

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, December 1, 1993, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Terrie T. McIntosh, Brad R. Baldwin, David K. Isom, Mary Anne Q. Wood, Glenn C. Hanni, Hon. Boyd Bunnell, M. Karlynn Hinman, Terry S. Kogan, Colin R. Winchester

EXCUSED: Thomas R. Karrenberg, James R. Soper, Francis M. Wikstrom, Perrin R. Love, Elizabeth T. Dunning, Allan L. Larsen, Jaryl L. Rencher, Hon. Ronald N. Boyce, Hon. Michael R. Murphy, Robert A. Echard, Hon. Samuel Alba and Hon. Anne M. Stirba

STAFF: Craig T. Jacobsen

VISITORS: James H. Beadles (Assistant Attorney General), Bruce Plenk (Legal Services)

I. WELCOME

Mr. Sullivan welcomed the Committee members to the meeting, disclaiming any responsibility or credit for the agenda which was inscripted with a sleigh and other festive decorations. Mr. Sullivan informed the Committee that there would be a publication of rules within the next few days. He suggested that the Committee could publish some of the new rules if certain work could be completed during the meeting. In particular, Mr. Sullivan emphasized the need to complete the work on Rules 30(f) and 72.

II. APPROVAL OF MINUTES

Mr. Sullivan advised Craig Jacobsen as to two minor changes in the November minutes. Subject to these two changes, the Committee moved for and approved the November minutes.

III. RULE 65B (EXTRAORDINARY RELIEF)

Mr. Sullivan introduced Mr. Beadles of the Attorney General's Office and turned the floor over to him to present his comments on Rule 65B. Mr. Beadles referred to his letter dated November 24, 1993. Mr. Beadles summarized his group's extensive study of post-conviction relief, and its intent to look at common law writs. Mr. Sullivan asked Mr. Beadles to point out any problems with proposed Rule 65B, based on the Utah Court of Appeals' recent ruling in *Currier v. Naxder*. Mr. Beadles identified a few possible pitfalls.

He stated that ninety days may be too short of a limitation. He also suggested that the lack of a good cause exception may pose a problem with the proposed rule. Finally, he also pointed out that the rule contains no language specifying an accrual date for purposes of limitation.

Mr. Sullivan asked Mr. Beadles what the limitation period would be on the proposed statute being drafted by Mr. Beadles and his group. Mr. Beadles responded that the limitations period in his draft would be one year, which is modeled after Washington State's statute, a statute that was recently upheld by the Washington State Supreme Court. Mr. Sullivan asked Mr. Beadles whether the Attorney General's Office intended to appeal the *Currier* opinion. Mr. Beadles indicated that his office would appeal the ruling, but that he did not expect a reversal and, therefore, intended to go forward with proposed legislation pertaining to post-conviction relief in the 1994 Legislative Session. There was further discussion regarding the specifics of Mr. Beadles' comments. Thereafter, Mr. Sullivan asked Mr. Beadles if he had suggestions as to who could be helpful to his group in its work on the proposed statute. Mr. Beadles indicated that attorneys who work with the media may be helpful. Mr. Sullivan then excused Mr. Beadles, thanking him for his time.

IV. PROPOSED RULE 72 (WRITS OF RESTITUTION)

Mr. Sullivan summarized the status of proposed Rule 72. Bruce Plenk and Terrie McIntosh had made new drafts of the proposed rule. From the newest draft, Mr. Sullivan had again redrafted the rule. The subcommittee had then edited Mr. Sullivan's draft. Mr. Sullivan also indicated that the subcommittee had been working on forms for the rule. Ms. McIntosh and Mr. Plenk agreed that this was the status of the rule.

Mr. Sullivan advised the Committee that there were three issues to be considered:

1. Additional changes to the rule;
2. Whether to send the rule out for comment; and
3. Lisa Watts-Baskin's letter.

Mr. Sullivan then proceeded to report as to the changes he had made to the rule in his redraft. He also addressed the language regarding service, stating that his redraft provided that service should be in accordance with Rule 4 unless not practical, in which case service could be made by mailing the writ to the last known address and by posting the writ on the premises. Mr. Sullivan also indicated that his redraft allowed evictions by the sheriff or constable.

Mr. Sullivan asked Mr. Plenk and Ms. McIntosh how they felt about sending the latest redraft out for comment (as per the Committee's normal process) before submitting it to the circuit courts for their comments. Mr. Plenk responded that normal circulation would be fine with him. Colin Winchester agreed to send the rule out for comment.

Mr. Sullivan then asked the Committee whether the provisions in the proposed rule were proper or, alternatively, whether they should be part of a statute. Brad Baldwin indicated that he had always felt that the provisions were substantive in nature and should be part of the unlawful detainer statute. Judge Boyce responded that Mr. Baldwin's observation was valid, but wondered whether special interest groups ultimately would rewrite a statute and damage the rule's contents. Mr. Plenk indicated that his research showed that states have gone both ways, but felt comfortable moving forward with the rule. Karlynn Hinman also agreed that the Committee should move forward. Mr. Sullivan asked the Committee what response should be made to the Legislature if the Legislature felt the provision to be substantive in nature. Mr. Baldwin responded that a rule governing writs of restitution is akin to the other procedural rules governing execution. Based on this discussion, Mr. Sullivan stated his opinion that the Committee should move forward and inform Ms. Watts-Baskin that sending the rule out for comment is a normal part of the process to make a good rule and eventually the substantive/procedural issue would have to be sorted out by the Legislature and the Supreme Court.

There was further discussion by the Committee regarding issues related to publication of the rule. The Committee discussed whether a Committee note should be added prior to publication. Mr. Sullivan suggested that it would be better to publish the rule and then add a Committee note. Thereafter, Mr. Winchester agreed to draft a Committee note. Ms. McIntosh then moved to publish proposed Rule 72. Ms. Hinman seconded the motion. The Committee unanimously approved the motion.

V. RULE 30(f) (DEPOSITIONS)

Beginning with Paragraph 1, the Committee went through proposed Rule 30(f) line by line, discussing any necessary final edits. The Committee discussion became very involved as to minute changes and edits. Mr. Sullivan then suggested that, because the Committee's original purpose for revising Rule 30(f) was to correct problems with filing, it may be unnecessary to make all of the minute changes being discussed by the Committee. Various members of the Committee discussed their opinions as to the scope of the Committee's work on proposed Rule 30(f). After this further discussion, Mr. Sullivan asked whether the Committee wanted to send the rule to publication, wait another month, or wait until the Committee had looked at Federal Rule 30. The Committee's consensus was to publish the rule. Terry S. Kogan moved to publish. His motion was seconded by Judge Bunnell. The Committee unanimously approved the motion.

VI. RULE 64D (CONTINUING GARNISHMENT)

Ms. Hinman reported on the subcommittee's progress with its draft. Mr. Baldwin also discussed the subcommittee's progress with comparing the draft to similar provisions in other states, including Idaho and Colorado. Mr. Baldwin reviewed specific provisions considered by the subcommittee. Mr. Sullivan thanked the subcommittee for its wonderful work. He stated that the work had been done at the request of the Legislature and

that if the Legislature asks, the Committee can report that the draft was prepared without final consideration by the full Committee and that the draft continues to be a work in progress. Mr. Baldwin briefly discussed the Legislature's draft and compared it to the Committee's draft. After further discussion, Mr. Sullivan suggested that the Committee wait for next month's meeting for a full discussion on the draft. Mr. Winchester stated that the Legislature wanted a report on the Committee's progress. Mr. Winchester volunteered to draft a letter to the Legislature.

VII. CONCLUSION

Mr. Sullivan asked the Committee if there was anything else that needed to be addressed. There being no further issues before the Committee, Mr. Sullivan thanked the Committee for its work and adjourned the Committee until Wednesday, January 26, 1994.