

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

October 26, 1994

1. *Welcome and Approval of Minutes (Alan Sullivan)*

2. *Discussion of Discovery Rule Changes (Alan Sullivan, Fran Wikstrom, and representatives of interested parties and organizations)*
ROCKY ANDERSON
ANNE SWENSON
HON. ROBIN REES
COLIN KING
} *guests*

3. *Peremptory Challenges Under Rule 47(e): (Perrin Love)*

4. *Modification of Rules of Civil Procedure Forms (T. Karrenberg)*

5. *Other Business*

MINUTES

Utah Supreme Court Advisory Committee
on the Rules of Civil Procedure
Wednesday, October 26, 1994, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Alan L. Sullivan, Colin R. Winchester, Honorable Boyd Bunnell, Honorable Anne M. Stirba, Terry S. Kogan, Honorable Ronald N. Boyce, Terrie T. McIntosh, Glenn C. Hanni, Thomas R. Karrenberg, John L. Young, James R. Soper, Perrin R. Love

EXCUSED: Brad R. Baldwin, Francis M. Wikstrom, M. Karlynn Hinman, Honorable Michael R. Murphy, David K. Isom, Allan L. Larsen, Jaryl L. Rencher, Robert A. Echard, Honorable Samuel Alba, Mary Anne Q. Wood, and Elizabeth T. Dunning

STAFF: Julie Fortuna

VISITORS: Colin P. King (Utah Trial Lawyers), Anne Swenson (Utah Defense Lawyers) Ross C. Anderson (Utah State Bar Litigation Section), and The Honorable Robin W. Rees (Board of Circuit Court Judges)

I. WELCOME

Mr. Sullivan welcomed the Committee members and visitors to the meeting. Mr. Sullivan thanked Craig T. Jacobsen for his service to the Committee and introduced Julie Fortuna as the new committee staff member.

II. DISCUSSION OF DISCOVERY RULE CHANGES

Mr. Sullivan opened discussion on whether the Utah Rules of Civil Procedure should incorporate the new federal discovery rules by introducing the following guest speakers: Colin P. King of Utah Trial Lawyers, Anne Swenson of Utah Defense Lawyers, Ross C. Anderson of the Utah State Bar Litigation Section, and The Honorable Robin W. Rees of the Board of Circuit Court Judges. Mr. Sullivan also recalled that the Committee had previously spoken to the Domestic Bar and to the Attorney General's Office considering the issues raised by the new federal discovery rules to domestic issues and extraordinary writs, respectively.

Mr. Sullivan reported that he had spoken with Bob Faust from the Federal Bar Association who indicated that the Association had not developed a position and could not address the success of the new federal discovery rules. Judge Stirba indicated that the Utah

District Court Judges had not had a chance to discuss the issue. Judge Rees indicated that the Utah Circuit Board of Judges had not had a chance to discuss the issue.

Colin P. King from the Utah Trial Lawyers addressed the Committee and reported that Utah Trial Lawyers is composed of plaintiffs lawyers in civil practice. Mr. King indicated that because its members are usually also members of the American Trial Lawyers the majority of their practice is plaintiffs work in the personal injury area. Utah Trial Lawyers has several hundred members that practice primarily in solo practices or in small firms (five to seven practitioners). Utah Trial Lawyers has a board of directors of ten to fifteen attorneys who practice 100% in the plaintiffs personal injury area. Mr. King represented that Utah Trial Lawyers believes the new federal discovery rules need to be further analyzed to determine which parts are meritorious and which parts are not meritorious. He indicated that Utah Trial Lawyers would like to wait and observe another year of federal practice under the new discovery rules before taking a stand on the issue as they are unsure whether adoption would result in overall benefit.

Notwithstanding, Mr. King indicated that most members of Utah Trial Lawyers are opposed to the voluntary disclosure requirements of 26(f) because of a belief that it would increase the expenses of a plaintiffs practice up front. Utah Trial Lawyers sees this as a handicap that inhibits bringing legitimate claims. Mr. King indicated that ninety percent of plaintiffs cases are settled and most members of the Utah Trial Lawyers would prefer not to spend money until they must. Mr. King also indicated that Utah Trial Lawyers believes that the up-front expert expenditures required by the new federal rules is discouraging. He also indicated that he believed forcing the plaintiffs attorney to make written disclosures up front would handicap the plaintiffs attorney because the rule applies equally to plaintiffs and defendants. Mr. King indicated that the gap between the plaintiffs and defendant's knowledge in personal injury cases is formidable in that defendant's lawyers are usually more specialized and have more knowledge and understanding of the case than the plaintiff's lawyer, so they should not be treated equally. Mr. King indicated that he believed that the 26(f) meeting required by the new discovery rules was a good idea because it encouraged communication between opposing attorneys. He inquired whether Rule 16 would suffice to ensure compliance.

Anne Swenson from the Utah Defense Association next addressed the Committee. She reported that the Association has about 10 members, comprised mostly of insurance defense attorneys, 20 to 25 of whom are active. Ms. Swenson indicated that the Association is not taking a position on whether to adopt the new federal discovery rules into the state system as they have had no meaningful discussion on the issue. Notwithstanding, Utah Defense Association sent 110 questionnaires to its members on the effectiveness of the new federal discovery rules and received forty responses. Five were in favor of adopting the new federal discovery rules with no comments, thirty-five were opposed to adoption indicating problems with 26(a) initial discovery in terms of ethical considerations, effective advocacy, fear of steeper plaintiffs practice, and perception of an impossible burden on defendants. Ms. Swenson also indicated that the Association favors a Rule 26(f) meeting although they are not taking a position. Ms. Swenson concluded her comments by indicating that the majority of the responses to the Association's poll appear opposed to adopting the new federal discovery rules.

Mr. Young asked the Committee to consider to what extent Rule 11 was needed if Rule 16 was used. Judge Stirba volunteered to take that question back to the Board of District Judges. She indicated that Rule 16 motions are rare and that a Judge would probably be uncomfortable requiring people to come forward with discovery by an order under Rule 16. In response, Judge Boyce reported that the Eastern District of Virginia has the highest case load

Judge Stirba asked what problems the Utah Federal District Court was trying to fix. She reported that State District Court Judges are statutorily required to dispose of cases within sixty days and that if more than six cases go beyond sixty days, or two go beyond one hundred eighty days, the District Court Judges may not be qualified for retention election. Judge Stirba indicated that Utah does not have the time problems of other bigger states.

Mr. Young inquired whether economic impact studies had been done. He indicated that there was a conference in Washington that may have collected information. Judge Boyce volunteered to keep his ears to the ground, to call Washington, and to check with other Magistrate Judges.

Judge Boyce next addressed the Committee and indicated that the new federal discovery rules trial period had been extended to March 31, 1995. He indicated that he believed in three to five years every federal court would adopt the rules and that the judicial conference had decided rather than opting out of the federal rules it would be an opt in situation. Boyce indicated that Arizona and Nevada have adopted the new federal discovery rules on a state level and in Arizona there has been a favorable response at the state level, although at the federal level there is a mixed bag. Judge Boyce indicated that Nevada had a less favorable response.

Mr. Anderson also indicated that he believed the Committee's undertaking with respect to the new federal discovery rules was premature. He indicated that he believed the Committee needed more experience and input and should not adopt the federal discovery rules for uniformity's sake because there is enough opposition from all sides. Mr. Anderson indicated that he would check to see whether any polling had been done regarding views on the new discovery rules at the national level.

Mr. Anderson from the Utah State Bar Litigation Section indicated that the Section had polled its members prior to the adoption of the new federal discovery rules, but had not since discussed the issue. Mr. Anderson read Judge Scalia's opinion that the United States Supreme Court adopted the new federal discovery rules in the face of universal opposition with only a few individuals from large firms and the judicial conference in favor. Mr. Anderson indicated that in the September 1993 poll, one-third of the Utah State Bar Litigation Section members responded. Of that one-third, seventy-seven percent opposed adoption of the new federal discovery rules. Mr. Anderson indicated that he viewed the new federal discovery rules as adding an unnecessary layer of costs, expenses and satellite litigation. He referred to a report that indicated that in contested tort, contract, and property cases in state courts, forty percent do not engage in formal discovery. Mr. Anderson indicated that he believes that under the new discovery rules the client becomes reluctant to disclose information, thus impeding client candor with attorneys, and that Rule 26(a) as it relates to expert reports in a horrendous waste of money. Mr. Anderson also indicated that eighty percent of the Utah State Bar Litigation Section members were opposed to changing Rule 11.

of any jurisdiction and they have adopted what is referred to as a "rocket docket" where every case is set for trial in six months except in very rare cases with no assigned Judge. Judge Boyce reported that the average "rocket docket" Judge tries fifty-nine jury trials a year so that discovery disputes are worked out by the parties and sanctions are horrendous.

Mr. Sullivan concluded the discussion by suggesting that the consensus of the Committee members was to wait and gather more experience and information before deciding whether to adopt the new federal discovery rules into the Utah Rules of Civil Procedure. Mr. Sullivan suggested that discussion on whether to adopt the new federal discovery rules be put on the Committee's agenda for March so that the Committee could review more information from states that have adopted the new federal discovery rules on the State level and hear reports from Judge Boyce and Judge Alba on one-and-a-quarter years of experience under the new federal rules.

III. PEREMPTORY CHALLENGES UNDER RULE 47(e)

Mr. Sullivan opened discussion on whether the Committee should propose a procedure to be adopted for peremptory challenges under Rules 47(e) by asking whether there needed to be a change to Rule 47(e) and indicating that the Chief Justice of Utah Supreme Court had asked the Committee to review this issue.

Mr. Love presented a written memorandum to the Committee summarizing adopted procedures for resolving *Batson* objections to the exercise of peremptory challenges. Mr. Love reported that no jurisdiction has imposed procedures for resolving *Batson* objections, rather the courts use common sense and discretion and are developing a body of common law. Mr. Love indicated that the recent Utah Court of Appeals decision in *State v. Pharris* provided a thorough and typical exposition of the *Batson* issues.

It was the general consensus of the Committee that there was no need to change Rule 47(e). Mr. Sullivan volunteered to write a letter to the Chief Justice explaining the Committee's position.

IV. MODIFICATION OF RULES OF CIVIL PROCEDURE FORMS

After a brief discussion by Mr. Karrenberg on the status of the forms located in the Appendix of Forms to the Utah Rules of Civil Procedure, it was the general consensus of the Committee that the forms needed to be revised. Mr. Sullivan and Mr. Karrenberg volunteered to form a subcommittee to revise the forms, including forms for domestic cases. Mr. Sullivan indicated he would check with Utah Legal Services to see whether they had adopted forms for domestic cases as suggested by Judge Stirba.

V. OTHER BUSINESS

Mr. Winchester indicated that the Utah Supreme Court had adopted the Committee's suggested changes to Rule 45, Rule 30F and Rule 69 effective November 1, 1994.

Mr. Sullivan indicated that the Sheriff's Association had asked the Committee to review service procedures as it is currently suffering from a backlog of requests.

Judge Stirba asked that the Committee consider Rule 60 (Relief From Judgment or Order) and Rule 4-501 (Motions) at the next meeting.

Mr. Sullivan indicated that Mr. Kogan and Ms. Wood would review Rule 68 (Offer of Judgment) at the next meeting.

VI. CONCLUSION

Mr. Sullivan reminded the committee that the next meeting would be held on December 7th. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.