MINUTES

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CIVIL PROCEDURE

Tuesday, November 20, 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)
Brad R. Baldwin
Wendell E. Bennett
Professor Ronald N. Boyce
Elizabeth T. Dunning
Robert A. Echard
M. Karlynn Hinman
David K. Isom
Professor Terry S. Kogan
Allan L. Larson
Terrie T. McIntosh
Bruce Plenk
James R. Soper
Francis M. Wikstrom

Staff:

Carlie Christensen
Jaryl Rencher

Guests:

John L. Fellows, Office of Legislative Counsel
Gay Taylor, Office of Legislative Counsel
W. Cullen Battle

1. Welcome and approval of Minutes

Alan Sullivan introduced and welcomed Jim Soper as a new member of the Advisory Committee; and the minutes of the June 20, 1990 and October 17, 1990 committee meetings were unanimously approved without modification.

2. Rule 65B

Mr. Sullivan re-introduced Gay Taylor and John Fellows from the Office of Legislative Counsel. Ms. Taylor and Mr. Fellows re-explained that their office had previously requested that sub-section (1) of sub-paragraph (d) of this rule be expanded to allow other governmental bodies aggrieved or threatened by the acts enumerated in the 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. Mr. Sullivan explained that at the last committee meeting the committee had decided to adopt a proposed change that would substitute the term "any person aggrieved or threatened" for the term "a private person aggrieved or threatened" under the paragraph assigning the Attorney General primary authority to file a petition for wrongful use of or failure to exercise public authority.

The committee, however, had requested that the Attorney General's office review this proposed change before formal adoption thereof. Accordingly, Mr. Sullivan had sent a letter to James R. Soper at the Utah Attorney General's Office requesting the Attorney General's consideration of the same. In response, Mr. Soper wrote on November 2, 1990:

> [T]he proposed change would permit other executive departments to file a petition under the rule in circumstances where the Attorney General may have decided, as a matter of policy, to take other action. To allow this conflicts with the Utah Constitution as well as case law . . . .
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> The proposed change also appears to expand to other public bodies the authority to deal with specific subject matter, i.e., the unlawful exercise of a public office and the illegal use of a corporate franchise. This seems inconsistent with the statutory duty of the Attorney General to take charge of all civil legal matters in which the state is interested. For the foregoing reasons, the Attorney General is opposed to the proposed changes.

In further explaining the Attorney General's view, Mr. Soper noted that the Attorney General is the only public official authorized to proceed under the present Rule and that any modification as suggested would inappropriately indicate that the new rule intended to extend such a right to governmental bodies not previously authorized to so act.

In response, Mr. Sullivan suggested that the committee could add the language "any person who is otherwise entitled to do so and who is threatened by one of the acts enumerated . . .", which modification would allow the Supreme Court to decide who could

appropriately petition the Court without interfering with case law precedent indicating that the Attorney General is the legal representative of officers and their agencies named in Article VII of the Utah Constitution.

Professor Kogan opined that the term "otherwise entitled" as proposed by Mr. Sullivan might inadvertently destroy the right of private persons to proceed under the rule unless there is any separate power existing in statute or case law which affords private persons such a right. Also, he suggested that the committee might simply adopt a note to the rule indicating that the modification was not intended to extend or detract from the powers of the Attorney General.

Terrie McIntosh noted that standing to proceed under the rule was perhaps necessarily implied and that a note as suggested by Professor Kogan might be sufficient to set forth the view urged by the Office of Legislative Counsel.

In response, John Fellows admitted that the Attorney General's position was well taken, but that the Office of Legislative Counsel could foresee instances where the Attorney General might usurp his power, thus necessitating a process whereby an aggrieved branch or office of the government could proceed under the rule. Accordingly, he proposed the following alternate language to Rule 65B:

> The legislative general counsel or the judicial general counsel may petition the Court under this paragraph (d) when their client is aggrieved or threatened by one of the acts enumerated in sub-paragraph (2) (A) or (B) of this paragraph (d) and if: (a) the Attorney General is a person who meets the requirements of sub-paragraphs (2) (A) or (B); or, (b) if the Attorney General fails to file a petition under this paragraph after receiving notice of the person's claim.

David Isom questioned whether the committee was trying to afford other public bodies standing under the new rule, and if not, whether the term "any person" as previously proposed would better serve all interests by allowing parties to petition under this rule if they have standing to do so.

Mr. Soper questioned why the committee was considering changing the rule unless the committee was trying to increase the standing of other public bodies that might otherwise not have a right to proceed under the rule.

Mr. Sullivan suggested that a committee note be prepared indicating that the committee did not intend to affect the issue of standing or enlarge statutory authority otherwise afforded public bodies in relation to the rule. This would allow the legislative

counsel or other governmental branches with authority to do so to petition the Court under the rule. Accordingly, Mr. Sullivan suggested that the rule be left as modified with the committee note as proposed.

Professor Boyce opined that the term "any person" might create an argument for other public bodies to claim they have standing to proceed under the rule. Accordingly, he suggested that the term "aggrieved person" be used so as to afford the Court the opportunity to decide who may properly petition under the rule in the event that the Attorney General fails to do so.

Professor Kogan suggested that the term "not otherwise prohibited by law to do so" might be sufficient modification to the rule to meet the concerns expressed.

Mr. Soper indicated that the Attorney General may decide not to file a petition as a policy matter and that the rule should not be modified so as to allow another agency to circumvent this constitutional prerogative of the Attorney General.

Professor Boyce indicated that the constitutional principle of separation of powers probably affords other agencies the power to proceed under the rule.

Mr. Sullivan noted that Rule 65B was promulgated before the separation of powers problem was "fine tuned" and that the rule should not procedurally preclude a governmental agency from petitioning the Court when it would otherwise be allowed to do so. Accordingly, he reiterated that the note should be drafted to indicate that the committee had not intended to modify any standing requirements otherwise required under the rule.

In conclusion, Mr. Soper suggested that the Attorney General be allowed to review any proposed modification, and Mr. Sullivan suggested that the committee approve amending the rule to provide that "any person who is not required to be represented by the Attorney General and who is aggrieved or threatened by one of the acts enumerated" could petition the Court.

In other respects, committee members questioned why the second sentence of proposed Rule 65B(d) required that "a petition filed by the Attorney General shall be brought in the name of the State of Utah." Specifically, committee members discussed whether the Attorney General should be disabled from bringing an action in his or her own name.

Professor Boyce explained that the common law utilizes this principle to give the Attorney General the full regency of his office and that it was the traditional role of the Attorney General to bring the action in the name of the state.

Bob Echard questioned whether the requirement to bring the action in the name of the state should be permissive instead of mandatory.

Professor Kogan moved to delete the second sentence, and to adopt the modified language as proposed by Mr. Sullivan, and, upon vote, a majority of committee members agreed.

Messrs. Isom and Soper opposed the change, and Mr. Soper indicated that he would approve a comment noting that the rule does not intend to modify existing powers.

John Fellows requested that the comment also indicate that the rule is being expanded to afford the legislative counsel the right to petition the Court.

In response, Mr. Sullivan explained that the amendment to the rule was not intended to modify existing powers of governmental bodies or branches of government to bring suit, but rather was intended to remove any procedural barrier to the same.

Mr. Sullivan agreed to make final changes to the rule and submit it to the Court for final approval and publication.

3. Rule 63A

Mr. Sullivan re-explained the evolution of the committee's review of Rule 63A. Specifically, Mr. Sullivan noted that the committee was revisiting this rule upon the Supreme Court's express request and that David Isom had been asked to prepare a draft of the rule incorporating the committee's suggestions at the last committee meeting.

Explaining his draft to the proposed rule, Mr. Isom noted that:

(a) the first sentence indicates that the rule only relates to civil actions commenced after adoption of the rule in any district or circuit court. Mr. Isom explained that the rule does not apply to the Supreme Court and questioned whether the committee wanted the rule to apply to the circuit courts.

Mr. Echard and Professor Boyce discussed proposed judicial organization changes drafted to faze out the circuit court system in the State of Utah. The committee decided to utilize the term "circuit court" inasmuch as the judicial system's reorganization may take several years.

(b) Mr. Isom indicated that the third sentence incorporates proposed language requiring parties to file with the Court a required fee for challenging judges. Mr. Sullivan questioned whether the rule needed to be self-financing, and Carlie

Christensen opined that the rule will probably have a minor fiscal impact and that assessing a fee exceeds the Court's authority to implement rules of procedure.

(c) As for the requirement in the proposed rule that the parties must send a notice to the assigned judge and the presiding judge when a peremptory challenge is made, Mr. Isom explained that the presiding judge will need to decide if the notice is proper to challenge any particular judge. Ms. Christensen indicated that in single-judge districts the presiding judge will need to refer the notice to another judge to consider the sufficiency thereof. Mr. Isom noted that judges challenged should not themselves make a determination of the appropriateness of such notice, and Ms. Christensen responded by indicating that single-judge districts will probably be reorganized in the future, which fact would restrict such an occurrence.

(d) Professor Kogan suggested that the term "assigned" judge be used consistently throughout the ruling in place of other adjectives.

(e) Ms. Christensen questioned why the rule did not include "juvenile courts", and Professor Boyce explained that the problem has not arisen in the juvenile context and that this committee should defer to the juvenile rules committee to make such changes as are necessary. The committee agreed with this suggestion.

(f) Regarding sub-paragraph (a), Mr. Baldwin suggested that the rule provide that the parties may, by unanimous consent and "without cause", change an assigned judge.

(g) Professor Kogan queried whether the rule should define "presiding judge", and Ms. Hinman questioned whether the Chief Justice should make the determination regarding all "replacement judges."

(h) Bruce Plenk queried whether the term "parties" in the rule related to potential defendants against whom a complaint had not been filed. Allan Larson indicated that the rule could invoke strategizing to circumvent required notice to all parties. Professor Kogan noted that unfiled defendants will not have an opportunity to participate in the challenging of judges, and Mr. Sullivan indicated that the alternative was to utilize Francis Wikstrom's approach and allow the parties to challenge a judge ten days before trial, which suggestion he believed to be counterproductive. Mr. Echard questioned whether the rule should perhaps allow parties to challenge a judge at the time they file a certificate of readiness for trial. Committee members generally discussed possible prejudice to third parties resulting from imposition of this rule, and Professor Boyce suggested that perhaps

the rule could set a time limitation for joining third parties in the action.

(i) As for sub-section 3 of sub-paragraph (a), providing that all parties must indicate they have agreed to the challenge, Mr. Baldwin suggested that the proposed language be stricken, while Mr. Isom indicated that a new judge will not know that all parties have agreed to the same unless such averments are required.

(j) Mr. Isom indicated that the 10-day notice of change requirement in sub-paragraph (b) arises out of Rule 15.

Professor Boyce suggested deletion of the term "responsive pleading." He also queried whether the rule should require a party to serve all defendants within 120 days.

Mr. Baldwin suggested that sub-paragraph (b) impose a 30-day rather than a 10-day limitation.

(k) Regarding sub-section (c), Mr. Sullivan indicated that the term "this rule" needed to be added to the provision which limits the challenging of judges to one occurrence, so that parties would not be confused that a judge could still be challenged under Rule 63. He also suggested that the term "under no circumstances shall more than one change of judge be allowed under this rule" be moved from this paragraph to sub-paragraph (a).

Professor Boyce questioned whether parties should be allowed to later join another who was precluded from dissenting from any challenge and whether the original second sentence of sub-paragraph (c) should be deleted which allows the Court to consider whether a change of judge has already occurred in deciding a motion to amend or add parties. Bob Echard questioned whether such a provision would prevent the compulsory joinder of parties; and Professor Boyce explained that the language only serves to caution judges who are considering joinder motions. Mr. Sullivan suggested that the provision be deleted.

(l) Regarding original sub-paragraph (d), Bob Echard questioned whether challenged judges should lose jurisdiction over the cases in single judge districts. Committee members also questioned whether presiding judges would lose jurisdiction to reassign cases when the presiding judges were the ones being challenged. Professor Boyce suggested that one judge should be appointed statewide to make all reassignment decisions. Ms. Christensen responded by indicating that judges will want to resolve these issues locally.

Professor Kogan and Ms. Dunning questioned whether the terminology "take no further action" was an improvement upon the term "lose jurisdiction." Professor Boyce indicated that the terms

are synonomous, and Bob Echard opined that challenged judges should not be given the choice to re-assign cases.

Mr. Sullivan suggested that the second sentence of sub-paragraph (d) be modified to provide that "in single-judge districts and where the presiding judge is being challenged the Chief Justice or his or her designee shall assign the new judge." Other committee members suggested that this proposal be modified to provide that "where the presiding judge is also the assigned judge the clerk shall promptly send the notice to the chief justice who shall determine whether the notice is proper and if so shall assign the action to a different judge."

(m) Regarding original sub-paragraph (e), Bruce Plenk questioned whether the letterhead on which the notice is filed might help challenged judges determine which party instigated the challenge. Professor Boyce opined that this would have no impact on the Court. Mr. Baldwin questioned what sanctions were available if a party disclosed to the Court that another had precipitated a notice of change.

(n) Regarding sub-paragraph (f), the committee decided to modify the term "this rule does not affect a party's rights under Rule 63" to "this rule does not affect any rights under Rule 63."

Thereafter, Mr. Sullivan re-read the final proposed changes to the rule:

> (a) Notice of Change. In any civil action commenced after _____, 1991 in any district court or circuit court, the parties by unanimous consent may, without cause, change the judge assigned to the action by filing a notice of change of judge. The parties shall send a copy of the notice to the assigned judge and the presiding judge. The notice shall be signed by all parties and shall state: (1) the name of the assigned judge; (2) whether all responsive pleadings have been filed and, if so, the date of the filing of the last responsive pleading; and, (3) that all parties have agreed to the change. The notice shall not specify any reason for filing the notice of change. Under no circumstances shall more than one change of judge be allowed under this rule in any action.
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> (b) Time. The notice shall be filed no later than 30 days after service of the last responsive pleading. Failure to file a timely

notice precludes any change of judge under this rule.

(c) Assignment of Action. Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall determine promptly whether the notice is proper and, if so, shall promptly reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who will determine whether the notice is proper and, if so, shall reassign the action.

(d) Non-disclosure to Court. No party shall communicate to the Court, or cause another to communicate to the Court, the fact of one party's seeking consent to a notice of change.

(e) Rule 63 Unaffected. This rule does not affect any rights under Rule 63.

Thereafter, Bruce Plenk questioned what would happen if a presiding judge does not reassign a particular case, and Alan Sullivan explained that the parties would have the ability to seek relief under Rule 65B.

Professor Boyce suggested that Judges Murphy and Bunnell be allowed to review the final proposed Rule 63 and respond to the same.

Thereafter, the committee members agreed by vote to adopt this proposed rule with two members dissenting.

In response to questions from the committee, Mr. Sullivan indicated that there would be no committee notes prepared for this rule since it was being adopted at the request of the Supreme Court.

4. Rule 30B--Videotape Depositions

Mr. Sullivan explained that he had received a letter from the litigation section of the Bar proposing modifications to Rule 30(b)(4) codifying practices regarding videotape depositions. Thereafter, Mr. Sullivan introduced Cullen Battle, Esq., to explain the proposed rule.

Mr. Battle noted that the litigation section of the Bar was proposing adoption of a rule that would allow videotaped depositions to be available as a matter of right and that would

spell out and clarify the procedures to be utilized in conducting videotaped depositions. In summary, he suggested the following: (1) the Rule should require a simultaneous stenographic transcription to avoid concerns in cases where there are problems with the videotape; (2) there should not be any unique notice requirements regarding the videotaping of depositions; (3) there should be a certification process for video operators; (4) the committee should consider how objections should be made to the editing of videotapes for trial; (5) there should be standard rules for operation of video cameras; and, (6) the committee should consider whether taping costs would be taxable.

In response, Mr. Sullivan thanked Cullen Battle for his explanation of the proposed rule and suggested that a subcommittee be appointed to review the proposal. Mr. Sullivan asked Mr. Battle to aid the subcommittee with its review, and Mr. Battle agreed. The subcommittee will be appointed prior to the next committee meeting.

In conclusion, Mr. Echard expressed his concerns regarding the videotaped deposition issue: (1) the videotapes should be of quality tape taken by professionals so that cases are not affected by inadequate materials or abilities; (2) the committee should consider who retains the tapes after the depositions; and, (3) the committee should consider that the Supreme Court has ruled that depositions may be public proceedings in some circumstances.

5. Next Month's Meeting

Alan Sullivan explained that the committee had traditionally not met in December and would accordingly next meet on Tuesday, January 8, 1991, at 4 p.m., at the Administrative Office of the Courts.

The meeting was adjourned at 6:12 p.m.