

**M I N U T E S**

SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 27, 1993, 4:00 - 6:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

**PRESENT:**

Alan L. Sullivan  
Francis M. Wikstrom  
Brad R. Baldwin  
David K. Isom  
Glenn C. Hanni  
Prof. Ronald N. Boyce  
M. Karlynn Hinman  
Mary Anne Q. Wood  
James R. Soper  
Thomas R. Karrenberg  
John L. Young  
Terrie T. McIntosh  
Perrin R. Love  
Elizabeth T. Dunning  
Hon. Michael R. Murphy

**EXCUSED:**

Alan L. Larson  
Hon. Boyd Bunnell  
Hon. Samuel Alba  
Robert A. Echard  
Prof. Terry S. Kogan  
Jaryl L. Rencher  
Craig T. Jacobsen

**STAFF:**

Colin Winchester

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Sullivan welcomed the Committee members to the meeting. The Minutes of the Committee's December 9 meeting were unanimously approved as distributed.

2. **ADOPTION OF RULES 35, 63A and 65B.** Mr. Sullivan reviewed the Supreme Court's two Minute Entries adopting Rules 35, 63A and 65B. Rule 35 was adopted as proposed, effective May 1, 1993. The Court made minor changes to Rule 65B and adopted it effective May 1, 1993. Rule 63A, previously adopted on an emergency basis effective April 15, 1992, was unchanged by the Court.

3. **RULE 45.** Mr. Love distributed copies of current state Rule 45, current federal Rule 45, and a draft of proposed Rule 45. He reviewed the draft at length, noting that it contained

provisions from the current state rule, the current federal rule, and suggestions from the subcommittee. The Committee discussed the proposal, noting the following concerns:

1. Mr. Sullivan noted that proposed (a)(2) provides for a subpoena to be issued from the court in which the trial or hearing is to be held, or from the court for the district in which the production of documents is to be made. He questioned whether the second option was necessary for subpoenas that would be given statewide effect.
2. Mr. Love noted that the process established in (a)(3), whereby either the clerk or an attorney may issue a subpoena, applies both to subpoenas commanding attendance at a hearing or deposition and subpoenas commanding production or inspection.
3. Mr. Soper noted that the service provisions in (b)(1) are more restrictive than the service requirements of Rule 4. He also noted that the reference to Rule 4(d) in current Rule 45(c) should be a reference to Rule 4(e).
4. Ms. Hinman noted that (b) (4) should provide that a party requesting copies of documents from the party who subpoenaed them should be required to pay the expense of reproducing the documents.
5. Mr. Hanni asked whether there was good reason to have three different types of subpoenas: one subpoena for a hearing or trial; one subpoena for deposition purposes; and one subpoena for the production of documents. Mr. Love responded that the first two subpoenas are already provided for in the state rule, and that only the proposed subpoena for the production of documents is new.
6. Mr. Hanni asked whether the proposal requires that a subpoena for production of documents be served on the other parties. Mr. Love responded that the last sentence of shaded (b)(1) includes such a requirement.

The Committee determined to defer questions regarding specific language in the proposal until the next Committee meeting. It was also determined that the subcommittee should provide, in time for the next Committee mailing, a synopsis of the proposal, an explanation indicating the source of each provision of the

proposal, and a summary of the differences between the proposal and the current state rule. Alternative provisions in the proposal should also be deleted.

Mr. Sullivan identified the following other issues to be addressed by the subcommittee in the next draft of the proposal:

1. (Alan, do you remember your first item?)
2. The ability of the parties to object to a subpoena.
3. Reasonable time limits on third party responses to a subpoena.
4. Resolve ambiguities in the current state rule.

Mr. Love noted that there is an article on federal subpoena practice in 139 F.R.D. 197.

4. **WRITS OF RESTITUTION.** Mr. Sullivan reminded the Committee that Bruce Plenk had proposed the adoption of a rule governing the enforcement of eviction orders. That proposal had originally been directed to the Judicial Council, which had referred it to the Committee. The Committee discussed the issue at its last meeting, and determined that there was a need for uniformity in enforcement, and that Mr. Plenk's initial draft was a good starting point, but should be subjected to revision.

Mr. Sullivan reported that he had met with Justices Howe and Stewart of the Supreme Court. They indicated their belief that there should be a uniform statewide procedure; that the proposed rule should be even-handed among landlords, tenants and other involved parties; and that where possible, the Committee should avoid proposing substantive law. Justice Howe had also expressed concern about lengthy delays before requiring a tenant to move from the property and lengthy storage requirements.

Mr. Sullivan reported that Mr. Plenk had obtained the assistance of a law student to review the various states' procedures, and that Mr. Plenk had recommended that James Dean, counsel for the Apartment Association of Utah, be included in the drafting process. Mr. Sullivan indicated that he would ask Mr. Plenk and Mr. Dean, along with one Committee member, to comprise a subcommittee and propose a specific rule.

Ms. Hinman indicated that New York has a well established body of law the Committee could look to for further guidance.

5. **DISCOVERY SUBCOMMITTEE REPORT.** Mr. Sullivan indicated that he was reducing the size of the discovery subcommittee to two: Mr. Wikstrom and Mr. Young. He then asked the Committee to consider taking the approach, for purposes of addressing the discovery rules, that all federal changes should be adopted for uniformity purposes, except where the Committee specifically determines not to adopt the federal changes.

Prof. Boyce reported that the proposed local federal rules on discovery had been withdrawn from consideration until after the new federal discovery rules go into effect. He opined that the local rules will therefore not be adopted until 1994, and that they will closely parallel the new federal rules.

Mr. Wikstrom summarized key changes to the new federal rules as follows:

1. Rule 26. The parties will have a meeting 14 days prior to the scheduling conference to narrow the issues, arrange for disclosure, and develop a discovery plan. Then, within ten days, the parties must disclose specified information, including the names and phone numbers of prospective witnesses, copies of documents, a computation of damages, and insurance agreements, if any. Thirty days prior to trial, the parties must disclose all witnesses and exhibits, and objections must be filed within 14 days thereafter. The parties must also provide a thorough disclosure of expert testimony at least 90 days prior to trial. Claims of attorney-client privilege and attorney work product must be specifically identified. Finally, the parties are under a continuing duty to supplement disclosures.

Mr. Sullivan noted that the parties often disagree on the scope of the lawsuit. Consequently, one party will provide disclosure based on a narrow view, while the other party will expect disclosure on a broader view. Prof. Boyce noted that the plaintiff's pleadings determine the scope of the suit. Mr. Sullivan opined that a defendant could then narrow the scope of the suit with motions to dismiss. Mr. Karrenberg noted that a RICO claim would require very broad disclosure.

2. Rule 37. Before a party can receive sanctions, the party must certify that it has tried to resolve discovery disputes. The sanction for a failure to disclose is a prohibition against use of the non-disclosed information or documentation at trial.

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3. Rule 30. Depositions are limited to ten per side, with no time limit on length. The party taking the deposition designates the method, whether by audio tape, stenographer, videotape, etc. Instructions not to answer a question are limited.
4. Rule 33. A twenty-five interrogatory limit is established. Parties must answer all unobjectionable parts of interrogatories.

Mr. Love asked what adverse affects, if any, will occur by not tracking the new federal rules. The Committee discussed the issue and opined that because discovery will be less expensive and because documents will be more readily available in the federal system, a plaintiff will prefer to use the federal system. Prof. Boyce noted that in districts where the new federal rules are already in effect, there was an initial increase in judge time, but that judge time dropped off sharply as attorneys become accustomed to the new procedures. He also noted that sanctions are severe when they are imposed, and that attorneys need to inform their clients, early on in the litigation, that clients must be prepared to comply with the new discovery procedures. The Committee also noted that there is a self-imposed "punishment" for a party being too broad in its initial pleadings. The party will be forced to review a broad disclosure of documents, most of which may be irrelevant.

The Committee determined to study discovery rules in light of the new federal rules, and to adopt similar rules, aiming for the same or a similar effective date.

Ms. Hinman queried whether the new rules are applicable in domestic relations cases.

Mr. Wikstrom indicated that the subcommittee will report on Rule 26 first, and consider each discovery rule in turn. He will contact the Bar Commission regarding the impact of early scheduling conferences.

Prof. Boyce noted that there is an article in a recent Iowa Law Review dealing with mandatory ADR.

Ms. Hinman noted that the Committee should be alert to other rules which may be effected by changes to the discovery rules.

6.           REQUEST FROM FRAN FISH. Mr. Sullivan directed the Committee to a letter from Fran Fish, the State Notary Public Administrator. The letter requests that the "residing at" language be deleted from jurats on court forms. The Committee determined not to make the deletion, and asked Mr. Sullivan to respond to Ms. Fish in writing.

7.           ADJOURNMENT. There being no further business, the Committee meeting was adjourned.