Agenda

Advisory Committee on Rules of Civil Procedure

January 14, 1998
4:00 to 6:00 p.m.

Administrative Office of the Courts
230 South 500 East, Suite 300

Welcome and Approval of Minutes	Alan Sullivan
Introduction of new member	Alan Sullivan Paula Carr
Comments to Rules	Peggy Gentles Tim Shea
Rule 63. Advocacy or comment by judge upon an affidavit of bias	Tim Shea
Rule 77(d)	Tim Shea

APPROVED MINUTES

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, January 14, 1998, - 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Cullen Battle, Thomas Karrenberg, Terrie McIntosh, Leslie Slaugh, Mary Ann Wood, Glen Hanni, Virginia Smith, Alan Sullivan, James Soper, Fran Wickstrom, Paula Carr.

STAFF: Peggy Gentles, Tim Shea.

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed the Committee members to the meeting. He introduced a new Committee member, Paula Carr, Clerk of Court in the Second District. Mr. Sullivan informed the Committee that the Supreme Court had recently appointed clerks of court to each of the Rules of Procedure Committees. Glen Hanni moved that the minutes of the last meeting be approved with one change. Tom Karrenberg seconded. The motion passed unanimously.

II. COMMENTS TO RULES.

Alan Sullivan reminded the Committee that rules had been published for comment and were now ready for recommendations for adoption to the Supreme Court. Peggy Gentles summarized the comments received on the proposed change to Rule 10 which would require all complaints to be filed with a cover sheet. Tim Dalton Dunn and Roger Tschanz stated that they objected to the requirement of a cover sheet as unnecessary and unjustified by any need to collect data. Tim Shea stated that the purpose of the cover sheet is to allow identification of the type of case being filed. The district courts need to know the composition of their caseloads in order to effectively manage them. Mr. Shea continued that most districts currently require some type of cover sheet, as does the federal court. However, the hope is that a uniform form will be used statewide. Ms. Gentles stated that Richard Daynes had expressed a concern that a complaint not be rejected for failing to comply with the requirement for a cover sheet. His concern was that a complaint would be rejected by a clerk and would therefore miss a statute of limitations. Leslie Slaugh pointed out that Mr. Daynes' concern is addressed by existing paragraph (f) of the rule which states that clerks shall accept filings that do not conform with the rule but may require counsel to substitute properly prepared papers. The Committee recommended no changes to Rule 10 as published for comment.

Tim Shea directed the Committee members to his memorandum on the comments to Rule 60 as published for comment. He stated that the Committee had received an unusually large number of comments on the proposed change to Rule 60. A majority of those comments opposed the change

extending the period to file a motion for relief from judgment under paragraphs (b)(1), (b)(2), and (b)(3) from three months to one year. Alan Sullivan pointed out that the Committee had received no comments on the proposal to remove the reason for relief from judgment listed in paragraph (b)(4). Leslie Slaugh stated that he had originally been in favor of the proposed change but has changed his mind after reading the comments. He sees a problem in cases typically in the state system, especially divorce, with extending the lack of finality. Alan Sullivan reminded the Committee that it had proposed the change for two reasons. First, there was a concern that three months was too short. Second, the Committee thought that the state rule should parallel with the federal rule. John Young stated that he saw a significant problem with the Committee's proposed changes for title insurance companies. Mr. Sullivan stated that Judge Stirba, who was unable to attend the meeting, had called him and discussed her reactions to the comments. Mr. Sullivan stated that Judge Stirba had been persuaded by the comments that the shorter time period should be retained. She had found the comment from the Judicial Rules Review Committee to be particularly persuasive. Alan Sullivan stated that he thought the Committee had three choices. It could leave the rule as it exists with the three month limit, it could change to one year, or it could adopt a middle ground of six months. Mr. Sullivan stated that it was his opinion that three months was too short. Francis Wickstrom stated that he had originally been in favor of the change but having reviewed the comments his opinion had changed. He felt that the different types of cases in the state court justified a shorter time period. Mr. Wickstrom moved that the Committee withdraw its proposal to change the three month time period to one year. Tom Karrenberg seconded. The motion passed unanimously.

Tim Shea presented the comments received on Rule 64C. The Committee's proposal was to change the amount of undertaking that a plaintiff must post to get a pre-judgment attachment of defendant's property. Mr. Shea directed the Committee to the Judicial Rules Review Committee's comment asking why similar language was not included in the provision for vacating of a writ of attachment by the defendant. Virginia Smith stated that while she was drafting the proposed changes to Rule 64C she had purposely left the amount of bond that the defendant needed to post as it appeared in the rule because it allowed defendants to post bond and quickly vacate the attachment. Any standard which required the court to determine an amount would require the defendant to wait longer. Leslie Slaugh suggested that, giving Ms. Smith's concerns, the provision governing defendant's bond could set an amount and then have a provision that the court could set a lower amount of bond. Fran Wickstrom asked why the defendant's bond was set at twice the amount of the plaintiff's claim instead of some amount tied to the value of the property attached. Ms. Smith stated the valuation issues in this area are often very difficult. She continued that the plaintiff's bond is not tied to the amount of the claim because the concern is damages to the defendant for the loss of the use of the property, although one of the factors of court can consider is the amount of plaintiff's claim. Tom Karrenberg pointed out that it is not easy for a plaintiff to get a pre-judgment attachment. The Committee discussed proposed language that would set an amount for the defendant to release the attachment that would be tied to the value of the plaintiff's claim but would also allow a lower amount to be set by the court. This proposal would allow a defendant the option of posting a bond without having a court hearing but would also not require the posting of a bond that may in fact greatly exceed the value of the property attached. Mr. Sullivan suggested that the following language be added to paragraph (f)(1) at the end of the first sentence: "or in such smaller amount as

may be proven adequate security for discharge of the attachment." Ginger Smith moved that the Committee recommend adoption of Rule 64C with the addition of the language suggested by Mr. Sullivan. Fran Wickstrom seconded. The motion passed unanimously.

Ginger Smith referred the Committee to the comment from Robert Goodman at Zion's Bank. She asked the Committee's permission to research further the issue raised by Mr. Goodman's comment of why a plaintiff is allowed to attach property owned by third parties in light of the garnishment rule. The Committee agreed with Ms. Smith's proposal to research the issue. Leslie Slaugh referred the Committee to his comment on Rule 64C which addressed a problem he perceived in paragraph (f). He thought the language might be interpreted to limit the amount of a plaintiff's judgment to the amount of the undertaking the defendant had posted to release pre-judgment writ of attachment. The Committee did not feel that an ambiguity sufficient to justify an amendment existed in the rule. Alan Sullivan stated that he thought the rule clearly limits the amount that the surety would be responsible for not the amount that the plaintiff can recover.

Leslie Slaugh referred the Committee to his letter that contained a number of comments on the proposed forms. The Committee discussed Mr. Slaugh's proposals and adopted them. In addition, the Committee decided that each form should incorporate other forms, such as captions, prayer for relief, as necessary to guide those using the forms in the preparation of a sufficient pleading.

III. RULE 77(D).

Tim Shea referred the Committee to a draft change to Rule 77(d). The proposal would remove a provision that states that the clerk shall not charge a fee for copies when a party provides a document for certification. Requiring a clerk to compare a document to the file rather than making a copy of the court's original makes more work for the clerks. Therefore, the clerks have asked that paragraph 77(d) be removed from the rule. In addition, Mr. Shea noted that it was probably not appropriate that a rule of civil procedure purport to control what a sheriff can charge. Leslie Slaugh moved that the proposed change to Rule 77 be published for comment. Tom Karrenberg seconded. The motion passed unanimously.

VI. RULE 63. ADVOCACY COMMENT BY JUDGE UPON AN AFFIDAVIT OF BIAS.

Tim Shea reported that two recent appellate opinions have addressed what information a judge reviewing a affidavit of bias may have. In one case, the reviewing judge requested specific information from the judge about whom the affidavit had been filed. In the other case, the judge about whom the affidavit had been filed included a comment with his referral of the affidavit to another judge. The issue for the Committee's consideration is whether the rule should be clarified to address when a judge may provide factual information for the record on an affidavit of bias.

Alan Sullivan stated that the Committee had discussed this rule previously. The rule as it exists currently is clear that when an affidavit is filed a judge must either recuse or stop the

proceedings and refer the affidavit of bias to another judge to determine the sufficiency of the affidavit. The problems that have identified with the rule are two-fold. First, judges perceive that the rule is unfair because they can not respond to statements in the affidavits. Second, the filing of an affidavit causes delay. Mr. Sullivan stated that Judge Stirba had said that she did not think that either of the appellate cases called for a change to the rule. However, she does have a concern that litigants use the affidavit of bias to cause delay often filing an affidavit at the beginning of a trial. While the affidavit may not be timely, the judge often feels that the affidavit should be referred to another judge for review.

The Committee discussed the issues surrounding Rule 63. Alan Sullivan suggested that the Committee look at what other states do with regard to the following questions: 1)who decides the issue of the timeliness of filing of the affidavit of bias; 2)should the rule require that the affidavits be referred to the presiding judge of the district; 3)should the judge be allowed to respond to an affidavit of bias in referring it to another judge; and 4)should the judge reviewing the affidavit of bias be allowed to request information from the judge presiding over the case. Mr. Sullivan asked that the staff investigate these areas. Also, he noted that the Rules of Criminal Procedure contain a similar provision and the Committee should coordinate its work with the Advisory Committee on Criminal Procedure. Finally, Mr. Sullivan noted that after the Committee had gathered more information, it should request input from judges.

V. ADJOURN

Alan Sullivan noted that the Committee's next meeting would be on the regularly scheduled third Wednesday of the month, February 25, 1998. There being no further business the Committee adjourned.