Agenda

Advisory Committee on Rules of Civil Procedure

May 19, 1998
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Board Room, Suite N21

Welcome and Approval of Minutes	Alan Sullivan
Rule 63	Tim Shea
Civil Discovery Rules	Cullen Battle Tom Karrenberg Perrin Love Alan Sullivan Mary Anne Wood

Parking

See Tim Shea to obtain parking validation stickers.

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MINUTES

Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure

Tuesday, May 19, 1998
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Perrin Love, James Soper, W. Cullen Battle, Fran Wikstrom, Honorable Ronald N. Boyce, Virginia Smith, Terrie T. McIntosh, Tom Karrenberg, Mary Anne Q. Wood, Paula Carr.

STAFF: Tim Shea, Peggy Gentles, Todd Shaughnessy

I. WELCOME AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. Tom Karrenberg moved that the minutes of the last meeting be approved. Perrin Love seconded, and the motion passed unanimously.

II. RULE 63 -- DISQUALIFICATION OF JUDGES.

Mr. Sullivan reviewed for the Committee the work that had been done to date on this rule, and some additional issues that arose in response to the most-recent draft circulated to the Committee.

Mr. Sullivan said that Judge Stirba expressed concern over language in subsection (a). She wanted the rule to make clear that judges have discretion to order, or not order, a new hearing. The language in the present rule suggests that a new hearing must be held. Mr. Sullivan suggested that this section we revised by replacing the final phrase with the following: "The judge to whom the case has been assigned may, in the exercise of discretion, determine to hear evidence, or some portion thereof, anew." Perrin Love suggested that "anew" is vague, and the rule should simply say "rehear."

Mr. Sullivan stated that subsection (b)'s reference to court commissioner is the only place in the rule where court commissioner's are identified. If court commissioner is used here, it logically should be used elsewhere in the rule. Doing so, however, may make the rule cumbersome. Mr. Sullivan suggested that court commissioner be dropped from subsection (b) and that the Committee prepare a comment to the rule making clear that it applies to court commissioners as well as judges.

Mr. Sullivan also expressed concern over the time period in subsection (b)(1)(B). The rule as drafted suggests that a motion may only be filed within 20 days of the enumerated events. He suggested that the rule state that a motion should be filed within 20 days of filing, but no later than the enumerated events. "Commissioner" also should be removed from subsection (b)(1)(B)(i).

Virginia Smith pointed out that there are some inconsistencies in the rule with respect to references to "party" and "party's attorney." She suggested that the rule be revised to refer consistently to "party."

Fran Wikstrom raised a concern about the requirement in subsection (b)(1)(C) that a party may not file more than one motion to disqualify in any action. His concern was that this requirement may preclude a party who has a legitimate claim against more than one judge. Mr. Shea stated that this is a common requirement in disqualification rules in other jurisdictions. Mr. Sullivan stated that this is necessary to avoid the possibility of abuse and that, as a general rule, if more than one motion to disqualify is filed in any action, it amounts to abuse of the rule.

Judge Boyce moved for adoption of the rule, as amended. Mr. Wikstrom seconded, and the motion passed unanimously. Mr. Sullivan asked Mr. Shea to prepare a Committee Note.

III. DISCOVERY PROJECT.

Mr. Sullivan reviewed for the Committee the proposed changes to the discovery rules. He reiterated the objectives of the proposed changes and explained that there are 6 general parts: initial disclosures, experts, pretrial disclosures, mandatory meeting, presumptive limits on discovery, and deposition rules.

Initial Disclosures. Mr. Sullivan explained that, in light of previous Committee discussions, they had developed the following requirements with respect to initial disclosures: (i) the materials to be disclosed would mirror those required by Rule 26(a)(1) of the Federal Rules of Civil Procedure, (ii) there would be a simultaneous exchange of initial disclosures and the timing would relate to the Rule 26(f) meeting, and (iii) the rule would exempt contract cases involving $20,000 or less and cases governed by Rule 65B or Rule 65C. Mr. Sullivan reminded the Committee that they had discussed numerous other exemptions, such as pro se cases and domestic cases, and that there still was a question whether other categories of cases should be exempt.

Perrin Love asked how much of the district court's caseload would be removed by these exemptions. Paula Carr stated that she thought it could be as much as 80 percent. Virginia Smith asked whether administrative review cases should be exempted.

Mr. Love asked what rules would govern exempted cases. Mr. Sullivan stated that these cases would only be exempt from the initial disclosure, mandatory meeting, and scheduling order requirements. All remaining discovery rules would apply, including the presumptive limits on discovery.

Cullen Battle asked whether these rules would apply to probate cases. Mr. Sullivan stated that he does not think probate cases would be subject to these rules.

Expert Testimony. Mr. Sullivan stated that this rule has been, and will continue to be, controversial. The elements of these rules include: (i) a requirement that each party identify experts and submit written reports, (ii) that this be done 90 days before trial, and (iii) experts cannot be deposed until after submission of a report.

Mr. Sullivan stated that the most controversial aspect of this rule is the requirement of a written report. There are two "versions" of this part of the rule under consideration. First, one that would require a full report, signed by the expert. Second, one that would require a "lawyer summary" of the expert's testimony. A majority of the Committee favored a full report, signed by the expert, though several members feel strongly that no expert reports should be required. The primary objection to a "lawyer summary" is that it is not effective to cross examine or impeach an expert, and that an expert who is required to sign a report will have to qualify the opinion in ways the lawyer will not. Judge Boyce added that a "lawyer summary" presents the additional possibility of rendering the lawyer a witness, if the lawyer's summary varies from the expert's testimony, and may present disqualification or ethical issues that may be abused.

Tom Karrenberg stated that the federal rule works well, but it's expensive. He is concerned that the state courts handle a number of cases that cannot justify the added expense of written reports. Mary Anne Wood questioned whether expert reports really are that expensive. The expert will have to do the required work in any event, and all the rule does is require that it be done sooner. Mr. Love added that a small case typically would not require a lengthy report, and Judge Boyce stated that a report may eliminate the need for a deposition. Cullen Battle suggested that the rule allow parties to opt-out of this requirement, and Mr. Sullivan stated that parties may do so by stipulation.

Fran Wikstrom suggested that parties not be permitted to take depositions at all, if the expert is confined to what is in the expert's report. Judge Boyce suggested that a middle-ground may be to say that a party cannot take an expert's deposition without leave of court.

Pretrial Disclosures. Mr. Sullivan explained that this would require parties to disclose the names of the party's witnesses, names of witnesses whose testimony will be presented by means of deposition, and exhibits.

James Soper suggested that parties should be required to designate witness they will call and witnesses they may call. This would help prevent problems created by relying on another party to have a witness present and that party subsequently decides not to call that witness.

Mandatory Meeting. Mr. Sullivan explained that the purpose of this rule would be to require the parties to meet and discuss a discovery plan as well as the claims in the case. The plaintiff would be responsible for initiating the conference. The plaintiff would then present the Court with a proposed discovery order. The Court, in its discretion, may hold a scheduling

conference, but would be required, in any event, to enter a discovery order. The same cases that are exempt from the initial disclosure requirement would be exempt from the mandatory meeting requirement.

Fran Wikstrom asked what would happen if neither the plaintiff nor the defendant held a mandatory meeting. Mr. Sullivan stated that nothing would happen. No discovery order would be entered. He stated that, under the federal rules, the meeting is held in relation to the Rule 16(b) hearing. Here, however, judges have stated that they are opposed to holding a scheduling conference, which means that the parties must be required to hold the meeting and propose a discovery order.

Mr. Wikstrom stated that if the parties decide they are comfortable with the presumptive limits on discovery, they should not be required to do anything, including having a mandatory meeting.

Mr. Battle stated that the rule should make clear that the Court must enter the discovery order if the parties ask for one. If the Court is not required to do this, the parties will not know what governs discovery in the case.

Deposition Rules. Mr. Sullivan explained that the deposition rules are modeled on the federal rules. There are two main parts: (i) changes in the means available to parties to record deposition testimony, and (ii) specifying appropriate objections and otherwise curbing deposition abuses.

A concern was raised over the interaction of the proposed rules with the Code of Judicial Administration. Under the CJA, for example, a case cannot be set for trial until discovery is completed and a party files a Certificate of Readiness for Trial. Mr. Sullivan explained that this is one reason the timing of the proposed rules runs from the filing of the complaint. Mr. Karrenberg stated that another potential conflict is that the CJA permits parties to conduct discovery up to 30 days before trial. This may conflict with a discovery order. He suggested that the Committee carefully review the CJA to determine whether other conflicts exist, and that implementation of the proposed rules will require coordination with, and possibly some changes to, the CJA.

Mr. Karrenberg also suggested that the Committee consider setting this up as a pilot program to see how it works in practice. Ms. Wood stated that it would be useful to get some objective measure of the effectiveness of the rules -- do they cut down the time for resolution of disputes and do they decrease the number of discovery disputes. Mr. Sullivan stated the Committee will take up these and other issues at its next meeting.

VI. ADJOURN.

Mr. Sullivan reminded committee members that the next meeting is scheduled for September. There being no further business, the committee adjourned.