MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 23, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Paula Carr, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson (via phone), Honorable David Nuffer, Honorable Anthony W. Schofield, David W. Scofield, Janet H. Smith, Todd M. Shaughnessy

EXCUSED: Glenn C. Hanni, Thomas R. Karrenberg, Virginia S. Smith, Judge R. Scott Waterfall, Lance Long, Debora Threedy

STAFF: Tim Shea, Matty Branch, Trystan Smith

I. APPROVAL OF MINUTES.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the February 23, 2005 meeting were reviewed, and the members suggested that two changes, and one addition should be made.

Judge Nuffer suggested Section IV-Fax Filing include his comments regarding the difficulty of scanning fax documents because of the poor quality of some facsimiles. Ms. Carr noted the third sentence, second paragraph, of Section IV incorrectly stated "Paula Carr commented that this proposed amendment has been discussed at Inns of Court." She said, "Inns of Court" should be changed to "by the clerks of the court." Mr. Carney suggested a deletion to the last sentence of footnote one contained of Section V-Offer of Judgment. Mr. Carney suggested the last sentence should be amended to read "Leslie Slaugh reported that H.B. 127 has been referred to the "Legislative Interim Committee."

The Committee unanimously approved the February 23, 2005 minutes with the amendments noted above.

II. RULE 74. WITHDRAWAL OF ATTORNEY.

Mr. Shaughnessy introduced a proposed amendment to Rule 74 that would prevent an attorney from withdrawing absent approval from the Court if (1) there is a motion pending, a (2) certificate of readiness for trial has been filed, or (3) if there is any discovery pending.

A number of the members of the Committee expressed concern regarding the proposed amendment. Mr. Blanch, Ms. Smith, and Mr. Slaugh expressed concern that some members of the bar may always consider there to be discovery pending because of the on-going duty to supplement. A number of the Committee members feared that the amendment, as written, would almost always require court approval prior to withdrawal. Judge Quinn expressed concern that the amendment may prevent lawyers from withdrawing when their clients have not been financially responsible.

Mr. Slaugh suggested a change to the amendment that would prevent an attorney from withdrawing if discovery was due within a 20-day period. Mr. Carney suggested a change to Rule 24 to include the language "unless there is an objection" to allow an opposing party to object to the withdrawal of an attorney, if the withdrawal was used in bad faith or as a tactic in litigation. Mr. Slaugh suggested the Committee amend Rule 74 to allow an opposing party to object within ten days after the motion to withdraw is filed. If, however, there was no objection, then the motion would be summarily granted. Mr. Battle suggested that Rule 74 should be amended to allow ten days notice before any withdrawal.

After considerable discussion, Mr. Wikstrom suggested the Committee further consider changes to Rule 74 and readdress the issue at the next meeting. Mr. Wikstrom also asked Mr. Shaughnessy to examine the counterpart to the Federal Rules and report back to the Committee.

III. RULE 45. SUBPOENA.

Mr. Shea introduced a proposed amendment to Rule 45 deleting in its entirety the Advisory Committee note. Mr. Shea indicated the Advisory Committee note was largely unnecessary because it simply mimicked the language contained in the rule. After minimal discussion, Mr. Wikstrom entertained a motion that the Advisory Committee note be deleted. It was moved and seconded and approved unanimously. Mr. Wikstrom asked Ms. Branch to ask the Supreme Court whether the Committee could eliminate the Advisory Committee note without prior Supreme Court approval.

Mr. Shea then discussed an addition to Rule 45(a)(3) which would allow an attorney admitted pro hac vice to issue subpoenas. Ms. Smith suggested that inclusion of the pro hac vice language was redundant. Mr. Wikstrom noted he would rather local counsel issue subpoenas, and recommended that the language not be added. Mr. Wikstrom asked whether there was any support for the inclusion of the pro hac vice language among the Committee members, being none, the Committee unanimously agreed it would not adopt the language.

Finally, Mr. Shea introduced a proposed amendment to Rule 45(c)(2) which would include a subpart (C). The proposed subpart would read "the party who has served a subpoena shall pay the reasonable costs of production and copying, a person who is not a party has no obligation to make copies or to advance costs." Mr. Shea noted that this language was taken from language contained in the Advisory Committee note.

Mr. Carney expressed several concerns regarding the proposed amendment. His main concern dealt with healthcare providers charging excessive amounts for the costs of production and copying. Mr. Carney suggested the Committee obtain more information regarding the subject, and noted that the law firm of Hoole & King filed a lawsuit against a healthcare provider regarding excessive charges. Mr. Carney expressed further concern that healthcare providers sometimes will not produce the entirety of the subpoenaed records. Mr. Carney suggested the Committee consider the model adopted in California requiring a producing party to certify that they have done a complete and thorough search of their records prior to producing the subpoenaed documents. Mr. Carney suggested a certification requirement may be something the Committee should evaluate further.

Mr. Scofield indicated to the Committee members that it should consider whether non-parties should bear the costs of production. Mr. Scofield noted that all citizens play an equal part in the judicial system, and perhaps allowing a non-party to bear some costs, if not all the costs of production, would not be objectionable. After considerable discussion, Mr. Wikstrom suggested the Committee revisit the suggested subpart for further discussion at the next meeting.

IV. E-FILING RULES.

Mr. Shea continued the discussion from the February 23, 2005 meeting regarding the Committee's adoption of e-filing rules. Mr. Shea began the discussion suggesting the Committee continue to use the word "papers," instead of the word "documents" for the sake of uniformity. Mr. Shea expressed concern that if the Committee were to interchange the two words in Rule 5, it would require the Committee to make similar changes throughout the remainder of the rules.

Mr. Shaughnessy suggested the Committee keep the phrase "Every pleading," instead of substituting the word "Papers" under Rule 10(a). Mr. Shaughnessy expressed concern the term "Papers" could be interpreted broadly and lawyers may believe the amendment would require that every page of every document include the name of the party by whom it was filed.

Mr. Shea began the e-filing discussion by addressing three (3) potential models the Committee could adopt for e-filing. The first model would require the attorney to electronically submit the filing to the court, and certify service of the document to the remaining counsel of record. The second model would contemplate that a third-party administrator or service would handle distribution of electronically filed documents. The attorney would serve the document with this third-party administrator, and then the administrator would send the document to the court and to the remaining parties. The third model would require the filing party to e-file the document with the court. The court would then send a notice to all the parties that the pleading had been filed. The court would not send the actual document, however. The parties could access the documents through a link provided by the court. A party would be allowed to download the document once for no charge.

Mr. Shea mentioned to the Committee that the court currently had in place the infrastructure for the third model. Mr. Shea did indicate that several members of the bench expressed concerns regarding the potential risk of the system failing to send timely notices, or other failures. Mr. Shea noted the language for the proposed third model should be contained under Rule 5(b)(1)(A)(VVI) and would state "upon any person with an electronic filing account, who is a party or attorney in the case, by submitting the paper for electronic filing."

The members of the Committee expressed concerns that many law firm's spam blocker programs may screen out notices provided to attorneys under the third model. Judge Nuffer mentioned that under the federal system all notices come from a single account to prevent notices from being screened by spam blockers.

Mr. Carney reiterated his previous concerns regarding pleadings containing lawyers' email addresses. Mr. Carney noted that by including e-mail addresses on pleadings, data-miners and others could have easy access to a lawyer's personal information. As a further to this discussion, Mr. Shea asked the Committee to consider what pleadings should look like in a larger context. The Committee had an extensive discussion regarding identity theft. A number of the members of the Committee were concerned about the inclusion of social security numbers, names, and home addresses in pleadings.

A number of the Committee members pointed out that not only should the Committee be concerned regarding lawyers' email addresses, but also parties' home addresses and other personal information. Ms. Carr indicated that perhaps the concerns regarding redaction of the lawyers' email addresses was unnecessary because lawyers' email addresses are already readily available in other contexts.

Judge Schofield expressed concern about pro se parties having access to e-filing. Mr. Shea indicated that there is nothing in the rules to exclude pro se parties from accessing the system. He further suggested that either a party or counsel can belong to the data registry.

In the context of e-filed documents, Mr. Shea asked the Committee to further consider their format. Mr. Shea raised the issue of whether we should continue to require a two inch text separation for e-filed documents. Mr. Shea suggested the two inch rule was antiquated, and based upon a concern regarding the use of too much paper. Mr. Shea suggested a 1.5 inch separation rule. He asked the Committee to consider the readability of electronic documents and which format, size, and font should be used. After discussing this issue, Judge Nuffer, Mr. Wikstrom, and Judge Schofield suggested that if Committee adjusted the format, that the Committee look at adopting a word count.

After extensive discussion regarding the above issues, Mr. Wikstrom suggested the Committee continue its discussion of these issues at the next meeting.

V. 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, April 27, 2005, at the Administrative Office of the Courts.

I:\My Documents\Committees\Civil Pro\Meeting Materials\Minutes\2005-03-23.wpd