M I N U T E S

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 29, 1991, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT:

Alan L. Sullivan
Brad R. Baldwin
Terrie T. McIntosh
Robert A. Echard
James R. Soper
Allan L. Larson
Prof. Ronald N. Boyce
Francis M. Wikstrom
Hon. Michael R. Murphy
Elizabeth T. Dunning
Wendell E. Bennett
Kent H. Murdock
David K. Isom
M. Karlynn Hinman

EXCUSED:

Hon. Boyd Bunnell
Prof. Terry S. Kogan
Glen C. Hanni
Samuel Alba
Bruce Plenk

STAFF:

Colin Winchester

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Sullivan welcomed the members of the Committee to the meeting. The Minutes of the April 10, 1991 meeting were approved as drafted.

2. **REPORT ON RULES 17, 65A AND 65B.** Mr. Sullivan reported that certain Committee members met with the Supreme Court on May 17 to discuss proposed Rules 17, 65A and 65B. Most of the Court's questions were dealt with Rule 65B. The Court wanted to ensure that the Committee had involved constituencies that would be affected by the rule change, and that the Committee had carefully considered transportation problems and potential bias problems that might arise due to the venue provisions of (b)(2). Those concerns were discussed and resolved to the Court's satisfaction. As a result of the meeting with the Court, Mr. Sullivan made the following changes to the Rule and the Note:

(1) Subparagraph (6)(4):

Attachments to the Petition. The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(2) First sentence of Subparagraph (b)(7):

On review of the petition, if it is apparent to the court that ~~the legality of the commitment has~~ the issues presented in the petition have already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face.

(3) Advisory Committee Note:

Paragraphs (d) and (e) replace paragraph (b) of the former rule. The committee's general purpose in drafting these paragraphs was to simplify and clarify the requirements of the pre-existing paragraph.

Mr. Sullivan reported that after making these changes, he forwarded the amended proposed rules to the Court for adoption.

3. **RULE 10(d).** Mr. Sullivan reported that he had received a letter from attorney Bruce Richards regarding a Fourth District Court requirement that garnishment forms be double-spaced. Current Rule 10(d) states that all typing shall be double-spaced, except for matters customarily single-spaced or indented. According to Mr. Richards, single-spacing is more legible for garnishment forms than double-spacing. Mr. Echard noted that the problem is not necessarily unique to garnishment forms.

MOTION: Mr. Echard made a motion that Mr. Sullivan write Mr. Richards indicating that the Committee will take no action of the request.

SECOND: Mr. Larson seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

4. RULE 1(a). Mr. Sullivan referred the Committee to a letter from Tim Shea regarding Rule 1(a). Currently, the rule states that the Rules of Civil Procedure apply in the Supreme Court, the District Courts, the Circuit Courts, and the Justice Courts. There is no mention of the Court of Appeals or the Juvenile Courts. The Committee directed staff to draft a proposed amendment to Rule 1(a) and to present the proposal at the next Committee meeting.

5. RULE 69. Mr. Baldwin reported that the subcommittee met and prepared a draft of the proposed rule. Before it is presented to the Committee, the subcommittee will meet once again in an attempt to resolve the extent to which a creditor must disclose that certain property is exempt from execution.

Prof. Boyce suggested that the availability of exemptions should be disclosed, but that a list of those exemptions need not be disclosed.

Mr. Baldwin suggested that the most common exemptions (i.e., homestead, vehicle used in business, tools of trade etc.) could be easily disclosed.

Prof. Boyce suggested that by implication, disclosure of certain exemptions might infer the exclusion of other exemptions.

Mr. Baldwin suggested that a general catch-all could be included.

Judge Murphy noted that when the Committee revised Rule 64D, it was difficult to refer to the list of exemptions in the statute. As a result, only the most common exemptions were listed.

Mr. Echard questioned whether federal laws govern the disclosure question.

Mr. Sullivan asked whether there are certain groups or constituencies that might like to participate in the proposal.

Mr. Baldwin suggested that the Utah Bankers Association, Utah Legal Services, and collection attorneys might be interested.

Mr. Sullivan asked Mr. Baldwin to speak with Bruce Plenk and to send the current proposal to those constituency groups for comment.

Mr. Baldwin noted that the subcommittee will meet again and distribute the proposal at the next Committee meeting. He noted that the subcommittee had already cleaned up

the rule's language, included a provision to require notice of a hearing to determine whether property is exempt, and incorporated certain other changes from Rule 64D.

6. RULE 35(a). Mr. Sullivan directed the Committee's attention to previously distributed Rule 35(a). He distributed a letter from attorneys at Strong & Hanni suggesting yet another alternative to the proposal, and a document setting forth four alternatives (the current rule, the federal rule, Alternative No. 1 and Alternative No. 2).

Mr. Echard noted that if a party claims physical injury, the defendant should not be allowed to force a mental examination.

Mr. Soper noted that the present rule permits the defendant to request and obtain such examinations.

Mr. Echard interprets the present rule as only permitting examinations by physicians.

Prof. Boyce noted that some conditions may require both physical and mental examinations, and that the cost of such examinations will force attorneys to be reasonable in requesting them.

Judge Murphy noted that examinations are discretionary with the court, and that the court will not allow abuses to occur.

Mr. Echard noted that a rule which is too broad will allow judges to expand, through discretion, the availability of examinations. He also suggested that the Committee receive input from the plaintiff's bar.

Prof. Boyce indicated that he would not limit the rule to physicians. He stated that there are non-physician experts who may know more about certain issues than physicians do. Such people should be allowed to make examinations and testify regarding those examinations.

Mr. Echard stated that he was not concerned about the qualifications of the examiner, but rather the scope of the examination.

Prof. Boyce noted that a requirement that examiners be licensed by a state of the United States is too narrow. The Court should be able to determine competence without regard to state licensing.

Mr. Wikstrom suggested that the Committee tentatively adopt Mr. Sullivan's Alternative No. 2. and send the same to plaintiff and defense lawyers for comment.

Mr. Echard questioned whether the rule should limit the number of examinations to which a party must submit.

Prof. Boyce suggested that if the number of examinations is limited, a specialist who was unavailable earlier in the case may not later be able to do the examination. The number of examinations should therefore be left to the discretion of the court.

Prof. Boyce suggested that Mr. Sullivan's Alternative No. 2 should be amended to read as follows:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, psychologist or other professional ~~who, by training and experience is capable of conducting an examination that is reasonably likely to assist the trier of fact~~ determined by the court to be competent to conduct the examination. The court may also order the party to produce for examination the person in his custody or legal control. . . .

Judge Murphy expressed opposition to Prof. Boyce's suggestion.

A Committee member questioned whether the suggestion would require the expert to appear before the court for a determination of competence.

Mr. Baldwin suggested that examinations should be performed by physicians, psychologists or other experts who by "knowledge, skill, experience, training, or education" qualify them as experts. This proposal conforms with Evidence Rule 702.

Mr. Sullivan proposed the following language:

> . . . physicians, psychologists or other professionals who are qualified by knowledge, skill, experience, training or education to conduct examinations . . . .

Mr. Baldwin suggested the following:

> . . . physicians, psychologists or other professionals who are qualified by knowledge, skill, experience, training or education to conduct examinations reasonably likely to assist the trier of fact to understand the evidence or to determine a fact in issue.

Prof. Boyce noted that the purpose of the examination may not be to assist the trier of fact.

Mr. Wikstrom noted that if the examination is reasonably likely to assist the trier of fact, it does not matter whether the testimony is ever used at trial.

Mr. Sullivan suggested the following language:

> . . . physicians, psychologists or other professionals who are qualified by knowledge, skill, experience, training or education to conduct examinations reasonably likely to yield discoverable information under Rule 26.

Mr. Baldwin suggested the following language:

> . . . physicians, psychologists or other professionals who are qualified by knowledge, skill, experience, training or education to conduct examinations reasonably calculated to lead to the discovery of admissible evidence.

Mr. Wikstrom and Ms. McIntosh indicated that Mr. Baldwin's "discovery" test is too broad.

Judge Murphy suggested sending two alternatives to the plaintiffs' bar and the defense bar, seeking input on both alternatives.

Prof. Boyce suggested that the Rule 26 test will work in nearly every case, but that occasionally, an examination may be conducted not for the purpose of testimony, but rather to aid in settlement.

Mr. Sullivan indicated that he would draft a proposal and send it for preliminary comment to the Committee, UTLA, the Defense Research Institute, the American College of Trial Lawyers and the American Board of Trial Advocates.

Judge Murphy suggested that Mr. Sullivan's cover letter also invite those groups to refer the proposal to their national organizations for comment.

7. RULE 30. Mr. Sullivan directed the Committee's attention to the issues previously discussed, i.e. videotaped depositions and filing of depositions.

Filing of depositions. Mr. Larson reported that there is conflict between URCP 5(d), CJA Rule 4-502 and URCP 30(f). His subcommittee proposed that CJA Rule 4-502 be cleaned up, that conflicts in Rules 5(d) and 30(f) be deleted, and that Rules 5(d) and 30(f) refer to CJA Rule 4-502.

Prof. Boyce noted that the new local federal rules may be helpful on the subject.

Mr. Larson proposed a rule which would require the reporter to deliver the original deposition to the party or lawyer taking the deposition, who would in turn hold the original and deliver it to the clerk if and when the deposition was to be used by the court.

Mr. Echard questioned whether the holder of the deposition should be required to certify, ten days before use, that he or she will produce the deposition as required.

Prof. Boyce stated that the rule should be harmonious with the new local federal rules.

Mr. Sullivan asked the subcommittee to continue its work on the videotaped depositions.

8. **ADJOURNMENT.** There being no further business, the Committee adjourned until September.

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