MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, December 3, 1997, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: **Thomas R. Karrenberg, John L. Young, David K. Isom, Leslie W. Slaugh, Terry Kogan, Honorable Ronald N. Boyce, Honorable Anne M. Stirba, Glen C. Hanni, Terrie T. McIntosh, Mary Ann Q. Wood, W. Cullen Battle, Perrin R. Love, Virginia Smith, Honorable William B. Bohling, Honorable Ronald E. Nehring**

STAFF: **Timothy R. Shea, Peggy Gentles, Matty Branch, Todd Shaughnessy**

I. WELCOME AND APPROVAL OF MINUTES.

Mr. Sullivan welcomed the Committee members to the meeting. He thanked Judges Bohling and Nehring for their willingness to attend the meeting to discuss their views on the civil discovery rules being considered by the Committee.

Judge Stirba made a motion to approve the October 22, 1997, minutes. Mr. Young seconded, and the Committee unanimously approved the minutes.

II. CIVIL DISCOVERY RULES.

Mr. Sullivan briefly reviewed the Committee's prior discussions on the issue of revising civil discovery rules. He stated that following the Committee's October meeting, a subcommittee was formed to begin drafting some specific language to be considered by the Committee and to seek reactions from members of the bench. Mr. Sullivan asked members of the subcommittee to describe the drafts prepared by each of them.

Initial Meeting of Counsel/Initial Disclosures.

Ms. Wood prepared a proposed rule regarding the mandatory meeting of counsel. She explained to the Committee that one of the primary issues that would need to be addressed is the timing of the meeting. She stated that the Committee wanted to avoid the rather complicated timing contained in the federal rules, and instead opt for a simple triggering event. The Committee, however, is divided on the issue of how quickly a meeting should be held, and whether a meeting should be held if there is a dispositive motion pending. Another issue is how to handle multiple-defendant cases. Ms. Wood explained that, in her view, the meeting should not

be held until all or most parties have entered an appearance and all issues are joined. She therefore drafted the rule to require the meeting "as soon as practicable and in any event no more than 10 days after the last pleading is filed . . . ."

The initial meeting rule conflicts with the mandatory disclosure rule drafted by Mr. Karrenberg. Mr. Karrenberg explained that, under his proposed rule regarding initial disclosures, such disclosures would be made within 10 days of when the defendant files a responsive pleading. Mr. Karrenberg explained that, in his opinion, initial disclosures should not be delayed by the filing of a motion to dismiss.

Mr. Hanni asked whether it was feasible to require an initial conference with the Court. He explained that, in his view, the prospect of having to discuss these issues with the judge helps move things along and, in addition, would be consistent with the federal rules. Judge Bohling stated that judges differ on the feasibility of having a scheduling conference at the outset of the case. He personally would welcome the opportunity. Other judges, however, are concerned about their caseload and whether it would be feasible to have a conference in every civil case filed. Judge Nehring agreed that such meetings are feasible and that the state rules should, wherever possible, mirror the federal rules. Judge Stirba agreed that it is helpful to have judges involved early on. She is concerned, however, about the categories of cases that are excluded from the requirements, particularly domestic cases, which could benefit from the changes. If included, however, it would make it very difficult to conduct initial scheduling conferences. Mr. Slaugh commented that he was not convinced the changes would increase efficiency and decrease cost to litigants. He stated that, in his opinion, a trial date is the best device for moving a case toward conclusion.

The Committee then discussed categories of cases that could be excluded from the requirements. Mr. Sullivan asked whether collections cases should be excluded. Mr. Slaugh indicated that there may be a definitional problem with what qualifies as a collections case. He suggested that the rules incorporate a minimum dollar limit. The Committee then discussed whether cases involving pro se parties should be excluded. Judge Boyce explained that the federal rules exclude pro se cases, but the Court automatically enters a scheduling order which is adjusted if necessary in a particular case. Mr. Sullivan questioned whether pro se cases should be excluded. Judge Nehring agreed that these cases often present difficult discovery issues, and these requirements could be helpful in those cases. He questions, however, whether a pro se party should be held to a "disclose it or lose it" standard.

Mr. Karrenberg then discussed whether it is counterproductive to require disclosures before the initial meeting of counsel and before filing an answer (e.g., if a dispositive motion is filed). Mr. Karrenberg stated that requiring disclosures before the meeting was not a problem because they are relatively straightforward. Several members of the Committee expressed that disclosures should be made after the meeting because the meeting serves as an opportunity to discuss what each party wants. Mr. Slaugh stated that the rule regarding the initial meeting and the rule regarding disclosures should dovetail with one another.

Mr. Sullivan asked whether disclosures could be made without an answer if the standard

for materials that must be disclosed is information that is disputed in the pleadings. Mr. Karrenberg stated that this distinction is not really a problem in the federal courts. Judge Boyce agreed. Mr. Battle asked what would happen if a counterclaim is filed. Would this require another round of meetings and disclosures? Members of the Committee indicated that this probably could be addressed by the duty to supplement discovery.

Presumptive Limits on Discovery.

Mr. Love discussed the amendments to create presumptive limits on discovery. He indicated that the major issue for the Committee to consider in connection with these amendments is whether to require expert witness reports. Mr. Love explained that this issue could generate significant opposition from members of the bar, particularly the plaintiff's bar, and that some form of compromise may be in order. He suggested that the rules could require disclosure of certain kinds of information, but not require a full report. This could include information similar to that typically requested in interrogatories and document requests. Another possibility is to have the attorney, rather than the expert, prepare the report. Judge Boyce questioned whether this could be done. It would, for example, limit a party's ability to cross-examine an expert based upon the contents of the report, and runs the risk of turning the lawyer into a witness if there are disputes about the report's contents. There also may be a problem with the attorney being able to accurately describe a particularly-complex opinion and the bases therefor. Mr. Love explained that a report, even if prepared by a lawyer, would help solve the problem the response typically given to written discovery about experts, namely, that the expert has not yet completed his or her analysis. Mr. Sullivan took an informal survey of members of the Committee on this issue. The Committee was fairly evenly divided on the issue of whether the rule should require expert-prepared reports, attorney-prepared reports, or simply information that typically is requested in interrogatories and document requests.

Mr. Love's proposed rule regarding pretrial disclosures mirrors the federal rule. He stated that this rule would require disclosure of witnesses and exhibits, similar to pretrial orders entered in many cases already, and probably would not generate any controversy. Judges Bohling and Nehring agreed.

Mr. Love then discussed the proposed rules regarding depositions. The proposed rules would presumptively limit the total number of depositions that may be taken, and successive depositions of the same individuals. The proposed rule also would allow a party to take a deposition by non-stenographic means without a stipulation or order. The rules also limit the manner in which a party may make objections, and objections that are preserved for trial.

Mr. Love also made changes to several discovery rules to bring them into conformity with the above, including Rule 31 (depositions upon written questions), Rule 33 (interrogatories), Rule 34 (document requests), and Rule 35 (requests for admission).

Mr. Sullivan told the Committee that he and members of the subcommittee would put together another draft of the discovery rules, taking into consideration this issues raised during the meeting. He asked Mr. Battle to further investigate the issues surrounding expert witness reports,

and report what he finds to the Committee.

III. COMMENTS TO RULES.

The Committee put this issue over to its January meeting.

IV. RULE 63: ADVOCACY OR COMMENT BY JUDGE UPON AN AFFIDAVIT OF BIAS.

The Committee put this issue over to its January meeting.

V. CONCLUSION.

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting scheduled for Wednesday, January 14, 1998, at 4:00 p.m. at the Administrative Office of the Courts.