# Agenda

## Advisory Committee on Rules of Civil Procedure

April 28, 2004
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

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| Approval of minutes. | Fran Wikstrom |
| Rule 51. Instructions to jury; objections. | Tim Shea |
| Rule 26. Standards of Professionalism and Civility. | Fran Wikstrom |
| Rule 73. Attorney fees. Fee splitting. | Tim Shea |
| Rule 65B. Extraordinary relief. Request by Clifton Panos. | Tim Shea |
| Rule 72. Property bonds. Request by Walt Merrill. | Tim Shea |
| Presumption of delivery | Fran Wikstrom |

**Meeting Schedule**

May 26
September 22
October 27
November 17 (3rd Wednesday)

# MINUTES

## UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

**Wednesday, March 24, 2004**
**Administrative Office of the Courts**

**Francis M. Wikstrom, Presiding**

PRESENT: Francis M. Wikstrom, David W. Scofield, Francis J. Carney, Glenn C. Hanni, Cullen Battle, Janet H. Smith, R. Scott Waterfall, Terrie T. McIntosh, Paula Carr, Thomas R. Lee, Todd M. Shaughnessy, Virginia S. Smith, James T. Blanch, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Thomas R. Karrenberg, Leslie W. Slaugh, Debora Threedy

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 February 26, 2004 meeting were reviewed and R. Scott Waterfall moved that they be approved as written. The Motion was seconded by James Blanch, and approved unanimously.

## II. RULE 47. COMMUNICATION WITH JURORS.

The Committee discussed proposed amendments to Rule 47. Mr. Waterfall raised the issue of the meaning of "challenge" in subsection (c), in the context of challenging an entire venire. Referring to the rule, Judge Lyle Anderson commented that judges have discretion to allow additional challenges when there are multiple defendants with adverse interests. Other members pointed out that there may potentially be ambiguity in subsection (e) regarding peremptory challenges.

After discussion, it was agreed that further work on this rule is needed. Frank Carney agreed to review case law and then work on the rule in light of those cases. The Committee then will discuss Rule 47 again at a later date.

## III. RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS.

The proposed amendments to Rule 51 were reviewed. Tim Shea stated that the intent of the amendments is to give judges discretion as to whether to repeat all instructions at the end of the case, when all instructions have already been given throughout the course of the case. Mr. Shea stated that the Advisory Committee on the Rules of Criminal Procedure has decided to table the comparable rule in the Criminal Procedure Rules because there have been petitions for certiorari filed in several cases dealing with this issue.

The Committee discussed various issues regarding Rule 51, including whether there is a need to include a distinction between providing copies of substantive rules as opposed to procedural rules, and whether there is a need for language stating that a copy of the rules "shall" be provided to any juror who requests one. It was moved and seconded that the second sentence of subsection (e) be deleted. The Motion passed by majority vote, with two members voting against. It was also agreed that references to "oral" rules will be deleted.

Judge David Nuffer and Judge Anderson expressed concern that if this rule states that all instructions must be in writing, there might be an appealable issue if a judge makes a verbal comment during trial since this might raise the issue of whether the judge's statement is an instruction as opposed to simply an admonishment.

Other members also made comments and pointed out concerns with Rule 51. After extensive discussion, it was agreed that the Committee would like more time to review this rule, and accordingly will not publish it for comment at the next cycle

## IV. REMEDIES RULES.

The Committee reviewed the final versions of the remedies rules, and made comments and pointed out concerns. Thomas Lee recommended moving subsection (e) to the end of subsection (b), and it was agreed to make this change. It was also agreed that requirements that are statutory can be included in the rules by referencing the statute.

Mr. Shea referred to the garnishment language of Rule 65D shown in italics on p. 33, and stated that the concept behind this is that only one continuing garnishment against a person can be ongoing at any one time. Mr. Shea asked opinions on this language. Judge Nuffer stated that he believes the italicized language is needed, and it was agreed that it should be included in the rule. Mr. Shea will work on the language to find a more efficient way to say the same thing, and then will move this language to the "general" section. It was also agreed that the language of Rule 64D at line 24, page 33, will be changed from "in favor of the state of Utah," so that it is limited to the two agencies in Utah permitted to do this.

In addition to the above, Committee members suggested minor changes in punctuation and wording, which were adopted. These include: (a) using "junior" instead of "subsequent" at

line 12 on page 38; and (b) deleting "interest" after "6 percent" on line 29, page 38 (Rule 69C).

Virginia Smith moved that the remedies rules be submitted for comment after the inclusion of all changes adopted at today's meeting. Mr. Lee seconded the Motion, which was approved unanimously. Mr. Wikstrom instructed that when these rules are submitted for comment, a special note is to be included to draw attention to them in hopes that Bar members will make an effort to carefully review the rules and proposed amendments.

## V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. Due to its desire to complete work on the remedies rules at today's meeting, the Committee has deferred discussion of Rule 26 and Rule 73 to a later date. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, April 28, 2004, at the Administrative Office of the Courts.

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# Administrative Office of the Courts

**Chief Justice Christine M. Durham**
Utah Supreme Court
Chair, Utah Judicial Council

**Daniel J. Becker**
State Court Administrator
**Myron K. March**
Deputy Court Administrator

## MEMORANDUM

**To:** Civil procedures Committee
**From:** Tim Shea
**Date:** April 19, 2004
**Re:** URCP 51

I've included two versions of amendments to Rule 51. The first is where we started, which addresses only the issue of *State v. Reyes*, by clarifying that final instructions do not necessarily need to include all prior instructions. The second version is in response to the many observations made during the last two meetings.



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Rule 51. Instructions to jury; objections.

(a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) Interim written instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) Final instructions. The court shall instruct the jury at the conclusion of the evidence on any matter not included in earlier instructions. The court may repeat an earlier instruction to assist the jury in comprehending the case. Parties shall file requested jury instructions at the time and in the format directed by the court. If a party relies on statute, rule or case law to support or object to a requested instruction, the party shall provide a citation to or a copy of the precedent. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Objections to instructions. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error

except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

(e) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Rule 51. Instructions to jury; objections.

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(b) Interim ~~written~~ instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. ~~Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction.~~ A party may request an interim ~~written~~ instruction.

(c) Final instructions. The court shall instruct the jury at the conclusion of the evidence on any matter not included in earlier instructions. The court may repeat an earlier instruction to assist the jury in comprehending the case. ~~Parties shall file requested jury instructions at the time and in the format directed by the court. If a party relies on statute, rule or case law to support or object to a requested instruction, the party shall provide a citation to or a copy of the precedent. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.~~

(d) Request for instructions. Parties shall file requested jury instructions at the final pretrial conference or at any other time directed by the court. If a party relies on a statute, rule or case to support or object to a requested instruction, the party shall provide a citation to or a copy of the statute, rule or case. The court shall provide the parties with a copy of the approved instructions, unless the parties waive this requirement.

(e) Oral and written instructions. Jury instructions shall be given orally. Whenever possible jury instructions should be in writing and a copy provided to each juror.

~~(d)~~ (f) Objections to instructions. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

~~(e)~~ (g) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

# Administrative Office of the Courts

**Chief Justice Christine M. Durham**
Utah Supreme Court
Chair, Utah Judicial Council

**Daniel J. Becker**
State Court Administrator
**Myron K. March**
Deputy Court Administrator

## MEMORANDUM

**To:** Civil Procedures Committee
**From:** Tim Shea
**Date:** March 17, 2004
**Re:** Rule 26. General provisions governing discovery.

Fran has suggested amending Rule 26 to identify in the discovery plan those who have pledged to abide by the Utah Standards of Professionalism and Civility.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(D) a statement indicating the names of counsel for the parties who have pledged to abide by the Utah Standards of Professionalism and Civility; and

~~(D)~~ (f)(2)(E) any other orders that should be entered by the court.



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## Standards of Professionalism and Civility

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

### Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible ex parte communications.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

# Administrative Office of the Courts

**Chief Justice Christine M. Durham**
Utah Supreme Court
Chair, Utah Judicial Council

**Daniel J. Becker**
State Court Administrator
**Myron K. March**
Deputy Court Administrator

## MEMORANDUM

**To:** Civil Procedures Committee
**From:** Tim Shea
**Date:** April 19, 2004
**Re:** URCP 73. Attorney fees. Fee splitting

The issue has been raised whether amendments to URCP 73 might be appropriate in light of fee arrangements allegedly designed to improperly evade the fee splitting prohibition of Rule of Professional Conduct 5.4.

URCP 73 replaced CJA 4-505 and 4-505.01 on November 1, 2003. If attorney fees are claimed by affidavit detailing the work done, URCP 73 requires, as did its predecessor, an affidavit stating that the fees will not be split in violation of RPC 5.4. If fees are claimed under the schedule of fees, URCP 73 does not require such an affidavit, but neither did its predecessor. The prohibition against splitting fees is in RPC 5.4 not URCP 73.

URCP 73 might be amended to require an affidavit acknowledging the fee splitting prohibition even when claiming attorney fees under the schedule. Indeed, the committee earlier considered including such a requirement but rejected it, arguing that if the prohibition itself did not deter, neither would an affidavit that one would honor the prohibition.

If URCP 73 is amended, the amendment should not go beyond requiring the affidavit. If it is sound policy to define fee arrangements designed to evade the prohibition on fee splitting as the equivalent of fee splitting and therefore prohibited, the better vehicle is RPC 5.4, which is the responsibility of a another committee. Whether a particular fee arrangement violates RPC 5.4 should be determined, not in a rule of civil procedure, but by a complaint to the Office of Processional Conduct or when properly raised in the course of litigation.

Encl. URCP 73
RPC 5.4

Rule 73. Attorney fees.

(a) When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony unless the party claims attorney fees in accordance with the schedule in subsection (d) or in accordance with Utah Code Section 75-3-718 and no objection to the fee has been made.

(b) An affidavit supporting a request for or augmentation of attorney fees shall set forth:

(b)(1) the basis for the award;

(b)(2) a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work;

(b)(3) factors showing the reasonableness of the fees;

(b)(4) the amount of attorney fees previously awarded; and

(b)(5) if the affidavit is in support of attorney fees for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(c) ~~No affidavit is required if~~ If a party requests attorney fees in accordance with the schedule in subsection (d) and if the attorney fees are for services rendered to an assignee or a debt collector, the attorney shall file an affidavit showing the terms of any agreement for sharing the fee and a statement that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4. In such cases the party's complaint shall state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, and cite the law or attach a copy of the contract authorizing the award.

(d) Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

| Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between | and: | Attorney Fees Allowed |
|---|---|---|
| 0.00 | 1,500.00 | 250.00 |
| 1,500.01 | 2,000.00 | 325.00 |
| 2,000.01 | 2,500.00 | 400.00 |
| 2,500.01 | 3,000.00 | 475.00 |
| 3,000.01 | 3,500.00 | 550.00 |

| | | |
|---|---|---|
| 3,500.01 | 4,000.00 | 625.00 |
| 4,000.01 | 4,500.00 | 700.00 |
| 4,500.01 | or more | 775.00 |

Advisory Committee Note. The schedule does not limit the amount of a reasonable attorney fee if an affidavit is submitted. The schedule of attorney fees includes amounts for routine orders supplemental to the judgment and routine collection writs. For attorney fees for collection efforts beyond such routine steps, the lawyer should apply to the court under subsections (a) and (b).

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(a)(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(a)(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(a)(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(d)(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(d)(2) A nonlawyer is a corporate director or officer thereof; or

(d)(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

COMMENT

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

The Rule is intended to prevent lay interference with the attorney/client relationship in non-profit public interest law firms. Typically, these organizations are structured so that a lay board of directors decides to undertake or fund a case or category of cases on behalf of a third party. The organization thus becomes the payor or provider of legal services for others.

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April 11th, 2004

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**RE That Eminent Brain Trust of the Utah Supreme Court** (The Advisory Committee on the Rules of Civil Procedure) **and Proposed Emendation of Rule 65B(d)(2)(A)**

## Present Rule

(d) Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

## Proposed Emendation

(d) Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction; (B) where the Court's authority to grant an original petition is informed of an otherwise apparent abuse of discretion below such that the petition may be favored thereby; (C) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (D) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (E) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

**O.k., Tim:**

**Let's see if we've both got this straight---**

**In previous correspondence I dealt with a perceived incongruity in Utah Civil Procedure Rule 65B(d)(2)(A), and you wrote back, "After considering your letter to me and**

your letter to Fran Wikstrom, the Advisory Committee on Rules of Civil Procedure voted unanimously not to propose any amendments." So thereafter I called and asked if you could be more elucidative of the problem, and you said I hadn't provided the Committee with any proposed emendation to vote on.

Jesus, Tim, I think it'd be enough just to point out the incongruity without having to suggest a rectification as well. But in order to disallow the Committee any pretext for inaction, I adduce the foregoing for their consideration.

I was guided to this formulation by reflection upon the U.S. Supreme Court's holding in *Felker v. Turpin*. (Felker was a state habeas petitioner convicted in Georgia of capital murder, rape, aggravated sodomy, and false imprisonment, and Turpin was the respondent warden.) At issue in the case was a provision of the Antiterrorism and Effective Death Penalty Act of 1996, which stipulated that Courts of Appeals orders granting or denying the filing of a second or successive application for habeas corpus in a district court "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari" to the U.S. Supreme Court, and whether that deprived the Court of appellate jurisdiction in violation of the Constitution's Art. III, § 2 Exceptions Clause, or violated Art. I, § 9, cl. 2, which provides that "[t]he Privilege of Habeas Corpus shall not be suspended."

Anyway, it was held that this provision does not constitute an unconstitutional restriction on Supreme Court jurisdiction, *and this ruling rested on the conclusion that the Act did not remove the Court's authority to entertain an original application for habeas corpus.* Of course the Supreme Court hasn't granted an original habeas petition since the 1920's, so I think somebody must be playing with our ****s, Tim. But as long as I can apply such theoretical thinking to the present situation with Rule 65B(d)(2)(A), who gives a tinker's damn?

You see, the Court went on in its holding to point out that, although the Act precluded actual review by it of Courts of Appeals orders denying or granting second or successive habeas petitions, either by appeal or by application for writ of certiorari, nevertheless "[I]n the exercise of our [original] habeas corpus jurisdiction, we may *consider* earlier gatekeeping orders entered by the courts of appeals *to inform our judgments* and provide the parties with *the functional equivalent of direct review*." (emphasis added). Christ playing poker on Sunday, Tim, that sounds like precisely the sort of gobbledygook we need to get us out of our dilemma with Rule 65B(d)(2)(A).

Hell, the Utah Supreme Court can't declare that it'll issue a writ of prohibition or mandamus to the judge of an inferior court based upon its determination that there was an abuse of discretion in a cause heard below, because that would be transmogrifying an original proceeding into an appellate proceeding. ("Original jurisdiction...means an independent jurisdiction, one not based upon...review of another court's judgment or proceedings." *Wheeler v. Northern Colo. Irrig. Co.,* 9 Colo. 248, 250) But the honorable Court could always say it had the right to inform its judgments by such considerations.



Clifton W. Panos

518 U.S. 651, 135 L.Ed.2d 827

[651] **Ellis Wayne FELKER, Petitioner,**

v.

**Tony TURPIN, Warden.**

**No. 95–8836(A–890).**

Argued June 3, 1996.

Decided June 28, 1996.

Rehearing Denied Aug. 27, 1996.

See 518 U.S. 1047, 117 S.Ct. 25.

After conviction for capital murder, rape, aggravated sodomy, and false imprisonment was affirmed on appeal, 252 Ga. 351, 314 S.E.2d 621, petition for writ of habeas corpus was filed. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., J., denied petition. The Court of Appeals for the Eleventh Circuit, 52 F.3d 907, affirmed. On petition for rehearing, the Court of Appeals, 62 F.3d 342, denied relief. Petitioner then requested stay of execution and filed application for permission to file second federal habeas petition. The Court of Appeals, 83 F.3d 1303 again denied relief. Petitioner filed petition for writ of habeas corpus for appellate or certiorari review and for stay of execution. The Supreme Court, Chief Justice Rehnquist, held that: (1) provision of Antiterrorism and Effective Death Penalty Act preventing Supreme Court from reviewing Court of Appeals order denying leave to file second habeas petition by appeal or by writ of certiorari does not, by implication, repeal Supreme Court's authority to entertain original habeas petitions; (2) provisions of Act creating "gatekeeping" mechanism in Court of Appeals do not apply to Supreme Court's consideration of original habeas petitions, but other restrictions in Act do inform Court's consideration of original habeas petitions; (3) Act's new restrictions on successive habeas corpus petitions do not amount to unconstitutional "suspension" of writ; and (4) petitioner's claims did not justify issuance of writ.

Petition for a writ of certiorari dismissed for want of jurisdiction, and petition for an original writ of habeas corpus denied.

Justice Stevens, with whom Justice Souter and Justice Breyer joined, filed a concurring opinion.

Justice Souter, with whom Justice Stevens and Justice Breyer joined, filed a concurring opinion.

**1. Constitutional Law ⇐52**
**Federal Courts ⇐442.1**
**Habeas Corpus ⇐617.1**

Provision of Antiterrorism and Effective Death Penalty Act preventing Supreme Court from reviewing Court of Appeals order denying leave to file second habeas petition by appeal or by writ of certiorari does not, by implication, repeal Supreme Court's authority to entertain original habeas petitions, which thus obviates any claim that Act deprives Supreme Court of appellate jurisdiction in violation of exceptions clause. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. §§ 2241, 2244(b)(3)(E), 2254.

**2. Habeas Corpus ⇐894.1**

Provision of Antiterrorism and Effective Death Penalty Act, creating "gatekeeping" mechanism whereby prospective applicant must file in Court of Appeals motion for leave to file second or successive habeas application in district court and three-judge panel determines whether application makes prima facie showing that it satisfies Act's requirements, does not apply to Supreme Court's consideration of original habeas petitions but rather expressly applies to applications filed in district court. 28 U.S.C.A. § 2244(b)(3).

**3. Habeas Corpus ⇐894.1**

Restrictions in Antiterrorism and Effective Death Penalty Act expressly applying without qualification to any second or successive habeas corpus application informs Supreme Court's consideration of original habeas petitions, whether or not Court is bound by such restrictions. 28 U.S.C.A. §§ 2244(b)(1, 2), 2254.

**4. Habeas Corpus ⇐894.1, 912**

Antiterrorism and Effective Death Penalty Act's new restrictions on successive habeas corpus petitions do not amount to unconstitutional "suspension" of writ, but rather constitute modified res judicata rule within compass of evolutionary process un-

the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."

Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ.

* * *

The petition for writ of certiorari is dismissed for want of jurisdiction. The petition for an original writ of habeas corpus is denied.

*It is so ordered.*

Justice STEVENS, with whom Justice SOUTER and Justice BREYER join, concurring.

While I join the Court's opinion, I believe its response to the argument that the Act has deprived this Court of appellate[666] jurisdiction in violation of Article III, § 2, is incomplete. I therefore add this brief comment.

As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus. It does, however, except the category of orders entered by the courts of appeals pursuant to 28 U.S.C. § 2244(b)(3) (1994 ed., Supp. II) from this Court's statutory jurisdiction to review cases in the courts of appeals pursuant to 28 U.S.C. § 1254(1). The Act does not purport to limit our jurisdiction under that section to review interlocutory orders in such cases, to limit our jurisdiction under § 1254(2), or to limit our jurisdiction under the All Writs Act, 28 U.S.C. § 1651.

Accordingly, there are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, § 2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review. In this case the Court correctly denies the writ of habeas corpus because petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act, including the standards governing the court of appeals' gatekeeping function.

Justice SOUTER, with whom Justice STEVENS and Justice BREYER join, concurring.

I join the Court's opinion. The Court holds today that the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104–132, 110 Stat. 1217, precludes our review, by "certiorari"[667] or by "appeal," over the courts of appeals's "gatekeeper" determinations. See 28 U.S.C. § 2244(b)(3)(E) (1994 ed., Supp. II). The statute's text does not necessarily foreclose all of our appellate jurisdiction, see, *e.g.*, 28 U.S.C. § 1254(2) (certified questions from courts of appeals); § 1651(a) (authority to issue appropriate writs in aid of another exercise of appellate jurisdiction); this Court's Rule 20.3 (procedure for petitions for extraordinary writs), nor has Congress repealed our authority to entertain original petitions for writs of habeas corpus.[1] Because petitioner sought only a writ of certiorari (which Congress has foreclosed) and a writ of habeas corpus (which, even applying the traditional criteria, we would choose to deny, see *ante*, at 2340–2341), I have no difficulty with the conclusion that the statute is not on its face, or as

1. Such a petition is commonly understood to be "original" in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S.Ct. Rev. 153.

From: "Walt Merrill" <wtmlaw@waltermerrill.com>
To: <tims@email.utcourts.gov>
Date: 3/16/04 11:47AM
Subject: Proposed Amendment to Rule 72, Utah Rules of Civil Procedure

Rule 72 of the Utah Rules of Civil Procedure, formerly Rule 4-509 of the Code of Judicial Administration, contains onerous, expensive, and time consuming requirements for property bonds to ensure to the Court that the real property holds adequate security for the purposes of the bond. Where high dollar bonds are posted, the requirements, together with the expense and time involved in following all the provisions of the Rule, are justified. However, in eviction actions, where property bonds are one of the forms allowed for possession bonds, not only is the action intended to be expeditiously handled, but the small amount of the bond doesn't justify the expense incurred in complying with all the provisions of the Rule. In fact, the cost of a foreclosure report alone makes use of a property bond economically unjustifiable, even though they are specifically mentioned in the unlawful detainer statute. For that reason, Judges in the Second District have approved property bonds in eviction actions which provide the legal description of the property and a sworn notarized statement of the owner as to the market value and liens against the property, but without all the other requirements of the Rule, where there is no objection by the other party. However, if the other party objects to the possession bond, the Judges have felt compelled to follow the Rule and find the bond insufficient, although at least one of the Judges has described the Rule as "overkill" with regard to eviction actions.

An amendment to Rule 72, allowing property bonds in eviction actions, or setting a threshold of $2,000.00, for example, for property bonds used in any action, without complying with the onerous, expensive, and time consuming requirements of the Rule would allow property bonds to be used by landlords, and tenants, in eviction actions, while still providing adequate protection and security for the tenant. Such an amendment could be accomplished by adding one of the following subparagraphs to the Rule:

(d) A real property bond posted in an action under Title 78, Chapter 36, Forcible Entry and Detainer, shall only comply with Subparagraphs (a)(1) through (a)(3) above, together with a sworn statement by all owners of record of the real property as to the market value of, and all encumbrances against, the property.

(d) A real property bond in the amount of $2,000.00 or less shall only comply with Subparagraphs (a)(1) through (a)(3) above, together with a sworn statement by all owners of record of the real property as to the market value of, and all encumbrances against, the property.

Rule 72. Property bonds.

(a) A real property bond posted with the court shall:

(a)(1) be signed by all owners of record;

(a)(2) contain the complete legal description of the property and the property tax identification number;

(a)(3) be acknowledged before a notary public;

(a)(4) be accompanied by a copy of the document vesting title in the owners;

(a)(5) be accompanied by a copy of the property tax statement for the current or previous year;

(a)(6) be accompanied by a current title report, a current foreclosure report, or such other information as required by the court; and

(a)(7) be accompanied by a written statement from each lien holder stating:

(a)(7)(A) the current balance of the lien;

(a)(7)(B) the date the most recent payment was made;

(a)(7)(C) that the debt is not in default; and

(a)(7)(D) that the lien holder will notify the court if a default occurs or if a foreclosure process is commenced during the period the property bond is in effect.

(b) The bond is not effective until recorded with the county recorder of the county in which the property is located. Proof of recording shall be filed with the court.

(c) Upon exoneration of the bond, the property owner shall present a release of property bond to the court for approval.

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April 15, 2004

Fran Wikstrom
Attorney at Law
Parsons, Behle & Latimer
201 So. Main Street #1800
Salt Lake City, Utah 84145

Re: Presumption of Delivery
U. S. Mail

Dear Mr. Wikstrom:

I respectfully submit the following information for consideration of your committee with the suggestion that the presumption of delivery be abolished; or, if not abolished, then limited to mailings by return receipt requested.

Respectfully yours,

J. Val Roberts
Attorney at Law

JVR:vhr
Encl. April 15, 2004 Memo, Presumption of Delivery by United States Mail No Longer Valid

MEMO

April 15, 2004

Presumption of Delivery by United States Mail No Longer Valid

Beginning when Benjamin Franklin initiated the U. S. Mail Service, the basis for presumption of delivery was that delivery would be made to the individual whose address might be General Delivery on a rural route or by letter carrier to an individual within a given city. With the advent of computer data bases, the Postal Service has changed from delivery to a person to delivery to a specific location.

Large central processing depots, such as the one in Salt Lake City, use mail sorting machinery capable of reading addresses. These machines have nine digit zip codes for every street address found anywhere in the United States. When the machine reads a given geographic location, it automatically sprays onto the envelope a bar code which contains the zip code identification of the specific geographic location to which the mail is addressed. If the sender does not address the envelope with a nine digit zip code, the machine takes the geographic zip code out of its memory, and it is applied as a bar code to the envelope.

Letter carriers have trays of mail which come to them from the central processing location in which all mail is geographically addressed. If the individual does not receive delivery at the geographic location, the letter carrier will pull the letter from his tray noting that it is undeliverable as addressed. Unless some postal worker knows that the letter should be placed in the individual's Post Office box, it will be sent to the dead letter office after being marked "undeliverable as addressed."

Unless the sender has both a return address and the words "address correction requested" on the envelope, the letter will not be returned to the sender. The postal services charges the sender a fee for the address correction service; and so far as I can determine, it is not used by district court clerks anywhere in the State. The result is that first class mail is not delivered to the addressee at a geographic location because that location is not on the letter carrier's route. The item is not placed in the addressee's Post Office box after being removed from the letter carrier's pre-sorted tray, and it is not returned to the sender unless a fee is paid for address correction.

Current case law has not yet taken into account the postal service change from personal delivery to location delivery, and the presumption of delivery cannot be presumed unless it is done by certified mail, return receipt requested or by express mail either of which have a tracking number assigned. The Utah Supreme court needs to effect a change in the Rules of Civil Procedure so as not to permit the courts to rely upon the old fashioned presumption of delivery.

I do not know the origins of the couplet which says, "Doctors can bury their mistakes, but the mistakes made by lawyers and judges must going on living with the results." I cite a horrible example of the foregoing trueism below:

> About a month ago, I sat in Judge Michael G. Allphin's courtroom. Two attorneys were arguing a motion for entry of default. One attorney's client had been attempting to represent herself pro se before hiring counsel, and the records before Judge Allphin were that a Notice of Hearing had been mailed by the district court clerk to the individual's condominium address in California, but it had not been returned to the court. The newly

> hired attorney made a strong argument that his client had a Post Office box. That the notice of hearing was never delivered. Because of the long-standing presumption of delivery, Judge Allphin ruled that the notice was mailed by the district court clerk, postage prepaid, to the individual at her street address, and it had never been returned to the court. Delivery was, therefore, presumed, the default had been entered, and the motion to set aside the default was denied based upon the presumption of delivery.

Since December 29, 2003, when a client mailed a large personal check to my Post Office box without including the nine digit zip code and a stop payment order had to be issued and a replacement check cut because after two months, it had neither been delivered nor returned to the sender, I have had two other experiences where the failure of the sender to include the complete nine digit zip code resulted in a failure of delivery to my Post Office box and the non-return of the item to the sender. In both cases, the one postal employee who knows all of the Post Office box holders in Centerville was either on vacation or off sick. The Postmaster has said that if I can tell him when the sender mailed the item, the address to which it was mailed, and the class of mail used, he might be able to trace the lost missive, but so far, no luck. My experience as a sender is no better. I expressed to the U. S. Post Office an overnight mail to a street address in Bartlesville, Oklahoma. The office building was not open on Saturday, March 29th. The Company mail room was not functioning, and so the Bartlesville Post Office placed the mail in the ConocoPhillips Post Office box. The numberical designation was not included in the address. When I telephone the Postal Department and gave the tracking number on April 13th, I

was advised that the express mail envelope had been laying in the Post Office box since March 29th and had not been picked up. After notifying the addressee that the express envelope was about to be returned for failure to pick it up, delivery was finally accomplished, but the presumption of delivery was shattered.

To make matter worse, my local Postmaster has advised me that organizations sending out large amounts of mail are given a discount rate by the U. S. Post Office if they hire other private organizations to spray bar codes on the envelopes so that they are more easily read by automatic sorting machines. Of course they still have the options of applying their own bar codes or paying the extra mailing fees and having it done in Salt Lake City by the Postal Department. I'm convinced that if you place a notice of hearing in the United States mail, postage prepaid, there's a very substantial probability that you should not presume that it will be delivered; but that you should, in fact, presume that it will not be delivered and it will not be returned. I believe the Rules of Practice should be changed to admit the new reality in the U. S. Post Office.