Agenda

Advisory Committee
on Rules of Civil Procedure

Maybe March 25?

February 25, 1998
4:00 to 6:00 p.m.

Administrative Office of the Courts
230 South 500 East, Suite 300

Welcome and Approval of Minutes	Alan Sullivan
Rule 63. Update.	Tim Shea
Rule 64C. Update.	Virginia Smith
Civil Discovery Rules	Cullen Battle Tom Karrenberg Perrin Love Alan Sullivan Mary Anne Wood

MINUTES

Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure

Wednesday, March 25, 1998
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Thomas Karrenberg, Perrin Love, Leslie W. Slaugh, James Soper, W. Cullen Battle, Mary Anne Q. Wood, Fran Wikstrom, Honorable Ronald N. Boyce, Virginia Smith, Terrie T. McIntosh, Honorable J. Dennis Frederick, Harry Caston.

STAFF: Tim Shea, Peggy Gentles, Matty Branch

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. He also welcomed the committee's guests, Judge Frederick and Harry Caston. Tom Karrenberg moved that the minutes of the last meeting be be approved. Perrin Love seconded, and the motion passed unanimously.

II. RULE 63 -- DISQUALIFICATION OF JUDGES.

Mr. Sullivan briefly reviewed the history of this rule, which basically seeks to establish a procedure for requesting disqualification of a judge, how such motions are made, to whom they are presented, and what, if anything, the judge who is the subject of the motion can say in response. The rule attempts to comply with recent Utah Supreme Court decisions in this area. The primary topic of discussion for the committee is the timing for such motions.

Tim Shea reviewed with the committee his research into how other states handle this issue. Mr. Shea indicated that states vary widely -- some require that a motion be made within a specified time after the conflict is discovered, other say that motions cannot be filed within a certain number of days before trial. He also met with the district and juvenile court judges, and intends to meet with the appellate court judges, to discuss this issue. The general consensus of the judges he met was the rule should contain some or all of the following elements:

A provision whereby judges can respond to an affidavit of bias or suggestion of a conflict of interest. Judges felt that they should be permitted to tell their side of the story;

A firm deadline after which such motions cannot be filed. Judges expressed concern that motions to disqualify often were abused by parties seeking to avoid an impending trial date or

otherwise gain some strategic advantage;

A mechanism to identify who should serve as the reviewing judge, particularly in districts where there may only be a limited number of judges available to hear such motions; and

An provision allowing the non-moving party to respond to the motion and raise any objections it may have to the motion.

Judge Frederick indicated that motions are not always decided by the Presiding Judge. If there is an impending trial, the judge should be permitted to pass the motion on to any other judge to make a speedy determination. Leslie Slaugh stated that there should be a mechanism whereby the case can be tried even if an affidavit of bias is filed. This creates problems, however, both because the case may have to be retried and because another judge should pass on the merits before the matter reaches the Judicial Conduct Commission.

Judge Boyce suggested that the committee retain the existing rule and add a provision allowing the judge to respond to the charge. The committee also could make clear that if the motions are filed for purposes of delay, the court should impose sanctions. James Soper suggested that the committee impose a rule that such motions must be filed within a specified time before trial. Mr. Sullivan asked whether it made sense to have a separate rule for late-filed motions. Tom Karrenberg suggested that if a motion is filed late, the attorney must state, in an affidavit, why it was not filed earlier.

Mr. Sullivan asked Mr. Shea to take all of the comments by the committee into consideration, and prepare a few alternative rules for the committee to consider at its next meeting.

III. RULE 64C(f) ATTACHMENT.

Mr. Sullivan asked Virginia Smith to discuss update the committee on the status of the revisions to Rule 64C. Ms. Smith told the committe that following its last meeting, she and Peggy Gentles had reviewed the rule and determined that the amendment to Rule 64C(f)(1) proposed during the committee's meeting may not be necessary and, based upon this, recommended to Mr. Sullivan that it not be sent to the Supreme Court with the other changes. Ms. Smith also stated that she had been discussing with counsel for Zions Bank a major overhaul of this rule and the rule governing garnishments. Cullen Battle agreed to work with her in this project.

IV. DISCOVERY PROJECT.

Mr. Sullivan reviewed for the committee the discussions about proposed changes to the discovery rules. He explained that the changes were based upon the Federal Rules of Civil Procedure, although there are some important differences between the state and federal courts. He summarized for the committee each of the six elements of the proposed changes to Rule 16, 26, 30, and 33. He explained that because of the interplay among these rules, it would be difficult to make some of the changes but not all of them. He emphasized, however, that the committee

has not recommended adoption of any of these rules and they are very much open for discussion and debate.

The six elements of the proposed changes include (i) initial disclosures, which raises a number of questions about timing and what types of cases, if any, should be exempt, (ii) expert testimony, which raises the question whether parties should be required to submit written reports, (iii) pretrial disclosures, which probably are not controversial, (iv) meeting of parties and conference with the court, which raises issues about whether judges have time to hold conferences and the value of doing so, (v) presumptive limits on discovery, which probably are not controversial, and (vi) rules regarding the conduct of depositions, which are the least controversial of the suggested changes.

Mr. Sullivan then explained his proposed timetable for the rules, both at the initiation of the suit (i.e., timing for initial disclosures, the meet-and-confer, and a court-ordered discovery plan) and prior to trial (i.e., pretrial disclosures).

Judge Frederick expressed concern about having district court's micromanage cases. He stated that in his opinion a mandatory conference with the court was unworkable given the calendars of most district court judges. He thinks the system works okay as it is, and does not need dramatic overhaul. He expressed some doubt whether the proposed changes would result in more rapid settlements, because in his view setting a trial date is the most effective way to settle a case. The committee then discussed what the likely caseload of district court judges would be following consolidation, and how many of those cases would be eligible for a court-ordered discovery plan. Mr. Sullivan explained that the number of cases subject to the requirement would be reduced significantly because, among other things, the rules do not come into play unless an answer is filed.

Mr. Karrenberg stated that the federal rules work fairly well, and that almost without exception the parties agree on a discovery plan. The difficulty with the federal system is that it sometimes is difficult to get a trial date. He suggested that the parties stipulate to a proposed discovery plan and, if they cannot agree, submit it to the judge. This would reduce the number of in-court conferences the court would have to hold because in the vast majority of cases the parties could submit a stipulated order for signature. Judge Boyce said that in-court conferences are valuable even if the parties have agreed because they often lead to a narrowing of the issues and, in some cases, outright dismissal. Cullen Battle stated that he thought requiring a conference would eliminate or greatly reduce the need to hold order to show cause "cattle calls." This time could be more productively used by the court at a discovery conference.

Perrin Love stated that the federal rules work well because you get a trial date at the conference, but in state court you do not get a trial date until the completion of discovery. Judge Frederick explained that it generally is difficult to predict at the close of the pleadings when discovery will be completed and how long a trial will take. For this reason, district courts do not set trial dates until completion of discovery.

Mr. Sullivan then polled members of the committee to determine (i) whether they thought it was a good idea to have parties get together to plan discovery, and (ii) whether they thought it

was necessary to involve the court in this planning process. Almost all members of the committee agreed that holding an initial planning meeting was a useful process and would help get cases off to a good start. Members of the committee differed on the latter question. Some felt it was necessary to involve the court at the outset, others thought it was either unnecessary or simply not feasible. Many members of the committee stated that there should be a device whereby a party can get a trial date at the outset of the case, and this would help in the discovery process. Mr. Caston also offered his views on the applicability of the proposed rules to domestic cases. He said that many aspects of the rule, including initial disclosures, would be beneficial in divorce cases, but others would have no application. He asked whether domestic cases could have a separate rule incorporating some but not all of the proposed changes.

Mr. Sullivan agreed to redraft the proposed rules incorporating the following: (i) the initial conference with the court would be permissive, but not mandatory, (ii) the parties, at the meet-and-confer, would set cutoff dates and submit a stipulated order to the court to govern discovery and, if they cannot agree, would raise the issue with the court, and (iii) the rules will remain silent on the issue of setting a trial date. Mr. Sullivan thanked committee members and guests for their comments and suggestions on the proposed rules.

V. ADJOURN.

Mr. Sullivan reminded committee members that the next meeting is scheduled for April 22, 1998, at the Administrative Office of the Courts (not in the new building). There being no further business, the committee adjourned.