

Agenda
Advisory Committee
on Rules of Civil Procedure

May 26, 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
Discovery Amendments	Alan Sullivan

Future Meeting Schedule

September 22
October 27
December 1

MINUTES**Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure****Wednesday, May 26, 1999
Administrative Office of the Courts****Alan L. Sullivan, Presiding**

PRESENT: Honorable Darwin Hansen, Honorable Anthony B. Quinn, Honorable Ronald N. Boyce, Terrie T. McIntosh, Paula Carr, Leslie W. Slauch, W. Cullen Battle, Tom Karrenberg, Fran Wikstrom, Virginia S. Smith

GUESTS: Chief Justice Richard C. Howe

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

I. PRESENTATION BY THE CHIEF JUSTICE.

Chief Justice Richard Howe made a presentation for Mr. Sullivan, thanking him for serving on the Committee for more than 12 years. The Chief Justice presented Mr. Sullivan a plaque to show his appreciation for his service on the Committee. Mr. Sullivan thanked the Chief Justice and members of the Committee for their recognition and for the opportunity to serve as Chair of the Committee. Mr. Sullivan announced that this was his last meeting and that Fran Wikstrom would be taking over as Chair of the Committee beginning in the Fall.

II. DISCOVERY RULES.

Mr. Sullivan reviewed for members of the Committee the changes made to the proposed discovery rules at the Committee's last meeting on which the Committee did not make a final decision. He began by noting the change to Rule 26(a)(1)(A) and (B), which requires the identification of information that supports a party's claims or defenses, rather than information that is relevant to disputed facts alleged with particularity in the pleadings. The Committee was in agreement that this change was an improvement over the federal rule.

Mr. Sullivan next reviewed a change to Rule 26(f)(3), which changes the date for service of a proposed discovery order to no more than 60 days after the first answer is filed, rather than 60 days after the complaint is served on the first defendant. This would mean that generally no discovery would take place while dispositive motions are pending.

Finally, Mr. Sullivan reviewed a change to Rule 26(d) to make it consistent. The rule would require that fact discovery be completed within 240 days after a defendant first appears. Fran Wikstrom made a motion to approve these changes. Cullen Battle seconded the motion. Although Tom Karrenberg opposed the changes to Rule 26(f)(3), the motion passed. In response to Mr. Karrenberg's concerns about delays while dispositive motions are pending, Judge Boyce and Mr. Wikstrom stated that the plaintiff had the ability to get relief from the Court. Leslie Slaugh pointed out that the rule sets a maximum outside limit -- plaintiff's counsel is free to request a meeting and submit a proposed discovery order earlier.

The Committee next discussed the Advisory Committee Note prepared by Tim, as revised with comments received from members of the Committee. Mr. Sullivan raised a preliminary issue concerning how this note should appear in print, and specifically whether it should be broken out among all of the rules amended, or put in a single place. Members of the Committee stated that the notes should appear in one place, with the possible exception of the changes to deposition practice, which could be appended to those specific rules. Mr. Sullivan suggested that the other rules cross-reference to the committee note for Rule 26. Virginia Smith stated that the notes read well and make sense as they are written, even though they are divided up among rules. The Committee decided that the notes should be in one general location, except for the notes to Rule 16 and the deposition rules, which would be appended to those rules. Each should have some cross-reference so a reader can find the general notes.

Mr. Slaugh suggested that the notes not restate the exemptions. The exemptions are as set forth in the rule, and there is no need to restate them. He suggested that the note instead state that the only exemptions are those set forth in the rules. Mr. Sullivan suggested some additional changes. On page 1 of the current draft, Mr. Sullivan suggested deleting the statement regarding default deadlines and the fact that they govern absent a court order otherwise, and replacing it with the following: "the plaintiff must and any party may move for a discovery order. If the Court does not order otherwise, the default deadlines will govern." Mr. Sullivan also recommended minor grammatical changes to the first and second paragraphs of page 2, and suggested that the reference to insurance agreements include the statement "that may satisfy some or all of any judgment." With respect to expert reports, Mr. Battle proposed some language, underlined in the current draft, regarding the fact that an expert will be bound by an expert report. Mr. Slaugh suggested that the party, not the expert, actually is the person bound. Judge McIff, who was excused from the meeting, recommended that this sentence not be included. He viewed this as a retreat back to the federal model, which the Committee decided not to follow.

Several members of the Committee expressed the view that for the rules to have any teeth, there must be at least some ability to bind the party to an expert's report. Others suggested that the language was unnecessary. The Committee unanimously approved the following language, in lieu of the underlined passage: "The expert should not be permitted to testify at variance with the report. For this reason, the committee believes that the expert should prepare and sign the report whenever possible."

Mr. Slaugh raised a question about treating physicians and whether they should be mentioned in the note. Mr. Sullivan explained that this is adequately addressed in the language

"retained or specially employed" from the rule. The committee discussed whether it was necessary to include anything in the notes on this topic. Judge Hansen stated that treating physicians often give expert opinions, and should be held to the same standard. Mr. Sullivan suggested that the Committee need not address the issue because there is a body of federal law on the subject to which courts can look when confronted with a specific question. He cautioned against having the Committee decide this issue in a vacuum.

With these changes, Mr. Karrenberg moved that the Committee approve the notes. Mr. Battle seconded. The motion passed unanimously.

With this, the discovery rules project has been completed and will be passed on the Supreme Court for consideration. Mr. Sullivan stated that the proposed rules, proposed advisory committee notes, along with the letters and comments received from practitioners will be forwarded to the Court.

Tim Shea reminded Committee members that the next meeting will be held on September 22 at the Administrative Office of the Courts.