

## MINUTES

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

Wednesday, September 23, 1992, 4:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Alan L. Sullivan, John L. Young, Terrie T. McIntosh, Prof. Terry S. Kogan, Thomas R. Karrenberg, M. Karlynn Hinman, Glenn C. Hanni, Mary Ann Q. Wood, Elizabeth T. Dunning, Jaryl L. Rencher, James R. Soper, Hon. Ronald N. Boyce, Colin R. Winchester, and Brad R. Baldwin.

EXCUSED: Kevin N. Anderson, Francis M. Wikstrom, Hon. Michael R. Murphy, Allan L. Larsen, David K. Isom, Perrin R. Love, Robert A. Echard, Samuel Alba, and Hon. Boyd Bunnell.

STAFF: Craig T. Jacobsen

VISITORS: Ralph Petty, John Sindt, Lorenzo Miller

#### I. WELCOME

Mr. Sullivan welcomed the members of the Committee to the meeting.

#### II. APPROVAL OF MINUTES

Ms. Hinman moved to approve the minutes of the April 1992 meeting. Mr. Karrenberg seconded the motion, and the minutes were unanimously approved.

#### III. MISCELLANEOUS BUSINESS

Mr. Sullivan announced that the regularly scheduled meeting time would be changed from the third Wednesday of every month to the fourth Wednesday of every month to resolve scheduling conflicts, including a prior conflict with the Inns of the court. Mr. Sullivan then reflected upon various projects and assignments completed by the Committee in prior years. Since the creation of the Committee in 1987, Committee members have focused on a broad range of rules, including service of process, parties, defenses, discovery, injunctions, garnishment, and other types of execution. Mr. Sullivan also reviewed the Committee's current focus on Rules 69, 35 and 65B.

Following the overview of past and current projects, Mr. Sullivan then asked the Committee members to consider the direction that the Committee should take in the future. Mr. Sullivan suggested some possible areas of focus, including analysis of Rules 45, 34 and discovery rules. Mr. Sullivan paid

particular attention to the sweeping changes that appear to be on the horizon with respect to discovery under the federal rules. Mr. Sullivan also proposed other areas of focus that had been brought to his attention, including alleviating the disharmony between Rules 5(d) and 30(f), and Rule 4-502 of the Rules of Judicial Administration. Mr. Sullivan also indicated that Fed. R. Civ. P. 50 had recently been amended, and the Committee may want to analyze the possibility of harmonizing Rule 50 with the new federal rule. Mr. Sullivan stated that Bruce Plenk had proposed that the Committee discuss the rules governing eviction procedures. After completing his review of these potential projects, Mr. Sullivan asked Committee members for any suggestions that they may have as to future direction for the Committee.

Magistrate Boyce addressed the rule changes that soon will go into effect at the Federal District Court. He stated that the changes will create a climate requiring disgorgement. Magistrate Boyce suggested that the Committee may want to work to model the Utah Rules after the Federal Rules so that there will not be diverse procedural practices within the state. Ms. Wood reiterated comments made at previous meetings that the subcommittee assigned to look at the changes to the Federal Rules had been enthusiastic about the direction being taken with the Federal Rules. Magistrate Boyce indicated that he believes the changes to the Federal Rules will be a permanent fixture in Federal Court. Magistrate Boyce indicated that Robert Campbell has the most recent draft of the proposed Federal Rules, and that the Committee could obtain a copy from him.

Mr. Sullivan asked the Committee members whether there were any other suggestions as to projects that could be undertaken by the Committee. Mr. Karrenberg suggested that the Committee could analyze limits on discovery independent of the proposed changes to the Federal Rules. Among such limitations, Mr. Karrenberg listed possibilities such as limiting the number of interrogatories and rule changes as to litigants' right to depose expert witnesses. Mr. Young stated that form interrogatories are very helpful in some types of cases, and may be an option to study. Ms. Wood indicated that limitations on discovery work well when there is also a full disclosure requirement.

Among other suggestions proposed by Committee members, Mr. Baldwin proposed analyzing Rule 45. He also suggested analyzing the rules governing restraining orders and injunctions. Responding to Mr. Baldwin, Mr. Sullivan emphatically declared that he had made an oath that the Committee would never again touch Rule 65.

Prior to moving on to other business, Mr. Sullivan introduced the visitors that were in attendance at the meeting.

#### IV. RULE 69

Mr. Sullivan thanked those Committee members for the work performed to amend Rule 69. Mr. Sullivan stated that Mr. Baldwin had a new draft of the rule, and asked Mr. Baldwin to comment on the draft. Mr. Baldwin reported that the Committee members who had worked on Rule 69 had talked with numerous people within the legal community and he believed that the new draft was acceptable to the various interest groups. Mr. Baldwin also reported that he had been asked to place language in the new draft that would permit process servers to serve writs of execution, but that he had declined to include such language. Magistrate Boyce revealed a recent Supreme Court case that disallowed immunity for mistakes made by non-Sheriffs/Constables with respect to the service of writs of execution.

Mr. Sullivan asked the Committee members to comment on whether the newest draft improperly favored one economic interest over another. Mr. Baldwin acknowledged that certain aspects of the draft could be a political hot potato. However, he maintained that the draft was acceptable.

Mr. Sullivan asked Mr. Baldwin whether the draft being presented at the meeting was a proposed final draft. Mr. Baldwin responded affirmatively, subject to minor revisions that needed to be discussed by the Committee during the meeting. Mr. Baldwin asked Mr. Sindt to comment on the effect of requiring that all posting of notice of sales be made in one courthouse in each county. In response, Mr. Sindt listed the objectives of posting requirements. Mr. Sindt suggested that the most important objectives are notice, obtaining highest value for the property being sold, and convenience. Mr. Sindt stated that although allowing posting in one courthouse for each county would be convenient in some counties, it would create problems in the state's rural counties. Professor Kogan discussed the possibility of identifying within the rule those counties where posting in a single courthouse could pose problems, and making an exception within the rule for those counties.

The Committee then focused on Rule 69's publication requirement. Mr. Sindt stated that at times the cost of publication compared to the value of the property being sold makes execution unfeasible. In addition, Mr. Young expressed concerns regarding the adequacy of the "one day prior to sale" requirement. Mr. Sullivan conducted a straw poll asking Committee members to vote on whether one day notice was reasonable or whether publication should occur more than one day prior to sale. Committee members were evenly split. Mr. Petty reminded Committee members that 90% of all execution sales are cancelled. Other Committee members expressed the view that the one day prior to sale requirement is adequate because many papers in rural communities are published only on Fridays. Professor

Kogan suggested that once a practice is established, people will adapt to it.

Following further discussion, Mr. Sullivan again poled the Committee members regarding publication requirements posing three alternatives: (1) one day prior to sale; (2) three days prior to sale; or (3) a split time requirement based on the value of the property. Nine Committee members voted for the one day requirement; three committee members voted for the three day requirement; and one committee member voted for the split time requirement.

Following the vote on the time requirement, the Committee discussed issues pertaining to the posting of the notice of sale. Mr. Petty stated that there is no real benefit to posting notice at the place of sale, suggesting instead that notice should be posted at the courthouse and three other places in proximity to the place of sale. The Committee decided to delete from the draft the language requiring posting at the "place of sale." With no other issues being raised, Mr. Sullivan asked Mr. Baldwin to finalize a Committee note for the Rule and the proposed final draft would be presented for final Committee approval at the next meeting.

#### **IV. RULE 35(a)**

There had been no significant public comment as to proposed Rule 35(a). Thus, the Committee had no discussion regarding Rule 35(a).

#### **V. RULE 65(B) (EXTRAORDINARY RELIEF)**

The Committee discussed public comments pertaining to the proposed changes to Rule 65B. Lorenzo Miller again discussed many of the issues that had been addressed at prior meetings. Mr. Miller stated that one of the main problems with the Rule is that it was adopted from common law rules. He indicated that subsection (c) appears to address personal custody problems that are not addressed by subsection (b). Mr. Miller reiterated that there is confusion among practitioners and judges as to the distinction between improper restraint on personal liberty versus improper jurisdiction. On behalf of the Attorney General's office, Mr. Miller requested the Committee to draft a Committee note to distinguish between such situations. After some discussion on this issue, Mr. Sullivan offered to draft a Committee note prior to the next meeting. Ms. Dunning also raised the issue of whether the Committee had received input from the plaintiff's bar. The Committee's consensus was that most often plaintiffs appear pro se and, therefore, there had been little input from plaintiffs.

## **VI. SUBPOENAS**

Mr. Sullivan indicated that Judge Murphy had discussed with him the Third District Court's dilemma as to an inconsistency in rules governing the issuance of subpoenas. He suggested that there be further discussion regarding these inconsistencies and the potential possibility for harmonizing all of the rules governing the issuance of subpoenas.

## **VII. CONCLUSION**

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting, scheduled for October 28, 1992.

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