MINUTES

SUPREME COURT ADVISORY COMITTEE
ON THE RULES OF CIVIL PROCEDURE

Wednesday, October 17, 1990, 4 p.m.
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah
Alan L. Sullivan, Presiding

Present:

Alan L. Sullivan (Chair)
Professor Ronald N. Boyce
Elizabeth T. Dunning
Glenn C. Hanni
M. Karlynn Hinman
David K. Isom
Allan L. Larson
Terrie T. McIntosh
Honorable Michael R. Murphy
Francis M. Wikstrom

Staff:

Carlie Christensen
Jaryl Rencher
Colin Winchester

Guest:

Gay Taylor, Office of Legislative Counsel

1. Minutes

The minutes of the June 20, 1990 committee meeting were presented. Approval of those minutes will be considered at the next committee meeting.

2. Rule 65B-Modification

Alan Sullivan explained that a revised draft of Rule 65B had been sent to committee members in September with changes made for the purpose of eliminating the concept of a writ. In regard to the revised draft, Mr. Sullivan explained that:

A. Paragraph (c)(5) was modified to provide a method whereby respondents would receive a copy of non-frivolous petitions. Also,

the concept of a "hearing order" was substituted for the term "writ" under the Rule since the concept of writ was not being used consistently as it related to the relief sought or the order setting forth a hearing.

Judge Murphy suggested that this paragraph also be modified to indicate that the service of a copy of the petition and the hearing order should be made by mail upon the respondent. This suggestion was unanimously approved by the committee.

B. Regarding paragraph (d)(3), Mr. Sullivan explained that the committee had previously decided to refer to Rule 65A in both this subparagraph and subparagraph (e)(3).

Thereafter, Mr. Sullivan introduced Gay Taylor from the Office of Legislative Counsel. Ms. Taylor explained that her office was requesting that subsection (1) of subparagraph (d) of this Rule be expanded to allow other governmental bodies aggrieved or threatened by the acts enumerated in this Rule to petition the Court under this paragraph if the Attorney General fails to file such a petition after receiving notice of the agency's claim.

In reponse, Judge Murphy noted that this proposal may involve substantive legal changes. Nevertheless, the committee unanimously voted to modify this paragraph to replace the term "private person" with "any person," thus allowing all governmental bodies to petition the Court for such relief, which opportunity will also afford the Court power to consider the same.

David Isom queried whether the Attorney General should be notified of this potential change, and Judge Murphy commented that the committee had previously decided to allow the Attorney General's Office to respond to any proposed changes to this Rule.

Upon motion, the committee unanimously approved all modified changes in the September 12, 1990 draft of Rule 65B, together with the changes mentioned, subject to any response to be made by the Attorney General's Office. Mr. Sullivan agreed to contact the appropriate

individuals at the Attorney General's Office and seek their comments in this regard.

3. Rule 65A-Modifications

Alan Sullivan explained that the September 12, 1990 draft of Rule 65A was modified at paragraph (c)(1), which earlier provided that security is not required by married persons in suits brought against each other. Mr. Sullivan noted that since the committee had decided that this was an unnecessary provision, it was deleted from the proposed Rule at the last committee meeting.

Mr. Sullivan further suggested that the committee should consider deleting the term "reasonable" in reference to notice to adverse parties under the Rule since reasonableness is implied within the notice requirements and since deleting the term would improve consistency throughout the Rule's text.

Upon motion, the committee unanimously approved the changes made to and in the September 12, 1990 draft of Rule 65A.

4. Rule 63A-Reconsideration

Mr. Sullivan explained the evolution of the committee's review of Rule 63A. Specifically, Mr. Sullivan noted that approximately one year ago the committee had received a petition by Jackson Howard, Esq. to amend Rule 63 to provide a method for the preemptory challenge of judges. At the same time as the committee was petitioned in this regard, Mr. Howard submitted a parallel petition to the Utah Supreme Court and a proposed bill to the Utah Legislature through Representative Valentine. After significant research and review, this committee voted against modifying Rule 63A to adopt Mr. Howard's suggestions. Nevertheless, some committee members opined that there was merit in considering a position suggested by Professor Terry Kogan, which would allow the preemptory challenge of judges with the stipulation of all counsel involved in any particular case. Nevertheless, after further review of this latter proposition, the committee voted in June to reject this suggestion. At that time, Mr.

Sullivan suggested that because Rule 63A was a sensitive issue and because only a narrow margin had defeated the proposed draft with few committee members participating, the Utah Supreme Court should be questioned regarding its view toward adopting such a rule.

In following through with the committee's decision in this regard, Mr. Sullivan had met in September with the committee's liason, Associate Chief Justice Richard C. Howe and with Chief Justice Gordon R. Hall of the Utah Supreme Court to discuss the proposed Rule in detail. Thereafter, Mr. Sullivan had received a call from Chief Justice Hall who explained that the Court was interested in adopting and promulgating a proposed Rule 63A similar to that submitted to the Court in draft form for its review. In response, Mr. Sullivan suggested to Chief Justice Hall that the Rule needed fine tuning, to which Chief Justice Hall agreed. Subsequent to that time, Carlie Christensen had met with the entire Utah Supreme Court on another matter and had occasion to visit with the Justices regarding their view of proposed Rule 63A.

In reporting on her meeting with the Utah Supreme Court, Ms. Christensen explained that the Justices had indicated their intense interest in adopting the proposed Rule and their anxiousness in doing so on a trial basis without submitting the Rule for public comment. Further, the members of the Court noted that they wanted the proposed Rule to apply to both criminal and civil actions and all trial courts of record with the requirement that Court executives notify the Administrative Office of the Courts whenever such a stipulated pre-emptory challenge motion was filed so that the administrative office could track the same. The Justices also stated that they favored the stipulated challenge proposal over Mr. Howard's initial preemptory challenge suggestion and that proposed Rule 63A was a politically expedient thing for the Court to adopt at this time based upon the legislature's recent review of a proposed bill regarding the same.

Concerning this latter point, Mr. Sullivan explained that Representative Valentine had recently prefiled a bill with the Utah

Legislature encouraging adoption of legislation allowing for the preemptory challenge of judges. This bill was considered by the Interim Judiciary Committee of the Utah Legislature on September 19. At the Utah Supreme Court's request, Mr. Sullivan had represented the committee at this meeting, where the Utah Court Administrator, William Vickery, spoke against the Rule as did the Third District Court representative, Judge Hanson. At that meeting, Mr. Sullivan discussed the history behind this committee's review and rejection of the proposal. Thereafter, members of the Interim Judiciary Committee nevertheless stated that they were convinced that such a rule was the only method whereby bad judges could be isolated and litigants could be made to feel that they were receiving a fair trial.

In response to a query by Professor Boyce as to whether the legislative committee members had discussed budgetary concerns necessarily associated with adoption of such a rule, Ms. Christensen explained that the Administrative Office of the Courts was preparing a fiscal note since the proposed legislation had passed out of the Interim Judiciary Committee. She also stated that the budget impact of such a rule would be difficult to determine in rural areas as transportation and per diem issues would need to be considered. Also in reference to the budget issue, Mr. Sullivan indicated that the sponser of the bill, Representative Valentine, had suggested at the Interim Judiciary meeting that perhaps the Rule could be structured to provide a method whereby the party filing the challenge would be required to pay for the cost thereof, thus offsetting any fiscal impact.

In response, Professor Boyce explained that the Constitution forbids an assessment of costs in a criminal action and that if the Court wanted such a rule to apply in such matters, costs could not be imposed on criminal defendants.

In other respects, Professor Boyce also noted that perhaps this committee should consider drafting proposed Rule 63A in such a way as to allow parties to stipulate to challenging appellate judges on the same basis as challenges made to trial judges.

Mr. Sullivan opined that it appeared beyond the scope of this committee's responsibilities to dictate what the Criminal or Appellate Rules Committees should do regarding adoption of a rule similar to a proposed Rule 63A. Nevertheless, Mr. Sullivan explained that this committee had been given the task to refine the Rule to a point where it was workable, and Mr. Sullivan appointed David Isom to initiate this attempt.

Thereafter, committee members discussed particular portions of the draft previously submitted by Professor Kogan. Mr. Sullivan suggested that paragraph (a) be recast as "notice of change" instead of "nature of proceedings." He also noted that the first sentence of that paragraph is unnecessary and that the Rule should begin by describing the process by which parties give notice of the challenge being made. Mr. Sullivan also suggested that the last sentence of paragraph (a) be deleted in referencing that notice should neither specify the grounds for the change nor be accompanied by an affidavit.

Regarding the timing issue of proposed Rule 63(a), Mr. Sullivan indicated that the twenty-day formulation in the current draft was proposed by Jackson Howard. Professor Boyce raised the issue as to when the Rule should cut off the right of potential third parties to challenge an assigned judge. Professor Boyce opined that the committee may want to consider drafting a proposal whereby parties agreeing to the change have to certify that they have no intention of suing third parties not served at such time as the challenge is made.

Karlynn Hinman questioned what would happen if a party was having trouble serving a third party such that the third party would not have any choice in the decision to challenge a particular judge at such time as a challenge was made.

Francis Wikstrom queried whether the Rule should allow parties to wait until after hearings had been held to challenge any particular judge in order that the parties could determine whether a judge was so abusive or incapable of grasping pertinent issue such that the judge needed to be challenged.

Judge Murphy noted that under Rule 38B litigants are required to decide at the initiation of a lawsuit whether to challenge judges for bias or prejudice. He suggested that Rule 63A be structured in a manner similar to Rule 38B with some consideration being made for requiring the parties to challenged a particular judge within ten days after the pleadings are at issue.

Glenn Hanni suggested that a client's business judgment may require adding third parties later in the lawsuit and that requiring the parties to challenge a judge early on in a lawsuit would certainly affect opportunities of added third parties to challenge the judge originally assigned.

Professor Boyce opined that parties added later in the lawsuit should not have a right to challenge particular judges. Professor Murphy noted that third parties who are later joined could, however, claim prejudice because they were not parties to the stipulation at such time as the challenge was made. In reply, Professor Boyce noted that challenging judges could be viewed as a management decision and not a matter for which a party could claim prejudice. However, Elizabeth Dunning opined that since latecomers to the litigation may not have been agreeable to challenging the originally assigned judge they may actually have suffered some prejudice in that regard. Fran Wikstrom noted that the time limitation under Rule 63A should perhaps be extended to encourage litigants to not challenge judges assigned.

In other respects, Ms. Dunning noted that since there is a body of law analyzing Rule 38 motions, this committee should consider drafting the Rule 63A proposal to parallel Rule 38 so that parties can take advantage of the depth of analogous case law.

Committee members also discussed whether the waiver principle should be included within Rule 63A or whether only the element of timing should work to cut off late challenging parties.

As for the issue of assignment of replacement judges under proposed Rule 63A, Ms. Christensen noted that the Administrative

Office of the Courts usually receives a request (based upon recusal) to assign another judge to a case, and that senior judges usually hear those cases. She explained that presiding judges should and usually do have some prerogative in multi-judge districts to assign new judges and that generally the assignment issue will only be considered by the Utah Supreme Court when the replacement judge is moving from one judicial level to another.

Mr. Sullivan queried whether there would be a problem under proposed Rule 63A if the presiding judge was being challenged. Judge Murphy noted that presiding judges should not be limited to the same judicial district because it might preclude senior judges being used. Judge Murphy also discussed the importance of the presiding judge's discretion to assign replacement judges in such situations.

Allan Larson expressed objection to any proposal to Rule 63A which would provide a method whereby active judges challenged might be replaced on the case by retired, juvenile or circuit court judges.

Professor Boyce suggested that the assignment issue might be beyond this committee's function.

Thereafter, committee members discussed whether court clerks should be required to immediately give notice to presiding judges of preemptory challenges made. Ms. Hinman suggested that the rule might provide that parties mail a copy of any preemptory challenge motions to the presiding judge.

Mr. Sullivan questioned whether subsection (e) of the proposed draft of the rule was unnecessary and whether there were any possible sanctions if a party communicated to the Court that another party had sought to challenge and eliminate a particular judge from the case.

Judge Murphy raised the issue of what would happen to matters under assignment and orders being made at the time any particular challenge was offered.

Committee members also discussed whether timing problems in criminal cases were different than those in civil cases and whether

this committee should suggest that the Criminal Rule Advisory Committee consider a parallel proposal to any rule drafted.

In summary, Mr. Sullivan requested that David Isom prepare a draft proposal of Rule 63A to address these issues, which draft would be circulated before the next committee meeting.

At such committee meeting, the committee will discuss proposed Rule 17(d) and a report from the Rule 56 subcommittee. Ms. Christensen was also asked to research what the Judicial Council had decided regarding Rule 77(d) involving notice to parties of orders signed.

5. Next Meeting

The next meeting of the Supreme Court Advisory Committee on the Rules of Civil Procedure will be held on Tuesday, November 20, at 4:00 p.m. at the Administrative Office of Courts.

The meeting was adjourned at 6:05 p.m.