Agenda

Advisory Committee on Rules of Civil Procedure

May 25, 2005
4:00 to 6:00 p.m.

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

Certificate to Glenn Hanni	Chief Justice Durham Fran Wikstrom
Approval of minutes.	Fran Wikstrom
Rule 64C. Attachments.	Tim Shea
Rule 74. Withdrawal of attorney.	Todd Shaughnessy
Rule 45. Subpoena.	David Nuffer Tim Shea
E-filing rules.	Tim Shea

Meeting Schedule

July 27, 2005
September 28, 2005
October 26, 2005
November 16, 2005

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 27, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Glenn C. Hanni, Thomas R. Karrenberg, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Anthony W. Schofield, Virginia S. Smith, Debora Threedy, Todd M. Shaughnessy, R. Scott Waterfall

EXCUSED: Paula Carr, Honorable Lyle R. Anderson, James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable David Nuffer, David W. Scofield, Janet H. Smith, Matty Branch

STAFF: Tim Shea, Trystan Smith

I. APPROVAL OF MINUTES.

Chairman Wikstrom called the meeting to order at 4:05 p.m. The minutes of the March 23, 2005 meeting were reviewed. Mr. Carney moved that they be approved as submitted. The motion was seconded, and approved unanimously.

II. RULE 64C. ATTACHMENTS.

Zachary Shaw from the Attorney General's office made a presentation to the committee suggesting Rule 64C be amended to include "in an action upon a judgment." Mr. Shaw indicated the Attorney General's office had numerous concerns about its ability to obtain pre-judgment writs of attachments to collect prior judgments in state collection actions, child support enforcement actions, criminal enforcement restitution actions, etc., because of the deletion of the "judgment" language from Rule 64C. Mr. Shaw noted the previous version of the rule included the "judgment" language which his office utilized to attach property where they alleged a fraudulent transfer from the judgment creditor to a third party.

Mr. Shea noted the committee deleted the word "judgment" from Rule 64C because the proper remedy would be to execute on a judgment under Rule 68, because by definition, you do not need a pre-judgment writ of attachment.

Mr. Wikstrom questioned whether a judgment creditor could obtain a pre-judgment writ against a transferee in the case of fraudulent transfer because this would not be an action on the

judgment. Mr. Shea indicated if there were a fraudulent transfer then a party should seek to enforce the judgment against the transferee under Rule 68.

Mr. Shaw told the committee that under Rule 68 a judgment creditor needs to show a fraudulent transfer by clear and convincing evidence — a higher standard than under Rule 64C. Mr. Shaw referred to the decision of *Jensen v. Aimes*, 519 P.2d 236 (Utah 1974) where he indicated the clear and convincing evidence standard had been set forth. Mr. Shaw further indicated the *Jensen v. Aimes* decision addressed Utah's Fraudulent Transfer Act.

Mr. Wikstrom indicated it did not appear the previous version of Rule 64C allowed a party to obtain a pre-judgment writ against a third party based upon a judgment against the transferor. He noted the proper remedy would be Rule 68. Several committee members expressed concerned that the Attorney General's interpretation of the original rule was incorrect. Mr. Shaughnessy expressed concerned the proposed amendment would be a mechanism to get around *Jensen's* clear and convincing evidence standard.

Mr. Wikstrom asked the committee to give thought to the bigger question that if there were a fraud should Rule 64C allow a party to attach assets. Mr. Wikstrom indicated the rule does not currently allow for pre-judgment writs in fraud actions, but allows attachments in contract actions and actions against nonresidents. The committee generally questioned why the rule did not have fraud language.

Mr. Hanni mentioned the problem is a fraudulent transfer. He suggested a party first needs to convince the trial court of a fraudulent transfer. Mr. Battle suggested the committee add the "fraudulent transfer" language. Ms. Threedy expressed concerned the term "fraudulent transfer" did not indicate an amount certain making it difficult for a trial court to determine an amount to attach.

Virginia Smith suggested Mr. Shea draft an amendment to Rule 64C addressing "fraud" and "fraudulent transfers." Mr. Wikstrom asked the committee to examine whether it should modify Rule 64C to include fraud.

Mr. Wikstrom suggested the committee continue its discussion of Rule 64C at the next meeting. Mr. Wikstrom asked Mr. Shaw to examine Rule 64D to determine whether the Attorney General's office could use the garnishment rules to serve its purposes.

III. RULE 68. OFFER OF JUDGMENT

The committee addressed a proposed amendment to Rule 68(a) allowing offers of judgment to be bilateral. The committee also addressed an amendment to Rule 68(e) expanding the definition of "costs" to include "reasonably incurred fees and expenses for expert witnesses who are not regular employees of a party for preparation for trial and during trial; and the reasonably incurred expenses for reporting and recording fees and travel expenses for depositions reasonably taken, whether used at trial or not."

Colin King spoke on behalf of the Utah Trial Lawyers Association ("UTLA"). Victoria Kidman spoke on behalf of the Utah Defense Lawyers Association. Mr. King began his presentation referring to two anecdotes presented by Eric Nielsen, and Steve Sullivan regarding their experiences representing plaintiffs in personal injury actions. Mr. King stated UTLA had no objection to making subsection (a) bilateral. However, he expressed concern that subsection (e) would have a chilling effect on clients with modest means.

Mr. King told the committee plaintiffs' personal injury lawyers do not allow cost-shifting to determine why they settle cases. He was fearful plaintiffs would improperly settle cases out of fear of having to reimburse the opposing party for costs.

Ms. Kidman stated the personal injury defense bar also dislikes subsection (e). She believed subsection (e) would prohibit the smaller valued cases from being tried. She further expressed concern that an insurance company presented with a first party claim from its insured would only have ten (10) days to respond or face the possibility of incurring substantial costs.

The committee was generally of the opinion that Rule 68 in its present form was ineffective. Mr. Karrenberg suggested a minimum dollar amount before subsection (e) came into play, for example $100,000. Mr. Carney expressed concern that plaintiffs' lawyers could make an exorbitant offer at the beginning of a case, and then run up costs.

Mr. Battle asked Ms. Kidman and Mr. King if they would have the same concerns if the provisions of subsection (e) were under Rule 54. Mr. Hanni indicated that traditionally the American legal system required the losing party to only pay his/her/its attorney's fees and costs, so why change it now.

Mr. Battle moved to adopt the amendment to subsection (a), strike the additions of subsections (e) 2 & 3, remove subsection (e)1, and revise subsection (e) to state "costs under Rule 54." Mr. Battle's motion did not receive a second.

Mr. Wikstrom entertained a motion to strike subsection (e) in its entirety, and adopt the amendment to subsection (a). Mr. Karrenberg seconded the motion, and it was approved unanimously.

IV. RULE 74. WITHDRAWAL OF COUNSEL.

Mr. Shaughnessy brought Rule 74 back to the committee for further discussion. The proposed amendment would allow withdrawal of an attorney, unless an objection is filed within five (5) days. Presumably an objection could be filed by an opposing party, an opposing attorney, or the withdrawing attorney's client. If an objection was filed, the object party would need to show good cause to oppose the withdrawal.

Judge Schofield asked whether there were any concerns that five (5) days was too short of a time period. Mr. Shaughnessy responded that he did not want to leave the withdrawing

attorney in limbo for a longer period. Mr. Carney asked whether the committee wanted to adopt a committee note with the proposed revision. Mr. Shea indicated he would prefer the committee, as a practice, adopt language that would not require a committee note.

Mr. Battle expressed concern that allowing a client to object may hamper an attorney with an unethical client from withdrawing. Several committee members expressed concern about abridging a lawyers' freedom to withdraw when a client isn't paying. Scott Waterfall indicated the rule did not need amending because it worked fine, as is.

Mr. Slaugh suggested the committee amend subsection (b) to state, "If a motion *or a deposition* is pending . . . ." Mr. Wikstrom asked for a sense from committee members on the proposed amendment. The committee expressed no clear consensus.

Mr. Shaughnessy moved to adopt the amendment. Mr. Carney seconded the motion, but no vote was called for.

Due to time constraints, Mr. Wikstrom asked the committee to revisit Rule 74 at the next meeting.

V. RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

Mr. Carney proposed an amendment to Rule 62 that would prevent a party from executing on a judgment until the expiration of ten (10) days. The purpose would be to prevent a party from enforcing a judgment until the time for post-trial motions expired.

After a brief discussion, Mr. Carney moved to adopt the amendment. Mr. Battle seconded the motion, and it was approved unanimously. Subsequently, Judge Schofield moved to redact the phrase "and on such conditions for the security of the adverse party as are proper." Ms. McIntosh seconded the motion, and it was approved unanimously.

VI. PHYSICIAN REPORTS.

Mr. Carney asked the committee to postpone the discussion on physician reports until he could propose alternative language.

VII. RULE 45. SUBPOENA.

The committee briefly revisited Rule 45. Mr. Shea asked the committee to consider whether a party should give ten (10) days notice of intent to serve a subpoena. Notice would require an opposing party to object before the subpoenaed party voluntarily complied.

Due to time constraints, Mr. Wikstrom suggested the committee revisit Rule 45 at the next meeting.