MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 25, 2004
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Francis J. Carney, R. Scott Waterfall, Terrie T. McIntosh, Leslie W. Slaugh, Thomas R. Lee, Todd M. Shaughnessy, Virginia S. Smith, James T. Blanch, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Thomas R. Karrenberg, Cullen Battle, Janet H. Smith, Glenn C. Hanni, Paula Carr, Debora Threedy, Honorable Anthony W. Schofield

GUESTS: Matty Branch
Bob Goodman

I. APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the January 28, 2004 meeting were reviewed, and Judge Anthony B. Quinn moved that they be approved as written. The motion was seconded by James Blanch, and approved unanimously.

II. REPORT ON MEETING WITH SUPREME COURT.

Mr. Wikstrom reported on his and Tim Shea's recent meeting with the Supreme Court, which was for the purpose of reporting the Committee's recommendations for amendments to the rules, and public comments that have been received. Judge Robert Hilder, Third District Court, also attended the meeting, and voiced opposition to the amendment to URCP 7 which increases from 10 pages to 25 pages the page limit for summary judgment memoranda. That amendment is presently in effect under the Supreme Court's emergency rules. Mr. Wikstrom reported to the Committee that the Supreme Court has approved all amendments recommended, with the exception of the amendment increasing the page limit for summary judgment memoranda. The page limit for summary judgment memoranda accordingly will return to 10 pages. Mr. Wikstrom expressed the thanks of Chief Justice Durham and the Court for the dedication and hard work of the Committee.

III. H.J.R. 16. AMENDMENTS TO URCP 62.

Prior to today's meeting, Committee members were provided with a copy of H.J.R. 16, which would amend URCP 62. Mr. Shea commented that this amendment appears to be part of a national trend with regard to supersedeas bonds.

IV. RULE 47. COMMUNICATION WITH JURORS.

The Committee considered the proposed amendments to Rule 47. Mr. Shea stated that the version of the rule presently before the Committee is the final recommendation, and gave the following reasons for proposing amendments: (1) to provide that the admonishment to jurors need not be given each time there is a break in trial proceedings, and (2) to bring the rule into line with distinctions made in case law. He noted that the Advisory Committee on the Rules of Criminal Procedure adopted this version after adding "including another juror" to the first sentence of part (1), and adding language to the end of part (1) to the effect that the judge should instruct at the beginning of the case and remind the jurors as appropriate.

Judge Lyle Anderson referred to a recent case[1] dealing with communications between a potential juror and witness prior to the jury's being selected. This prompted a discussion about whether language should be added to the rule to address this situation, or whether it was more properly part of voir dire and the responsibility of the court and attorneys to inquire about. The Committee then discussed Thomas Lee's comment that the language of the amendment seems to imply that jurors can communicate with court personnel regarding the "subject of the trial," and also discussed whether the rule would preclude common courtesies such as "excuse me" or "thank you" from being exchanged. Mr. Shea will incorporate into the proposed amendment various suggested changes arising out of these discussions. Judge Anderson moved to approve these changes. Mr. Lee seconded the motion, which was approved unanimously. Mr. Shea will present the rule, with the suggested changes, at the March meeting.

V. RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS.

Mr. Shea stated that the proposed amendment to Rule 51 is in response to requests by district court judges, and that the Advisory Committee on the Rules of Criminal Procedure has decided not to pursue a comparable change to the Criminal Rules at this time. That Committee instead will wait to see the outcome of several cases now pending before the Supreme Court on the issue of failure of the trial court to give **all** instructions at the end of trial (even though the trial court has given all instructions throughout the course of the trial). Mr. Shea asked whether this Committee would also like to delay considering this proposed amendment.

Francis Carney opposed any delay. He stated that the committee that is presently working

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[1] *State v. Shipp*, 2004 WL 316150, 2004 UT App 40 (Feb. 20, 2004).

on a revised version of the Model Utah Jury Instructions had intended to suggest that instructions be given throughout the trial as they apply. Any proposed amendment to Rule 51 would impact that, and the MUJI committee will need to know the outcome of this proposed amendment before preparing its own recommendations.

Scott Waterfall commented that for the rule not to require that all instructions be repeated at the end of the presentation of evidence at trial, appears to fly in the face of current practice. In response, Mr. Shea stated that the amendment will not deny the court the right to do that, and will only give the trial judge discretion about whether or not to repeat all instruction already given. It was also suggested that the rule make clear that at least one complete copy of instructions must be provided to the jury, even if the instructions are given during the course of trial as they apply.

Judge Anderson moved to approve the language of lines 21-23 of the proposed amendment,[2] and also to include language making clear that no matter when instructions are given, one complete copy of the instructions must be provided to the jury. The motion was seconded and approved unanimously. Mr. Shea will work on the language of the amendment, and present a revised version for review at the next Committee meeting.

VI. REMEDIES RULES

Virginia Smith introduced Bob Goodman of Zions Bank's Legal Department, whose work for Zions includes dealing with garnishments and writs. Mr. Goodman has been invited to the meeting to provide the Committee with any input or comments that he may wish to make on the proposed amendments, based on his own practical experience.

As an introduction, Mr. Shea stated that the amendments to remedies rules began as an effort to redraft Rule 64 to make it more understandable. The effect of this was to cause a redrafting of Rule 64 to make it a general statement regarding writs, with each type of writ then being addressed specifically. Mr. Shea worked with a group of judges, lawyers and law clerks to reach the present point in drafting, and has also sent the proposed amendments to sheriffs for comment. It is intended that the proposed amendments be submitted for comment in April 2004. Mr. Wikstrom clarified that the Committee has already worked through these amendments, and that the most recent substantive changes are in **bold** type on the documents provided to members. The only exception to that is on page 15, where Mr. Shea has now added the concept of "continuing garnishment."

The first proposed amendment is at page 18, line 7, and would provide for service by

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[2]This will impact the technical result of *State v. Reyes*, 2004 WL 63460, 2004 UT App. 8 (Jan. 15, 2004).

publication. According to Mr. Shea, the concept of service by publication was previously implicit, but this amendment will make it explicit. Leslie Slaugh pointed out a wording concern in line 10 of page 15, and proposed language that would make clear that certain items must be included in the notice. This change was approved. Judge Nuffer also suggested a language change, which was also approved.

The second proposed amendment is found at page 20, lines 17-18 ("An affidavit may be based upon information and belief by describing the investigation conducted to support the information and belief."). Mr. Shea stated that this was included because there are times when the grounds and facts needed for the affidavit may be difficult to describe. Mr. Goodman gave an example of where it is unknown whether property is being used for work purposes, or where there are other persons involved with the property. Mr. Carney commented that he is concerned with a party providing an affidavit on information and belief, and that a party should be required to "know." The Committee then discussed the fairness of such an affidavit. Mr. Goodman commented that the problem is that without such language, a party cannot even apply for a writ unless it specifically knows the information, which can sometimes be difficult. After extensive discussion about how to resolve the concern described by Mr. Goodman, it was decided that the proposed language would be deleted, and that an additional provision would be included after section (c)(5) which will state "ownership or special interest in property." Mr. Shea will also renumber the sections as appropriate.

Judge Quinn commented that there is a problem with having a distinct section on "Prejudgment writs in general," since there are different standards for replevin, as opposed to attachment or garnishment. He noted that since a lower standard is required for replevin, this also appears to be a substantive change, and also pointed out that this provision would place a great burden on lenders who take property as security because it would force them to comply with the requirements of this section. It was agreed that "replevin" will be carved out of this section.

The third proposed amendment is found at page 24, lines 9-11, and requires compliance with Utah Code Ann. § 78-22-1.5 with regards to affidavits or applications and interrogatories. Virginia Smith commented that this makes it easier to determine/identify the person being garnished. Mr. Carney suggested that the proposed language be changed to simply state "the judgment information required by Utah Code Ann. § 78-22-1.5." This change was approved.

The fourth proposed amendment is found at page 25, lines 11-13 ("The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving and filing the amended answers in the same manner as the original answers."). Mr. Goodman stated that garnishees presently are being challenged as to whether they have the right to amend their answers, and this would specifically allow the garnishee to do so. Mr. Goodman provided an example of a situation where a garnishee bank might provide an bank account balance which later turned out to be incorrect because the garnishee was not yet aware that the account holder had just made a withdrawal from that account at an ATM. The Committee agreed

by consensus to submit this proposed amendment.

The fifth proposed amendment is found at page 25, lines 23-24, and would allow the trial court to "permit discovery." Mr. Goodman stated that the present rules are unclear as to whether discovery is allowed, with the result that there sometimes is no way to challenge certain statements, and that this proposed amendment would allow for depositions. An issue was raised as to whether discovery is already allowed in these situations pursuant to Rule 26, and whether it is a right and not simply permissive. After a discussion as to whether discovery rights attach to ancillary proceedings, Judge Anderson made a motion to adopt this proposed amendment and to move it to Rule 64 (Writs in general) at part (C)(2). Judge Nuffer seconded the Motion, which was approved unanimously, with one abstention.

The sixth proposed amendment is found at page 26, lines 14-16 ("If the garnishee takes reasonable steps within a reasonable period of time to secure property to which defendant has immediate access, the garnishee is not in violation of this rule."). Mr. Goodman explained that part of the problem at present is that a garnishment can be served on anyone,[3] so that it will get to the proper person eventually but it may take awhile. This proposed amendment would recognize that it takes time to implement a garnishment. He provided one example of a situation where a bank had only a one-hour time frame in which to implement a garnishment, and when it was not able to comply in that time period, the court ordered a $10,000 judgment against the bank. David Scofield and Mr. Slaugh stated that they believe that the present rule already handles this situation, with Mr. Scofield pointing out that a garnishee can "show cause" why it was not able to comply. After discussion, Mr. Lee moved to adopt the language of the proposed amendment, but to make it clear that it is the garnishee's burden to establish this. Judge Quinn seconded the motion. Before a vote could be taken, Judge Nuffer commented that this amendment would appear to provide an absolute defense to garnishees. After discussion, it was agreed that Mr. Shea will work out language to include the concept that the garnishee has the burden to establish this and that it is not an absolute defense, and the motion was approved.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, March 24, 2004, at the Administrative Office of the Courts.

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[3]For example, it might simply be served on a teller at a bank, so that it may take time to get to the proper person who can implement it.