Agenda

Advisory Committee on Rules of Civil Procedure

April 22, 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
Rule 63	Tim Shea
Rule 77	Paula Carr
Civil Discovery Rules	Cullen Battle Tom Karrenberg Perrin Love Alan Sullivan Mary Anne Wood

The next meeting of the Committee is scheduled for May 27 at 4:00 p.m. at the Scott M. Matheson Courthouse, 450 South State Street. The room assignment and parking instructions will accompany the meeting materials.

MINUTES

Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure

Wednesday, April 22, 1998
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Perrin Love, James Soper, W. Cullen Battle, Fran Wikstrom, Honorable Ronald N. Boyce, Honorable Ronald E. Nehring, Virginia Smith, Honorable Anne M. Stirba, Paula Carr, Terry Kogan.

STAFF: Tim Shea, Matty Branch, Todd Shaughnessy

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. Terry Kogan moved that the minutes of the last meeting be approved. Judge Stirba seconded, and the motion passed unanimously.

II. RULE 23.1 -- DERIVATIVE ACTIONS.

Mr. Sullivan asked Perrin Love to describe for the Committee the problems he discovered with Rule 23.1. Mr. Love explained that the rule is identical to its federal counterpart, including its reference to collusive joinder to confer federal jurisdiction. He suggested that this language be eliminated. He also suggested that the rule be rewritten to make it gender neutral. Mr. Sullivan thanked Mr. Love for bringing this issue to the Committee's attention, and asked him to work with Tim Shea in redrafting a rule for the Committee's consideration. He also asked Mr. Love to examine the rule and see if there are any additional changes that need to be made.

III. RULE 77 -- COURT CLERKS.

Mr. Sullivan asked Paula Carr to introduce this issue to the Committee. Ms. Carr explained that because Rule 77 states that the district courts are always open, she and some other district court clerks have received telephone calls late at night from attorneys seeking to file papers. She said that some courts have after-hour filing boxes, many smaller courts do not. In these areas, clerks receive phone calls at home asking that papers be filed. Ms. Carr explained that while not commonplace, this is an inconvenience.

Mr. Sullivan then explained the background of Rule 77 and its federal counterpart. He said that term "always open" means that the court always has the power to act, and the

Committee should be careful in considering any amendment that may create confusion regarding this meaning. Mr. Karrenberg questioned why this should mean that the clerk's office is open. The Committee also discussed the availability of after-hour filing boxes, and why they are not available in every jurisdiction. The problem, according to Ms. Carr, is cost. Many courts cannot justify the cost of installing a box given the number of filings.

Mr. Sullivan asked Ms. Carr to contact other clerks and work with them in suggesting language that would ensure (i) that the courts are "always open", but (2) the clerks can keep normal hours.

IV. RULE 63 -- DISQUALIFICATION OF JUDGES.

Mr. Sullivan asked Mr. Shea to discuss his recent work on this rule. Mr. Shea explained that he had met with the boards of judges to discuss this rule, and has examined similar rules in a number of states. He presented the Committee with a revised version of Rule 63 for its consideration.

Judge Stirba expressed concern over the provisions in the rule that give the parties the ability to decide whether to require a new trial or additional evidence if a new judge takes over. She explained that the judge should make this decision, with input from the parties. She explained that it is very difficult for a judge to enter findings of fact when that judge did not preside over the trial, and the judge should have the discretion to require all or a portion of the case to be retried if necessary. Mr. Sullivan suggested that the rule be changed to permit a judge to take whatever measures the judge deems necessary to be able to enter findings of fact. The Committee then discussed a number of language changes to the draft of Rule 63.

Mr. Shea then discussed the timing for filing a motion to disqualify. He said that other jurisdictions vary widely. He also said the rule makes clear that affidavits of bias are subject to Rule 11. Judge Stirba raised concerns about pro se litigants. Judge Boyce questioned whether the rule gave parties too many opportunities to challenge, and would be therefore subject to abuse. Judge Stirba explained that it is important to have the motion reviewed by another judge because these issues often come up later before the Judicial Conduct Commission. Judge Nehring agreed, and said one important aspect of the rule is the ability of the judge to respond.

Mr. Sullivan suggested that the language be clarified so that the "target" judge either (i) grants the motion, or (ii) certifies it to the presiding judge and has the option of submitting an affidavit if he or she chooses to do so. The target judge should not "deny" the motion and then have it reviewed by someone else. The Committee then discussed at length the standard for determining bias. Several members of the Committee stated that relevant provisions of the Code of Judicial Administration should be incorporated by reference, while others objected to doing so. The Committee agreed the standard should be more clear. Mr. Sullivan asked Mr. Shea to prepare another version of the rule for consideration by the Committee at a future meeting.

V. DISCOVERY PROJECT.

Mr. Sullivan reviewed for the Committee the discussions about proposed changes to the discovery rules. He stated that he would like to make a presentation to the district court judges in May and would like to have a draft to take to them. He briefly summarized for the Committee each of the main elements of the proposed changes.

Mandatory Meet-and-Confer. Mr. Sullivan has revised this requirement based on comments from Committee members, and has suggested a compromise position on a number issues. First, the meeting would be held 60 days after the complaint is served on any defendant. The meeting could be in person or by telephone. Finally, if the parties agree, they can prepare a stipulated discovery and scheduling order and submit it to the court for approval. If the parties cannot agree, the plaintiff shall, or any party may, request a Rule 16 conference with the court and the court must hold such a conference. Discovery would not begin until the conference is held.

Judge Stirba objected to the requirement that the court hold a conference. She said the rule should be permissive and the court should have discretion whether to hold one. Judge Boyce said that his experience with the federal rules is that parties agree 90 percent of the time, and in the remaining 10 percent of case, the court really should hold a hearing at the outset. Judge Stirba questioned whether this requirement was even necessary because, under the existing rules, parties have an incentive to keep the case moving -- a party can request a trial date by filing a certificate of readiness and if parties fail to keep the case moving, they will be subject to an order to show cause why the case should not be dismissed. Mr. Sullivan suggested that the rule could be modified to make clear that a party may request a Rule 16 conference and, if the party fails to do so, the presumptive discovery limitations will govern.

Mr. Sullivan explained that if courts are unwilling to hold conferences, the rules will break down. The only way discovery starts is by the occurrence of a conference, or presentation of a stipulation, and if the parties and court do nothing, there is no way to get the process moving. Judge Nehring suggested that hearings could be discretionary, but the rule could require the parties to each submit a proposed discovery order, and the court could then choose one or prepare its own. In short, the rule could say that hearings are permissive, but the court must enter an discovery order.

Members of the Committee then discussed cases that could be eliminated from the discovery rule requirements. Judge Nehring explained that, in his opinion, this is likely to be the biggest concern of district court judges. The Committee discussed the pros and cons of setting a simple dollar limitation. The Committee also discussed whether domestic cases should be exempted. Virginia Smith pointed out that exemptions should not be wholesale; in other words, some cases should be exempted from some of the requirements.

Mr. Sullivan stated that the Committee had a couple of options. It could recommend that the discovery rules be substantially overhauled, incorporating each of the elements, in some form, and exempting out certain categories of cases. Or, the Committee could eliminate the rules that are presenting difficulty, and simply the non-controversial disclosure and deposition rules. Judge Boyce said the biggest impact of the federal rules has been the meet-and-confer and initial disclosure requirements and he strongly favors incorporating these. The real issue with the discovery order requirement seems to be the perception by judges that they will not have enough

time to hold hearings in every case. Mr. Sullivan explained that the critical issues seem to be whether the Rule 16 conference is mandatory and whether a discovery order is mandatory. He said that he would take all of these issues into consideration and present the Committee with some alternatives at its next meeting.

VI. ADJOURN.

Mr. Sullivan reminded committee members that the next meeting is scheduled for May 19, 1998, in the new building. There being no further business, the committee adjourned.