Utah Supreme Court Advisory Committee on Civil Procedure

A G E N D A

October 16, 1991

1. *Welcome and approval of minutes (Alan Sullivan)*

2. *Rule 30(b)(4), Videotaping of Depositions (Alan Sullivan)*

3. *Rule 35(a) Mental and Physical Examinations (Tom Karrenberg & Alan Sullivan)*

4. *Reports from Subcommittees:*

   A. *Rule 69 - Brad Baldwin*

   B. *Changes in rules relating to signing of depositions - Allan Larson*

   C. *Rule 56 - Kevin Anderson*

   D. *Discovery Generally - Fran Wikstrom*

MINUTES

Supreme Court Advisory Committee
On the Rules of Civil Procedure

Wednesday, October 16, 1991, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Robert A. Echard, Thomas R. Karrenberg, Kevin N. Anderson, Alan L. Sullivan, Terrie T. McIntosh, Colin Winchester, Prof. Ronald N. Boyce, Glenn C. Hanni, Perrin R. Love, Hon. Michael R. Murphy, James R. Soper, M. Karlynn Hinman, John L. Young

EXCUSED: Samuel Alba, Hon. Boyd Bunnell, Elizabeth T. Dunning, Jaryl L. Rencher, Prof. Terry S. Kogan, David K. Isom, Allan L. Larson, Brad R. Baldwin, Francis M. Wikstrom, Mary Anne Q. Wood

STAFF: Craig T. Jacobsen

I. WELCOME

Mr. Sullivan welcomed the members of the Committee to the meeting and introduced Craig T. Jacobsen to the Committee as the new recording secretary.

II. APPROVAL OF MINUTES

A motion was made to amend the minutes of the October 16, 1991 meeting to change item 5 so that "Rule 69" would read "Rule 59." The motion was seconded and approved and the minutes were then approved as amended.

III. RULE 30(b)(4), VIDEOTAPED DEPOSITIONS

Mr. Sullivan commenced a discussion pertaining to the Bar's interest and concerns relating to changes of Rule 30(b)(4). Videotaped depositions are becoming a routine practice yet there are no clear guidelines on when the courts allow them. There are currently two proposals for changes to Rule 30(b)(4) that are before the Committee. The first proposal is the proposal contained in the June 1991 federal provisions. This federal proposal is part of a package of changes that will not be acted upon by the U. S. Supreme Court in the near future. The second proposal originated approximately one and a half years ago. W. Cullen Battle and Erik Strindberg of the Utah State Bar's Litigation Section Committee prepared this second proposal. It is more detailed than the federal proposal. It requires, absent some

other agreement, that videotaped depositions be taken before a Rule 28 approved officer.

There have previously been problems with changing the rules governing videotaped depositions to permit them as a matter of course because (1) some attorneys feel it is easier to shade the truth and cast a negative shadow with a videotaped deposition and (2) because videotaped depositions tend to benefit the rich more than the poor. On the other hand, videotaped depositions arguably take advantage of better technology and are more reliable. Given these issues, the Committee will discuss two topics related to Rule 30(b)(4): (1) should Rule 30(b)(4) be amended, and (2) what direction should any change(s) take.

Prof. Boyce raised another objection to videotaped depositions. He indicated that they are more complex to handle by the court. A discussion then ensued with various Committee members expressing their opinions. Some expressed that videotaped depositions may actually decrease litigation costs because they may save the expense of paying an expert to come for trial. Others also felt that a change in the rule would eliminate some of the gamesmanship which currently occurs when an attorney attempts to enter into a stipulation to permit a videotaped deposition. Many states currently have a rule which allows more latitude for taking videotaped depositions. The second proposal attempts to take the best of the rules from other states.

Mr. Love indicated that he felt a videotaped deposition is less easy to manipulate than a transcribed deposition. Mr. Echard disagreed expressing his opinion that videotaped depositions can be manipulated and that there are many variables in their use. Mr. Echard questioned the ability of attorneys to index videotaped depositions.

Prof. Boyce recounted a case he had seen where videotaped depositions had necessitated literally hundreds of rulings and that if the plaintiffs had not hired a large out-of-state law firm, they would have been overwhelmed by defendant's use of videotaped depositions.

Mr. Hanni asked the cost of videotaped depositions. Committee members responded that these depositions cost several hundred dollars per day more than traditional depositions.

Mr. Hanni suggested that a problem with videotaped depositions is that they would have to be treated as trial depositions. Mr. Sullivan responded that the same problem exists with traditional depositions.

There was further discussion by the Committee on the increased cost of litigation that would result from videotaped depositions. Mr. Hanni suggested that because 90% of cases are

ultimately settled, videotaped depositions are an unnecessary cost. Mr. Echard agreed stating that costs will necessarily go up if videotaped depositions become more widely used. Mr. Echard suggested that attorneys would spend more time preparing for a videotaped deposition. Mr. Sullivan indicated that the same issue exists with stenographic depositions. Mr. Echard disagreed, explaining that because a videotaped deposition could have a greater impact on a jury, attorneys would have to spend more time in preparation. Mr. Karrenberg noted that attorneys need to recognize the current technology. He asked for the judges to relate their experience with videotaped depositions.

Prof. Boyce responded, indicating that the rule needs to be flexible. He also noted that video depositions are very time-consuming at trial and jurors tend to go to sleep when watching long videos. Mr. Karrenberg countered suggesting that in his experience, videotaped depositions take more time at trial if counsel is not prepared but if prepared, the time difference is not significant. Prof. Boyce stated that Fed. R. Evid. 106 permits the introduction of contemporaneous documents and would thus result in breaking up the videotape. Judge Murphy felt that too many attorneys do not know how to present videotaped deposition. Nevertheless, videotaped depositions are a tool for litigation and should not be ignored. Judge Murphy also suggested that flexibility is needed. Judge Murphy indicated that there are problems with editing the videotape and continuity of the videotape. He believes that the more structured second proposal would be good in the future but more flexibility is needed during a transition period. He believes that a rule on videotaped depositions should permit stipulation by the parties and should permit their use as a matter of course if they are nondisruptive.

Mr. Sullivan asked whether a party should be permitted to use videotaped depositions as a matter of course without notice. Judge Murphy indicated that as a judge, he would want to hear a party's objection to a proposed videotaped deposition. Prof. Boyce also indicated that it is much quicker for a judge to go through a written transcript than to view a videotape. Judge Murphy reiterated that because the use of videotaped depositions is in a transitional period, we need a transitional rule.

Mr. Sullivan stated that the current rule already permits the parties to stipulate. He raised the question of who should bear the burden of proving whether a videotaped deposition should be permitted or disallowed.

Mr. Echard asked how often motions to use videotaped depositions are filed. He suggested that if the current rule is working, it should not be changed. Mr. Karrenberg stated that perhaps videotaped depositions are not being used because attorneys don't understand their availability.

Mr. Young returned to the questions originally posed, i.e., should there be a rule change with respect to the use of videotaped depositions. He stated that the Committee discussion had been on the merits of videotaped depositions and whether they should be used at all. Prof. Boyce indicated that there are instances when judges should know why videotaped depositions are desired. Mr. Echard again asked why the burden should be shifted to the party opposing a videotaped deposition. Mr. Sullivan responded, stating that the burden should be shifted because video better approximates reality. Judge Murphy indicated that he does not see a need to discourage the use of new technology. Prof. Boyce stated that given the current state of technology, litigation costs will necessarily go up through use of videotaped depositions. However, he believes that judges will allow videotaped depositions if there is no articulated objection.

Mr. Sullivan wrapped up the discussion by stating that Mr. Battle and Mr. Strindberg should be invited to the next meeting to give a presentation on their proposal and compare their proposal to the federal rule proposal. Mr. Sullivan also indicated that he would prepare a comparison of the costs for videotaped depositions and the costs for stenographic depositions.

III. RULE 35(a), PHYSICAL AND MENTAL EXAMINATIONS

Mr. Sullivan opened the discussion by reviewing the previous meeting's discussion where the Committee took a straw vote which indicated that most Committee members prefer the new federal rule which will permit examinations to be performed by experts other than physicians. Mr. Karrenberg has studied issues related to possible changes to Rule 35(a). There is an issue as to whether Rule 35(a) should also be amended to permit individuals other than the examiner and examinee to be present at the examination.

Mr. Karrenberg reported that there is a general feeling that Rule 35(a) should give the court discretion to determine issues surrounding examinations. Mr. Karrenberg's biggest concern is how to define "certification" for purposes of determining who is qualified to perform examinations. Mr. Karrenberg suggested that the federal rule be adopted along with a detailed committee note. Mr. Karrenberg indicated that the Committee ought to address the issue of whether third persons should be allowed to be present at the examination. He volunteered to research and prepare a draft of a new Rule 35(a).

Mr. Hanni stated that we should go slow in permitting other individuals to be present at examinations. Such a change would inject another element into the litigation process necessitating attorney involvement. The change could also be disruptive. Prof. Boyce noted that the real issue being resolved by changes to Rule 35(a) is that the injured has a partisan doctor to report

on the injured's condition. Prof. Boyce stated that the independent medical examination counterbalances opinions by the partisan doctor. Judge Murphy suggested that since the injured party has an opportunity to undergo a private exam, the defendant should be given the same opportunity to privately examine the injured. Judge Murphy noted that the problems arising from abusive doctors who perform IMEs is a separate issue.

Mr. Sullivan asked the Committee members whether they feel a court has discretion to order the presence of a third party at a mental or physical examination. The general feeling of the Committee was that the court has such power. Mr. Sullivan suggested that if Rule 35(a) is amended, the defense bar gains an advantage. He posed the question whether something should also be given to plaintiffs' bar.

Mr. Hanni stated that a change to Rule 35(a) would continue to be counterbalanced because any good plaintiff's attorney should prepare an examinee prior to the examination. Mr. Echard disagreed stating that some examinees lack the ability to be prepped.

A general discussion followed which touched on the private nature of examinations, examples of individuals who cannot be prepared by an attorney for an examination and whether a judge should have discretion on whether to close off an examination. Mr. Karrenberg noted that the present rule permits the court to close off examinations.

Mr. Echard felt that permitting greater discretion will create nonuniformity. Prof. Boyce responded stating that nonuniformity would only be an initial problem. Mr. Echard suggested that rather than permit others to be present at the examination, we should trust the examiners and their ability to conduct an examination in a professional manner.

Mr. Sullivan suggested that as part of Mr. Karrenberg's research, he study rules adopted by other jurisdictions governing examinations and provide the Committee with four or five examples so that the Committee can make comparisons. Mr. Karrenberg indicated that he would undertake such research.

IV. REPORTS FROM SUBCOMMITTEES

Mr. Sullivan suggested that the Committee skip the reports to be presented by subcommittees because many of the Committee members who were to present the reports were not present at the meeting.

V. ADJOURNMENT

There being no further business, the Committee was adjourned until November 20, 1991.

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