Agenda

Advisory Committee on Rules of Civil Procedure

February 24, 1999
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
Comments to Rule 63	Tim Shea
Discovery Amendments	Alan Sullivan
Judgment Lien Statute	Tim Shea
Amendments to Rule 1 for Final Action	Tim Shea

In addition to the enclosed materials, please bring with you the draft discovery rules and analysis of the comments mailed to you prior to the January meeting.

Future Meeting Schedule.
Summer meetings will be necessary to complete our work on the discovery amendments. 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.

March 24
April 28
May 26
June 23
July 28
August 25
September 22
October 27
December 1

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, February 24, 1999
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Honorable Darwin C. Hansen, Honorable Anthony B. Quinn, Terrie T. McIntosh, Paula Carr, Leslie W. Slaugh, W. Cullen Battle, Glen Hanni, Fran Wikstrom, Honorable Ronald N. Boyce, Virginia S. Smith.

STAFF: Tim Shea, Peggy Gentles, Todd Shaughnessy.

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. Glen Hanni moved that the minutes of the last meeting be approved. Leslie Slaugh seconded, and the motion passed unanimously.

II. RULE 63.

Mr. Sullivan reviewed for the Committee the history of the changes to Rule 63, the comments received following publication of the rule, and the issues raised during the Committee's last meeting. There were two overarching issues. The first involved whether the judge reviewing the motion should simply determine the sufficiency of the affidavit and motion, or whether the judge should consider the merits. The second related to whether the judge should be given an opportunity to respond and, if so, under what circumstances. Mr. Sullivan explained that he had asked Tim Shea and Peggy Gentles to gather information from other states.

Mr. Shea reviewed for the Committee the results of his research. He explained that states generally seem to fall into two categories, those that consider "legal sufficiency" and those that consider "legal sufficiency plus truth of the claim asserted." He also explained that some states follow the federal model, where the reviewing judge makes the final determination. Most of our surrounding states, however, has a two-tier process similar to the one in the proposed changes to Rule 63. Those states, however, also require the judge to determine "legal sufficiency and truth." He indicated that Utah is somewhat unusual in that it has a two-tier process, but the reviewing judge only determines "legal sufficiency." He also indicated that if "legal sufficiency" is the standard, and the judge therefore does not need to make a determination of "truth," the need for a response from the subject judge is less critical. Mr. Sullivan questioned whether, if the standard is "

legal sufficiency," there is any need to respond. Judge Boyce stated that even with this standard the judge should be permitted to respond to gross misstatements.

Mr. Shea presented the Committee with a "middle ground" suggested by Judge McIff wherein a judge assumes the accuracy of the facts unless they are rebutted. The subject judge may ask for an opportunity to respond. Mr. Sullivan suggested that the draft include Leslie Slaugh's proposal for the standard to include "legal sufficiency" plus "filed in good faith."

Mr. Hanni asked whether this would put the reviewing judge in an uncomfortable position of having to determine the truthfulness of a fellow judge based on a submission by that judge in response to a motion to disqualify. Members of the Committee then discussed whether the standard should be changed to reflect the "middle ground" proposed by Judge McIff, or changed to reflect the draft prepared by Mr. Shea. Several members of the Committee felt the standard should be "legal sufficiency" alone, and that if the reviewing judge has questions, he or she can ask them of the subject judge. Others stated that "legal sufficiency" alone is not enough, and will invite abuse by litigants displeased with a particular judge or that judge's rulings.

Fran Wikstrom moved that the Committee adopt the draft Rule, as drafted by Mr. Shea, with the following addition: page 2, lines 21-22, the phrase "and made in good faith" should be added following "legally sufficient"; page 2, line 25, the phrase "In determining issues of act or law" should be deleted; and page 2, lines 2-3, the phrase "and not less than two days prior to the hearing, except that a motion may be filed prior to the commencement of the hearing upon a showing of good cause." Cullen Battle seconded the motion, and the motion passed unanimously.

III. DISCOVERY RULES.

Mr. Sullivan reviewed the status of the discovery rules project. He explained that the rules had been presented to practitioners in several forums, and he had received feedback from many interested groups. He stated that there are several amendments that simply are not controversial; others, however, have and will generate controversy.

Terrie McIntosh explained that her biggest concern was the criticism being voiced by some that the discovery rules were being propounded by lawyers who practice in large law firms who have a much different case load than some small and solo practitioners. She stated that the Committee should make certain the rules are fair to all practitioners and do not impose additional costs on poor clients. Judge Boyce stated that this criticism seemed to be voiced by individuals who have little or no experience with the federal rules, and that the empirical evidence available shows that these kinds of rules decrease costs. Mr. Sullivan stated that part of this criticism stems from a misunderstanding of what the proposed rules actually do. He explained that many people with whom he has discussed the rules start with that attitude, but are persuaded otherwise. The cases that are not suited to these rules are by and large exempted, the rules may always be changed by agreement of the parties, and they do not really result in more work for lawyers, but simply require a change in attitude about how lawyers handle cases.

Mr. Slaugh expressed some concern that the rules will encourage parties to engage in

more, unnecessary discovery. Mr. Sullivan questioned whether requiring parties to prepare initial disclosures would do this. Initial disclosures simply do not require that much work, and the benefit of providing them to parties early in the case outweighs any additional burden on the lawyers. Glenn Hanni and Judge Boyce agreed that early initial disclosures are a good thing and should be encouraged.

Mr. Sullivan then discussed a plan for proceeding forward with the amendments. He said that he would like the Committee to go through the proposed rules and consider several issues, and finalize the rules so they can be sent out for comment. Mr. Slaugh suggested that when the rules are sent for comment, some summary or explanation of the Committee's work should be provided.

Mr. Sullivan began with the issue of what must be disclosed in a party's initial disclosures. The Committee reviewed the suggestions, and concluded that the rule should be modeled on the federal rules currently in effect, which require disclosure of documents "relevant to facts alleged with particularity in the pleadings."

The Committee then discussed exemptions. Cullen Battle suggested that the Committee consider exempting administrative review of zoning decisions. The Committee discussed the various types of administrative appeals that come before the district courts, and concluded that these proceedings should not be exempted, at least in the draft sent out for comment. The Committee also discussed whether pro se parties should be exempted, and determined that, for the present draft, they should remain exempted.

The Committee next discussed expert reports. Mr. Sullivan noted that this is a controversial issue, and that two proposals have been advanced. The first would require a written report signed by the expert. The second would require a written response, signed by counsel, and would be in the nature of an answer to interrogatories. Judge Boyce stated that the second alternative is too weak, and will not serve the purpose of requiring a report. Mr. Slaugh suggested that the second alternative should be seriously considered because, among other things, it will diffuse criticism of the rules as a whole. Mr. Shea informed the Committee that this is a " hot button" issue for the plaintiffs bar, who has indicated that they can better control costs with the second alternative. Mr. Hanni stated that the second alternative is better because the only advantage of the first is possible elimination of depositions, and this simply will not happen. Mr. Sullivan reminded the Committee that the expense of an expert report is an important issue for many practitioners, who may oppose the amendments on this basis alone. The Committee decided to propose that expert testimony be disclosed in writing, and that the rules not require they be signed by experts, or by attorneys.

Mr. Slaugh proposed several changes to correct grammatical and typographical errors in the present draft, which the Committee approved.

Judge Boyce moved that the Committee submit the proposed rules, as amended, for comment. Virginia Smith seconded. **Tim, my notes are unclear about what happened here.**

IV. ADJOURN.

There being no further business, the Committee adjourned.