

**M I N U T E S**

**SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF CIVIL PROCEDURE**

Wednesday, September 22, 1993, 4:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

**PRESENT:**

Alan L. Sullivan  
John L. Young  
Hon. Boyd Bunnell  
Prof. Terry S. Kogan  
Mary Anne Q. Wood  
Perrin R. Love  
Thomas R. Karrenberg  
James R. Soper  
Prof. Ronald N. Boyce  
Hon. Michael R. Murphy  
Elizabeth T. Dunning  
Francis M. Wikstrom  
M. Karlynn Hinman  
Brad R. Baldwin  
Alan L. Larson

**EXCUSED:**

Terrie T. McIntosh  
Jaryl L. Rencher  
David K. Isom  
Glenn C. Hanni  
Hon. Samuel Alba  
Robert A. Echard

**STAFF:**

Colin Winchester

**GUEST:**

Annina M. Mitchell  
James H. Beadles  
Lorenzo Miller  
Lisa Watts Baskin

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Sullivan welcomed the Committee members to the meeting. The Committee's July meeting minutes will be distributed and approved at the next Committee meeting.

2. **STATUS REPORT OF PENDING RULE PROPOSALS.** Mr. Sullivan reported the status of the following rules:

Rule 69. Rule 69 has been completed and is awaiting publication for public comment.

Rule 45. Rule 45 is completed and is awaiting publication for public comment.

Writs of Restitution. The rule on writs of restitution is in process and should be completed during the next two meetings.

Discovery Rules. The new federal rules on discovery will go into effect on December 1, 1993, unless Congress acts to intervene. The Committee is waiting for the adoption of the federal rules before it considers revisions to the state rules.

Continuing Garnishments. The Legislature's Judiciary Committee has again discussed the proposal and has requested that the Advisory Committee report back in writing by January 1, 1994. Prof. Kogan expressed concern about the substantive nature of the rule. Judge Murphy reported that the previous garnishment subcommittee had examined the issue of continuing garnishments, but had not recommended them because they were considered to be substantive in nature.

Rule 65B. The Legislature's Judicial Rules Review Committee and Judiciary Committee have accepted reports from the Attorney General's Office.

3. RULE 65B. Lorenzo Miller, Jim Beadles and Annina Mitchell were present to discuss the concerns of the Attorney General's Office. Mr. Beadles and Mr. Miller distributed a handout summarizing those concerns. Mr. Beadles reported that his practice includes representation of the Board of Pardons and Department of Corrections, and that the concerns arise frequently in those petitions for extraordinary writs filed by pro se inmates. He summarized the major issues as follows:

Substantive Content of Rule 65B. Rule 65B creates substantive causes of action. Originally, the contents of the rules were in statute. In 1951, they were included in the Utah Rules of Civil Procedure. The procedures are intermingled with substantive provisions.

Prof. Kogan expressed concern about the suggestion that the substantive provisions be placed in statute and the procedural provisions be left in rule. According to Prof. Kogan the substantive and procedural provisions should remain in one place, rather than be divided.

Mr. Sullivan suggested that both the Supreme Court and the Legislature approve amendments to the rule, rather than divide the rule. Mr. Beadles questioned whether the Advisory Committee could then later amend the rule, or whether the Legislature must approve all subsequent amendments.

Mr. Miller noted that the rule does away with the common law names of extraordinary writs, but that the Rules of Appellate Procedure still refer to writs of mandamus and writs of habeas corpus.

Mr. Beadles noted that when the rule did away with the names of the various common law writs, the remedies for the respective writs became blurred. He further noted that specific remedies should be re-established for each of the various writs. Finally, he noted that pro se inmates do not understand the layout of the rule, and therefore often file for relief under the wrong paragraph.

Mr. Sullivan suggested that the rule continue to contain both substantive and procedural provisions. The amendments could be submitted to the Legislature for ratification. Mr. Beadles was asked to draft amendments within the current rule and report back to the Committee.

4. CONTINUING GARNISHMENTS. Mr. Sullivan and Mr. Baldwin discussed the Legislature's continuing interest in this matter. They had appeared at the Legislature's Judiciary meeting earlier this month. Judge Murphy indicated that the garnishee interrogatories should include a question asking whether there is already another garnishment pending. Mr. Baldwin reported that the Administrative Office of the Courts had provided copies of continuing garnishment rules and statutes from other states. No continuing garnishment statute or rule has been the subject of a reported constitutional challenge. The proposal introduced to the Legislature calls for a garnishment which would continue for 90 days. It applies only to wage garnishments. Other creditors who garnish within that 90 days would be forced to wait until the conclusion of the 90 days before their garnishments would begin. The Legislature has asked the Advisory Committee to study the issue further and report back in writing no later than January 1, 1994. It appears that there is substantial support for the idea of continuing garnishments in the Legislature's Judiciary Committee.

Ms. Wood noted that the Office of Recovery Services and the Internal Revenue Service are generally given priority.

Mr. Young expressed concern that creditors will have to stand in line, and that it may therefore be quite some period of time before a creditor is able to garnish the judgment debtor.

Mr. Sullivan appointed Ms. Hinman as chair of a subcommittee to study and report back. Mr. Baldwin was appointed as one member, and Mr. Sullivan suggested that Bruce Plenk or his designee be appointed as the other member. Ms. Hinman will contact Mr. Plenk and make that third appointment. The subcommittee will study the continuing garnishment issue and a handful of other garnishment concerns that have been brought to Mr. Sullivan's attention over the last several months, and will report back either in October or November.

5. **DISCOVERY RULES.** Prof. Boyce and Mr. Wikstrom reported the status of the new federal rule, noting that individual districts can opt out on certain provisions. Prof. Boyce anticipates that Utah will not exercise those options, and that the options will eventually disappear completely. Mr. Wikstrom reported that he gave a presentation on the proposed federal rules at the Bar's Annual Meeting in Sun Valley. The attendees' response was generally negative, and it appears that the "mutual disclosure" provisions seem to be the most controversial.

Judge Murphy noted that many state cases are unremarkable and do not mandate the full-blown disclosure that the new federal rules would require.

Mr. Karrenberg expressed concern about the provisions dealing with experts' reports.

The Committee discussed the matter briefly, and determined to continue to wait for the adoption of the proposed federal rules before proceeding further.

6. **OTHER ISSUES TO BE STUDIED.**

Rule 63(b). Judge Murphy expressed concern over the Court of Appeals' decision in Barnard v. Murphy, noting that the decision overly restricts trial judges and interferes with the efficient resolution of Rule 63(b) affidavits. The matter is currently the subject of a petition for writ of certiorari before the Supreme Court. Once the Supreme Court has concluded its review, if any, the matter may be referred further to the Committee.

Depositions. Mr. Young distributed an article dealing with the conduct of counsel in depositions. The article is a summary of Hall v. Clifton Precision, and holds that a lawyer and a client do not have the absolute right to confer during the client's deposition. He suggested that the Committee deal with the issue further in its continued in-depth study of the discovery rules.

Rule 65A. Mr. Karrenberg expressed concern that the rule, as currently drafted, requires a party seeking an injunction to show each of the four criteria set forth in the rule. According to Mr. Karrenberg, that conjunctive approach is contrary to the disjunctive approach established in case law. He would prefer a balancing of the four requirements. Mr. Karrenberg was asked to draft specific proposed language, with authorities, and to report back to the Committee.

Forms. Mr. Karrenberg expressed concern that the forms appended to the Rules of Civil Procedure are outdated and generally not very helpful. Mr. Karrenberg and Mr. Sullivan will review the forms and report back at the next meeting.

Filing Of Depositions. Mr. Soper noted that the Committee had previously discussed the conflict between the Rules of Civil Procedure and the Code of Judicial Administration in this area, but had not resolved the matter. Mr. Sullivan will place the matter on the next Committee agenda for additional review.

Confession of Judgment. Mr. Sullivan referred the Committee to a letter he received regarding confessions of judgment. Specifically, the issue of including costs and attorneys' fees within a confession of judgment was raised. Mr. Soper suggested that the rule be amended to allow attorneys' fees incurred to date within the offer of judgment. Mr. Wikstrom and Ms. Dunning expressed concern that attorneys' fees may only be included in a confession of judgment if they are taxed as "costs" as may specifically be provided by statutes.

Mr. Sullivan asked Mr. Soper to draft a proposal and bring it back to the Committee for additional review.

7. FUTURE MEETINGS. The Committee will continue to meet on the fourth Wednesday of each month at 4:00 p.m.

8. ADJOURNMENT. There being no further business, the Committee meeting was adjourned.