

# Agenda

## Advisory Committee on Rules of Civil Procedure

November 10, 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	Tom Karrenberg
Advisory Committee Notes to Rules 5, 6, and 77	Tim Shea
Discovery Amendments Comments from lawyers Further federal changes	Tom Karrenberg

### **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 Peggy Gentles 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.

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

## MINUTES

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

Tuesday, November 10, 1998  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

**PRESENT:** James Soper, Honorable Ronald N. Boyce, Terrie T. McIntosh, Tom Karrenberg, Paula Carr, Leslie W. Slaugh, W. Cullen Battle, Mary Anne Q. Wood.

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

**GUESTS:** Colin King, Tom Shaffer, Janet Goldstein, Frank Carney.

#### I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. Mr. Sullivan also welcomed the guests who were in attendance to discuss with the committee their initial impressions of the discovery rules project.

Mr. Sullivan also informed the committee that two new members, Judge Tony Quinn and Judge Darwin Hansen, had been appointed to the committee and would begin attending meetings shortly.

Leslie Slaugh pointed out that page 3 of the minutes from the October meeting should be clarified to make sure they reflect the committee's decision to leave at \$20,000.00 the amount-in-controversy division between cases subject to the new discovery rules and those that are not. Tom Karrenberg moved that the minutes of the last meeting be approved. Mr. Slaugh seconded, and the motion passed unanimously.

#### II. AMENDMENTS TO RULES 5, 6, AND 77 -- COMMITTEE NOTES.

Mr. Sullivan reviewed with the committee the proposed advisory committee notes prepared by Tim Shea for the recent proposed amendments to Rules 5, 6, and 77. Mr. Sullivan made a minor change to the note for Rule 6 to clarify when the 3-day mailing period is included in the calculation of time.

With these amendments, Mr. Karrenberg moved that the Advisory Committee Notes be

adopted. Judge Boyce seconded, and the motion passed unanimously.

### **III. DISCOVERY PROJECT.**

Mr. Sullivan reviewed for the Committee and guests the history of the committee's work on the discovery project. He explained that the committee's work on the project began in 1994 and was initially triggered by the amendments to the Federal Rules of Civil Procedure in 1993. Beginning in late 1994, the committee began looking at whether the amended federal rules could be shaped to our courts. That effort ultimately was abandoned for a number of reasons, including the fact that the federal rules were still in a state of flux and not widely accepted and practitioners had not had much experience with them.

After the amendments to the federal rules became more widely accepted and followed in a number of state, and after practitioners had become more accustomed to them, members of the committee along with several judges proposed that the committee take up the issue again. That effort culminated in some tentative conclusions about the shape the rules likely would take. These were presented to district court judges across the state and were greeted with widespread approval.

The committee continued to revise and refine the rules and, during its September meeting, the committee decided to seek input, before the formal public comment period, from lawyers and other groups who likely would be affected. The committee circulated letters inviting comments and made copies of the draft rules available on the internet. Written comments were received both from individuals and groups, and copies provided to committee members.

Mr. Sullivan then discussed the American Bar Association's Discovery Guidelines for State Courts (August 1998) and the preliminary proposed draft of additional amendments to the Federal Rules of Civil Procedure. The federal rules likely will be amended in several ways, including the following: (1) the ability of district court's to opt out will be eliminated, (2) certain cases will be exempted, (3) the scope and timing of initial disclosures will be changed, (4) Rule 26(f) conferences may be conducted by telephone, (5) the rules will be clarified to address parties who are joined at a later date, and (6) discovery will be divided into two categories -- party controlled and court controlled, which will both limit and expand the present scope of discovery under the federal rules.

Mr. Sullivan explained to the guests that the committee's goal in inviting them to attend was primarily a fact-finding effort. The committee was very interested to hear what the guests had to say about the discovery project in general, and to respond with specific issues of concern. Mr. Sullivan then explained that one of several goals the committee sought to achieve was uniformity between the federal and state rules, recognizing that differences between state and federal courts and practices would dictate some significant differences. Mr. Sullivan stated that the guest's comments would be assembled and considered by the committee and additional changes to the rules would be discussed. The committee would then adopt a final draft and sent it out for public comment. With this introduction, Mr. Sullivan invited the guests to discuss whatever issues they deemed appropriate with the committee.

Frank Carney and Janet Goldstein, members of the Executive Committee of the Litigation Section of the Utah State Bar, addressed the committee. Mr. Carney explained that the Litigation Section was not taking a position on the rules at this time -- some members are opposed to the changes and others are in favor. He explained his efforts to get a sense of the feelings of the members of the section, and the willingness of the section to assist in gathering additional information. He discussed with the committee his willingness to solicit written opinions from members of the section. Judge Boyce and Mr. Sullivan suggested that these opinions not be expressed simply in the form of a "yes" or "no" vote, but that people have the ability to provide additional substantive commentary. Mr. Carney agreed to work with Mr. Sullivan in developing a survey for members of the section. Mr. Sullivan and other members of the committee thanked Mr. Carney and Ms. Goldstein for the willingness to assist in the project and for providing input.

Colin King, President of the Utah Trial Lawyer's Association ("UTLA") also addressed the group. Mr. King explained that his group consisted of approximately 350 trial lawyers in the state, largely (but not exclusively) plaintiff's lawyers who handle tort cases. Mr. King provided the committee a detailed written response to the proposed rules by UTLA, and also written comments jointly authored by members of Mr. King's firm and of Ralph Dewsnap, Mr. King's partner. Copies of these statements were provided to members of the committee.

Mr. King said there are a number of the proposed amendments to which neither he nor UTLA objects, including the changes to Rule 30. UTLA, however, is concerned because its members believe that the typical case they handle does not need the level of control envisioned by the rules. According to Mr. King, much of what the committee is trying to accomplish can be done through proper use of the existing Rule 16. Doing so, he believes, would lessen the number of discovery disputes and the scope of discovery in general. Mr. Sullivan explained the evolution of the current rules and the goal that they establish a presumptive limit for certain things, but lawyers could work out exceptions as required by individual cases. The committee initially favored holding Rule 16 scheduling conferences in every case, but the district court judges were opposed to this. The committee therefore adopted a presumptive limit that was intended to make sure cases were moving. The lawyers for the parties, however, have the ability to decide what works best in each individual case.

Mr. King said that another problem with the rules, and one that exists under the current federal rules, is the difficulty of putting lawyers in the position of guessing what is relevant to their opponent's case and possibly compromising their client's case in doing so. Mr. King also proposed that tort cases be added to the list of exempt cases. He said that these cases compromise 5% or less of the courts' dockets and there is serious concern about the cost of hiring and disclosing experts early on in a case. Mr. Sullivan explained that parties are obligated to designate experts at some point, and that a well-prepared report would invite a motion to limit the scope of a deposition and would eliminate the need for additional reports.

The committee then discussed the timing for expert reports. Several members suggested that reports be due after cutoff of fact discovery. This would lessen the cost and hardship of providing a report at the outset of the case. Mr. Sullivan explained that the parties can agree to this under the form of the current rules. Mr. Karrenberg emphasized the need to educate

practitioners about the rules. He also told Mr. King that the requirement of expert reports was one issues the committee had spent a lot of time discussing. Mr. Sullivan then reviewed the committee's discussions on this issues and the various proposals that have been considered.

The committee then heard from Tom Shaffer of Fabian & Clendenin. Mr. Shaffer explained the practice of state courts in Ohio, where he also practices, and the comprehensive pretrial orders that courts enter in every case. Mr. Shaffer stated that courts in Ohio are able to handle large caseloads with fewer judges by careful and consistent enforcement of comprehensive pretrial orders. The court holds a telephone scheduling conference with counsel in every case at which deadlines are established. The court also gives the parties a trial date, which is considered very firm. He says there are few discovery disputes because courts do not hesitate to sanction parties. According to Mr. Shaffer, the problem is not with the current rules, but with judges. Mr. Sullivan explained that the rules, as a practical matter, cannot force judges to do more. The parties, however, can ask the court for an order that includes a host of issues, similar to the pretrial orders Mr. Shaffer refers to.

Mr. Karrenberg emphasized the need to educate lawyers about the rules. Mr. Slaugh noted that the rules should specify how long the judge has to enter the discovery order that is submitted by the parties.

#### **IV. ADJOURN.**

Mr. Sullivan reminded the committee that there was no meeting in December, but that meetings would resume in January. There being no further business, the committee adjourned.