Agenda

Advisory Committee on Rules of Civil Procedure

January 27, 1999
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Welcome and Approval of Minutes	Alan Sullivan
Introduction of New Members	Judge Darwin Hansen Judge K.L. McIff Judge Anthony Quinn
Comments to Rule 63	Tim Shea
Discovery Amendments	Alan Sullivan

Parking.

Enter parking level P2 from 400 South. There is a left turn lane if you are westbound on 400 South. Bear to the left as you descend the driveway. After parking, take the elevator to the first floor rotunda. Pass through the security checkpoint and take the elevator (on your right) to the 3d floor. (The elevator to the Courthouse floors is separate from the elevator to the parking garage.) The Council Room is in the North wing of the Courthouse, Suite N31. Identify yourself at the receptionist's desk. See Tim Shea or Peggy Gentles for parking validation stickers.

Future Meeting Schedule.

All meetings are scheduled from 4:00 to 6:00 p.m. in the Judicial Council Room, Suite N31 at the Matheson Courthouse, 450 South State.

February 24
March 24
April 28
May 26

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, January 27, 1999
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Honorable Kay L. McIff, Honorable Darwin C. Hansen, Honorable Anthony B. Quinn, James Soper, Terrie T. McIntosh, Tom Karrenberg, Paula Carr, Leslie W. Slaugh, W. Cullen Battle, Glen Hanni, Fran Wikstrom, Mary Anne Q. Wood.

STAFF: Tim Shea, Peggy Gentles, Todd Shaughnessy.

GUESTS: Senator John Valentine, Elizabeth Dunning.

I. WELCOME, INTRODUCTION OF NEW MEMBERS, AND APPROVAL OF MINUTES.

Alan Sullivan welcomed committee members to the meeting and thanked them for their attendance. He also introduced new committee members, Judge Kay McIff, Judge Darwin Hansen, and Judge Anthony Quinn.

Fran Wikstrom moved that the minutes of the last meeting be approved. Glen Hanni seconded, and the motion passed unanimously.

II. JUDGMENT LIENS ON REAL PROPERTY.

Mr. Sullivan informed the Committee that an issue had arisen in the current legislative session regarding Rule 62 and the posting of appeal bonds. Senator John Valentine was invited to attend the meeting and to summarize for the Committee the issue involved. Senator Valentine stated that an issue had been brought to his attention regarding the effect of a judgment lien on real property, when the party against whom the judgment is entered appeals the decision. According to Senator Valentine, as things now stand, the judgment operates as a lien on all real property and that lien is not extinguished, even if the party posts a bond pursuant to Rule 62. He stated that the legislature is considering passing legislation that would permit a judge, in the judge's discretion, to allow a party to post sufficient collateral and eliminate the judgment lien. The judge would have considerable discretion to determine the nature and appropriate amount of the collateral. This would protect parties from having substantial amounts of real property tied up

because of a judgment that may be substantially less than the value of that real property. Elizabeth Dunning added that the policy behind the proposed change is to lessen the leverage that a judgment creditor has against a party with substantial real property subject to the lien (i.e., developers).

Senator Valentine presented the Committee with some proposed revisions to Rule 62, which, when read in conjunction with proposed changes to section 78-22-1 of the Utah Code, would accomplish this. The amendments consist of an additional sentence that would permit the judge to "terminate" the judgment lien upon the provision of adequate security. Members of the Committee also proposed several changes to the proposed amendment to section 78-22-1.

Leslie Slaugh pointed out some potential problems with the proposed changes, including the possibility that the collateral would end of not being sufficient to satisfy the judgment at the conclusion of the appeal. He also questioned whether the lien could, or should, "reattach" upon affirmance. Mary Ann Wood questioned the wisdom of shifting the risk of loss to a party who has prevailed. Tom Karrenberg indicated that the posting of security in lieu of a bond had potential implications under the bankruptcy code that should be explored before making the proposed change.

Mr. Sullivan questioned whether any amendment to Rule 62 was necessary. He stated that the lien on real property was created by section 78-22-1, and, since the legislature created the lien, it had the power to limit its scope if appropriate. Tim Shea stated that a change to Rule 62 alone probably would have no effect because the lien is created by statute. Senator Valentine also informed the Committee that the amendments to section 78-22-1 would likely be proposed during this legislative session, and a corresponding amendment to Rule 62, if one was necessary, also would have to be made. Mr. Sullivan suggested that given these time constraints, and the Committee's inability to make a decision this quickly, Senator Valentine should consider proceeding with a statutory amendment and, if the Rule still presents a problem, inform the Committee who can take up the issue then.

III. RULE 63.

Mr. Sullivan reviewed for the Committee the history of the changes to Rule 63. He stated that the genesis of the amendments to Rule 63 was comments received by judges expressing frustration about their inability to respond to false allegations of bias, automatic disqualification upon the mere filing of an affidavit of bias, and the improper use of this device for strategic reasons. He said that the Committee had spent significant time reviewing rules from other states and trying to strike an appropriate balance between these concerns and the necessity of requiring disqualification when it is truly appropriate.

The Committee received numerous written comments following publication of the Rule, which Mr. Shea summarized for the Committee. Mr. Shea stated that the overall objective of giving judges an opportunity to place a statement on the record was generally well accepted, many people who commented felt the amended rule went too far. The general concerns were that the amended rule reflected an adversarial process that previously had not existed and, more

importantly, the focus had shifted from a simple determination of the sufficiency of the affidavit, to a process whereby the reviewing judge must weigh and consider conflicting evidence.

Mr. Shea presented the Committee with some additional changes to Rule 63 that, in light of these comments, would shift the reviewing judge's inquiry back to a simple determination of the sufficiency of the affidavit. Mr. Sullivan indicated that these proposed changes represented a slight retreat from the position initially approved and adopted by the Committee and would avoid creating an adversarial situation between an affiant and a judge. Mr. Shea stated that one advantage of doing this is that it would keep intact the case law that has developed from Utah's appellate courts on this issue.

Cullen Battle questioned whether this retreat was appropriate. Changing the rule as proposed would mean that virtually every motion would have to be granted. This would seriously undermine one of the goals of the amendments, which was to reduce gamesmanship. Tom Karrenberg agreed that the proposed "legally sufficient" standard was too lenient. Mr. Slaugh proposed a middle ground -- the rule could avoid testing the merits, but preserve some teeth, by stating that the motion should be granted if it is "legally sufficient and filed in good faith." This would avoid creating an adversarial situation, but would allow the reviewing judge to determine whether the motion has been filed for an improper purpose.

Mr. Shea also discussed the elimination of the provisions that permitted the reviewing judge to conduct a hearing, take evidence, and request memoranda of points and authorities. Again, the goal was to reduce the adversarial nature of the inquiry. Also, concern was raised about the propriety of a judge testifying given constraints imposed by the Code of Judicial Conduct. Mr. Wikstrom stated that the Judicial Conduct Commission often receives complaints relating to comments by a judge about a party or the credibility of a party. Mr. Wikstrom also questioned the magnitude of the problem, and wondered whether a dramatic change was necessary. Mr. Slaugh stated that he had been involved in a couple of cases like this. According to Mr. Shea, the judges consider it a serious problem.

The Committee next discussed a proposed change that would allow a response by the judge for whom disqualification is sought only if requested, in the form of questions, by the reviewing judge. Mr. Shea stated that this was how Chief Justice Zimmerman handled a disqualification issue involving a member of the Utah Supreme Court. Several members of the Committee, however, stated that the "subject" judge should have an opportunity to respond to unsupported allegations, and should not have to await questions from the reviewing judge. Mr. Karrenberg stated that the Committee had decided that a higher standard, and the ability of the " subject" judge to respond, was appropriate.

Mr. Sullivan stated that the root issue was the standard. The Committee needed to decide whether the standard should be "legally sufficient," which, in most cases, would mean a facial review of the allegations and nothing more. Or, alternatively, whether the standard should "the motion should be granted," which would necessitate a more careful and detailed inquiry. Mr. Sullivan stated that the federal courts apply a fairly rigorous standard which tries to ferret out false allegations and gamesmanship.

Judge Hansen stated that the mere filing of a motion may ultimately result in disqualification because once the allegation is made, even if it is determined to be false, that judge can no longer preside over the case. Ms. Wood stated that the Committee must rely, to a certain extent, on the non-moving party to point out abuse and that sanctions such as Rule 11 should take care of most of the problem.

Mr. Sullivan again asked members of the Committee to decide which standard is most appropriate. Mr. Wikstrom and Ms. McIntosh, among others, remained concerned about having a judge comment on the merits, and the potential implications for such a judge before the Judicial Conduct Commission. Mr. Sullivan stated that there is some discomfort in not getting to the bottom of the allegations, for the benefit of everyone involved. Mr. Slaugh stated that the standard "should be granted" was not definitive enough, and that the standard should be "legally sufficient and brought in good faith."

Mr. Sullivan asked members of the Committee to think about the appropriate standard, and be prepared to discuss them at the next meeting. He also asked Mr. Shea to compile whatever information may be available about the extent of the problem, including any information about the numbers of disqualification motions filed.

IV. ADJOURN.

There being no further business, the Committee adjourned.