MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 26, 2004
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Cullen Battle, Terrie T. McIntosh, David W. Scofield, Leslie W. Slaugh, Paula Carr, Virginia S. Smith, Thomas R. Karrenberg, James T. Blanch, Janet H. Smith, R. Scott Waterfall, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable David Nuffer

STAFF: Tim Shea

EXCUSED: Francis M. Wikstrom, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy, Honorable Lyle R. Anderson, Judith D. Wolferts

GUESTS: Commissioner Michael S. Evans, Robert J. Shelby (for Judith D. Wolferts)

I. APPROVAL OF MINUTES.

In the absence of Committee Chairman Francis M. Wikstrom, Tim Shea called the meeting to order at 4:00 p.m. The minutes of the March 24, 2004 meeting were reviewed, and Francis J. Carney moved that they be approved as written. The Motion was seconded by R. Scott Waterfall, and approved unanimously.

II. RULE 101: MOTION PRACTICE BEFORE COURT COMMISSIONERS.

Tim Shea presented a draft of proposed Rule 101, governing motion practice before court commissioners. The draft was prompted by the fact that no rule now exists governing this practice area. The commissioners had previously reviewed and approved the proposed draft. Commissioner Michael S. Evans was introduced, and Mr. Shea offered a general explanation of the intended purpose of several sections of the proposed Rule.

Leslie Slaugh raised several concerns about the draft in its current form, particularly whether the service provisions under subsection (c) were adequate in light of the fact that attorneys in divorce proceedings often file a notice of withdrawal immediately following entry of a final decree, creating a potential problem for parties who fail to receive actual or timely notice of post-decree motions. Additionally, Mr. Slaugh was concerned with the selection of 90 days for service under subsection (b) and the selection of only specific motions in subsection (j) for separate treatment under Rule 7. Mr. Slaugh questioned whether a better approach might be to

require post-decree service on parties, instead of their attorneys.

Mr. Shea noted the commissioners were recommending personal service after the 90 day period, thinking that enough time would then have passed to treat any subsequent motion like a new action under Rule 4. Commissioner Evans indicated the commissioners were looking for a bright line rule for when notice must be given to a party, instead of lawyers, following entry of a final decree.

Mr. Slaugh proposed that subsection (b) be eliminated and subsection (j) amended to provide that service of post-judgment motions filed 90 days or more after entry of a judgment must be effected under existing Rule 4. With respect to subsection (j), Judge Anthony B. Quinn indicated a preference for uniformity, suggesting that all motions before commissioners should be treated similarly. Mr. Carney inquired whether there was currently a different local practice in each of the district courts. It was widely believed to be the case. There was general consensus that local discretion seemed to offer a good solution.

Thomas R. Karrenberg asked whether a group of family law practitioners had been afforded an opportunity to review the draft and offer feedback. Commissioner Evans and Mr. Shea explained that the practitioners had reviewed the draft and offered suggestions, but not directly on the points raised by the Committee.

Mr. Slaugh identified other potential problems with the proposed expedited timeline for submitting motions, responses and replies. After some discussion about potential modifications to the proposed language to meet those concerns, Judge Anthony W. Schofield suggested a better approach might be to refer the proposed rule to the Board of District Judges for review and feedback before spending a great deal of time working out the kinks and polishing the specific language. The Committee agreed such a course was a prudent way to proceed. The proposed Rule will be so referred for review and feedback prior to further Committee action.

III. RULE 106: MODIFICATION OF DIVORCE DECREES.

For the reasons discussed above, the Committee concluded the draft of proposed Rule 106 would also be referred to the Board of District Judges for review and feedback prior to further Committee action.

IV. RULE 47: PEREMPTORY CHALLENGES.

Mr. Carney and Mr. Shea led a discussion concerning the fact that Rule 47 currently refers to "parties" having three peremptory challenges each, when the case law has since clarified that each "side" has three peremptory challenges. There was discussion concerning the *Randle v. Allen* decision by the Utah Supreme Court clarifying the intended limitation absent "substantial controversy" between the parties. Discussion ensued concerning whether the Rule should be changed to incorporate the case law clarification, or whether an annotation should be offered.

Cullen Battle pointed out the problems with third-party practice and other issues that occasionally arise in complex litigation. Mr. Battle suggested it would be difficult to craft a rule that would account for all the various potential complexities. James T. Blanch inquired whether the federal rule might offer some guidance. There was general consensus after reading the federal rule that it offered superior flexibility to the existing Rule 47. Mr. Carney offered to work on a draft of an amended Rule 47 that would more closely resemble the federal approach. The silence in opposition to Mr. Carney's offer was predictably deafening.

V. ELECTRONIC DISCOVERY.

Judge David Nuffer described ongoing efforts to amend the federal rules to account for dramatic changes in the manner of generating and storing electronic data over the years. He detailed the prevalence of paperless transactions, e-mails and e-Business solutions, all of which are forcing courts to deal with new electronic discovery issues without the benefit of modern rules.

Several non-controversial proposed amendments to the federal rules were discussed, as were several contentious proposals. There was unanimous agreement that it was wise to wait until fall to see what fruits the current federal efforts yield and the specific proposals for rule changes that follow. It was agreed to table the issue until fall, at which time the issue will be revisited.

VI. ADJOURNMENT.

The meeting adjourned at 5:30 p.m. The Committee will next meet at 4:00 p.m. on Wednesday, July 28, 2004, at the Administrative Office of the Courts.