

Agenda

Advisory Committee on Rules of Civil Procedure

September 23, 1998
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Welcome and Approval of Minutes	Alan Sullivan
Consideration of Comments and Final Committee Recommendations on Rules 5, 6, and 77	Tim Shea
Discovery Amendments	Alan Sullivan
Other Rules for Future Consideration Rule 4 and Rule 23.1 Rule 64C	Perrin Love Ginger Smith and Cullen Battle
Letter from Dave Nuffer	Tim Shea

Parking:

Enter parking level P2 from 400 South. There is a left turn lane if you are westbound on 400 South. Bear to the left as you descend the driveway. After parking, take the elevator to the first floor rotunda. Pass through the security checkpoint and take the elevator (on your right) to the 3d floor. (The elevator to the Courthouse floors is separate from the elevator to the parking garage.) The Council Room is in the North wing of the Courthouse, Suite N31. Identify yourself at the receptionist's desk. See Tim Shea or Diana Pollock for parking validation stickers.

Future Meeting Schedule.

All meetings are scheduled from 4:00 to 6:00 p.m. in the Judicial Council Room, Suite N31 at the Matheson Courthouse, 450 South State.

October 28	March 24
December 2	April 28
January 27	May 26
February 24	

MINUTES

**Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure**

**Wednesday, May 19, 1998
Administrative Office of the Courts**

*May be
9/23/1998?*

Alan L. Sullivan, Presiding

PRESENT: James Soper, Fran Wikstrom, Honorable Ronald N. Boyce, Virginia Smith, Terrie T. McIntosh, Tom Karrenberg, Paula Carr, Glenn C. Hanni, Leslie W. Slaugh, Terry S. Kogan.

STAFF: Tim Shea, Peggy Gentles, Mattie Branch Todd Shaughnessy

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. He informed the committee that Judge Bunnell had resigned from the committee, and would be replaced by Judge Lynn Payne, and Judge Stirba also had resigned, and the Court was in the process of identifying her replacement.

Mr. Sullivan stated that the committee was winding down on a number of projects, and asked committee members to think about what projects, if any, the committee should undertake next. He asked Tim Shea and Peggy Gentles to carefully review the rules and help the committee identify rules that are outdated or otherwise need change.

Terry Kogan moved that the minutes of the last meeting be approved. Judge Boyce seconded, and the motion passed unanimously.

II. AMENDMENTS TO RULES 5, 6, AND 77.

Mr. Sullivan asked Mr. Shea to review the comments received following publication of amendments to Rules 5, 6, and 77. Mr. Shea informed the committee that these rules were published for comment last spring. No comments were received on the amendments to Rule 77. The one comment received on Rule 6 was a suggestion that it be applied to the Utah Rules of Appellate Procedure as well. Mr. Sullivan asked Mr. Shea to pass this comment along to the group responsible for amendments to the Rules of Appellate Procedure. The committee received one comment on the amendments to Rule 5. The author suggested that parties be given at least 5

days notice before any hearing. The committee agreed that the purpose of the amendments was not to authorize hearings with less notice, but to clarify how notice should be given under such circumstances. Mr. Sullivan asked Mr. Shea to prepare an advisory committee note explaining this. The committee agreed that no further amendment to the rule was necessary.

Mr. Sullivan asked Mr. Shea to prepare advisory committee notes for each of these rules before passing them along to the Court for consideration.

III. DISCOVERY PROJECT.

Mr. Sullivan reviewed for the Committee the status of the discovery project and the proposed changes to the discovery rules. He stated that the proposed rules had been well received by the district court judges.

The committee then discussed whether it should seek preliminary comments on the rules from groups or members of the bar. Mr. Sullivan suggested that after some additional changes to the draft are made, the committee should consider circulating a draft to different sections of the bar, including the litigation and family law sections. Mr. Wikstrom suggested that the committee seek broader input, perhaps by posting the proposed rules on the Internet. Mr. Shea stated that the proposed rules could be placed on the AOC's web page, the bar's web page, and perhaps in other places as well. Several members of the committee states that getting preliminary comments from the bar, and determining whether there are strong objections to any portions of the rules, would be helpful. Mr. Sullivan suggested that beginning with the next meeting, the committee should invite various groups to attend the meeting and provide comments.

Mr. Sullivan reviewed the overall structure of the rules, and reminded the committee that they are patterned largely after the federal rules. Terrie McIntosh stated that, in her opinion, the organization of the rules was confusing and wondered whether anything could be done to make them easier to follow. For example, the requirements of the initial disclosures are discussed first, the time for doing them is later, and exceptions are much later still. She stated that the current format of the rules is difficult to follow and could be improved. Mr. Sullivan stated that the structure is borrowed from the federal rules and that an effort has been made to keep the rules as similar in structure as possible.

The committee then discussed specific rules and changes:

Rule 16: Mr. Sullivan proposed changes to subsection (b) to more clearly express the nature of the scheduling and management conference and to clarify the requirement of an order. In cases where the parties fail to meet and fail to submit a proposed discovery plan, they will be governed by the presumptive limits, without further action by the court.

Mr. Sullivan stated that subparagraph (c) was unnecessary and the items listed as (1) through (11) could be placed elsewhere. Members of the committee suggested that these items,

or some of them, be placed in subparagraph (a) or (b), or placed in an advisory committee note. The committee then discussed the distinction between scheduling and management conferences as explained in subparagraph (b) and pretrial conferences, as explained in paragraph (a). Jim Soper stated that this may confuse people, and wondered whether the scheduling and management conference should come before the pretrial conference.

Rule 26: Mr. Sullivan stated that subparagraph (a)(2)(A)'s reference to exempt cases should increase the dollar amount from \$20,000 to \$25,000 because this is consistent with distinctions the courts have made between different categories of case. Several members of the committee stated that, if anything, the amount should be decreased, not increased. Others thought this was a natural division given the historical distinctions and other issues like filing fees. The committee decided to solicit opinions from members of the collections bar.

Members of the committee also questioned what would happen if an original claim was for less than this amount, but a counterclaim or third party complaint was in excess of this amount. Mr. Sullivan stated that the rules are designed to be flexible and should apply if parties want them to.

Mr. Sullivan then asked whether there were other categories of cases that should be exempted. Probate and administrative cases were suggested as possibilities. Mr. Sullivan stated that most probate cases would never trigger the requirements, and therefore probably did not need to be exempted. If the probate involves an adversary proceeding, the rules would be triggered and should apply. Mr. Sullivan explained that there are a number of proceedings that are non-adversary, and the rules should not apply in these cases. The committee then discussed whether administrative cases should be exempted. Virginia Smith stated that some administrative cases may fall within the requirements of the rules, and probably should be exempted. Mr. Sullivan asked Ms. Smith and Mr. Shea to review UAPA and solicit opinions from administrative agencies on how best to address these cases. Ms. McIntosh suggested that this problem could be resolved by applying the \$25,000 limit to administrative cases as well.

The committee then discussed the requirement of expert witness reports. Several members of the committee expressed the view that reports should not be required. Others stated that they are useful and should be part of the rule. Mr. Sullivan stated that this is an issue the committee will undoubtedly receive comments on, and they should solicit those comments. Ms. McIntosh also suggested changes to the headings to make Rule 26 easier to understand.

Mr. Wikstrom suggested that the timing for disclosures and discovery cutoff should be staggered, with the plaintiff going first and the defendant responding thereafter. Mr. Sullivan stated that one goal of the rules is to get discovery moving more quickly and that the rules represent an effort to strike a balance between the needs of plaintiffs and defendants. For this reason, the timing runs from the party's pleading or motion.

The committee then discussed the Rule 26(f) conference. Mr. Sullivan stated that the

district court judges felt the meetings should be in person, not by telephone. Judge Boyce agreed that face-to-face meetings are more effective. Distance, however, may present situations where face-to-face meetings are impractical.

The committee made of number of other changes to the specific language of the proposed rules. The committee agreed that the rules should be distributed informally so that the Committee can receive comments and input.

IV. ADJOURN.

There being no further business, the committee adjourned.