consisting of Allan Larson, Elizabeth Dunning and Jim Soper had been formed to look at: (1) Justice Zimmerman's request that Rule 30(f)(1) and (5) be modified to eliminate the requirement that depositions be filed; (2) the Cullen Battle-Eric Strindberg proposal for changes to Rule 30(b) on the videotaping of depositions; and (3) whether discovery rules should be limited in civil cases based upon recent federal approaches addressing the issue.

Professor Boyce noted that there may be a good reason to not parallel the federal approach to modify discovery rules since the approach was most pertinent to commercial litigation and not tort litigation which fits the mode of state practice. Mr. Sullivan noted, however, that there are grave abuses of discovery processes in the state practice and that the rules may

need to be modified to involuntarily force parties to do what they would not otherwise do regarding discovery.

Judge Murphy suggested that the discovery subcommittee also visit Rules 35(a) regarding mental or physical examinations and the problem that arises when it may be unfair to defendants in particular cases not to include psychologists or vocational experts as appropriate examiners under the rule.

As to the Rule 30 issue, Mr. Sullivan explained that Justice Zimmerman had suggested the committee review the conflict between the rule which seems to imply that the court reporter seals and files depositions, and the rules of practice that indicate that the party who noticed the deposition retains the same and it is only filed in support of summary judgment motions or at time of trial.

Mr. Sullivan also referenced that the subcommittee should consider privacy issues in discovery proceedings inasmuch as documents on file with the court may be public records to which the press has access. Alan Sullivan asked that any suggestions committee members had pertaining to discovery rules be funnelled to the subcommittee on discovery, with a timetable for such issues to be constructed later.

David Isom suggested that perhaps the discovery rules could be modified to require parties to certify that documents requested under Rule 35 have been produced or objected to; and Bob Eckert also referenced that perhaps the rule could be modified to provide that parties sign and aver that a reasonable search was made and all documents have been produced or objected to.

7. Assistance of Counsel.

Alan Sullivan explained a request received from Chief Justice Hall for this committee to study changes in the procedural rules that might assist the court in handling claims of ineffective assistance of counsel in habeas corpus proceedings by requiring trial courts to conduct evidentiary hearings on the question of ineffective assistance of counsel to develop a record thereon prior to that issue being raised to the Supreme Court.

In discussing the request, professor Boyce referenced that (1) the proposal does not lend itself to modification of

civil procedural rules but rather, suggests a process for the court to implement, and (2) perhaps habeas corpus is the only proper approach in which to raise issues of ineffective assistance of counsel.

Judge Murphy explained that the Supreme Court's frustration centers around the fact that evidentiary hearings should be held so that the Supreme Court or Court of Appeals may appropriately review such issues on appeal.

Professor Boyce discussed the California view which allows a trial judge to question a defendant at trial and obtain his or her admission as to the competency of counsel. Bob Eckert questioned whether this approach would be grounds for mistrial inasmuch as a defendant would not know whether or not he or she had received effective assistance of counsel when pressed by the court to admit such fact.

Alan Sullivan suggested that the committee consider the issue and offer suggestions as to attorneys knowledgeable about the area of law that might provide assistance to the committee in considering Chief Justice Hall's request. Judge Murphy also suggested that the Attorney General's Office, having expertise in the area, be consulted in this regard.

8. Rule 77(d)

Alan Sullivan explained the history behind this rule which provides a mechanism for court clerks to send notice to parties when orders have been signed, and which mechanism has apparently not been followed in most districts based upon a lack of funding. Mr. Sullivan queried Carlie Christensen about the status of this rule, and Ms. Christensen replied that the judiciary was fighting an insurmountable financial obstacle in order to address problems such as that raised by the mailing requirement of Rule 77(d).

In response to Mr. Eckert's suggestion that an additional amount be added to the filing fee to cover the costs of postage, Ms. Christensen noted that such filing fees revert to the general fund and cannot be utilized for such purposes.

Meanwhile, Glen Hanni suggested that something ought to be done to pursue the rule's enforcement, and Mr. Sullivan referenced that there appeared no way to enforce the rule absent resolving the funding issue. Nevertheless, Mr. Sullivan

suggested that Carlie Christensen contact the clerk's association and request that they comply with the Judicial Council's previous request and provide a protocol for implementation of this rule.

9. Next Meeting and Adjournment.

The next meeting of the Supreme Court Advisory Committee on the Rules of Civil Procedure is set for Wednesday, March 20th at 4:00 p.m. at the Administrative Office of the Courts.

The meeting was adjourned at 6:05 p.m.

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