

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 28, 2004
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Thomas R. Lee, Virginia S. Smith, Thomas R. Karrenberg, Honorable Lyle R. Anderson (via telephone)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: James T. Blanch, David W. Scofield, Janet H. Smith, R. Scott Waterfall, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable David Nuffer, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy

GUESTS: Matty Branch

I. APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the March 24, 2004 meeting were reviewed, and Thomas R. Lee moved that they be approved as written. The Motion was seconded by Terrie T. McIntosh, and approved unanimously.

II. RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS.

Tim Shea has prepared two versions of a proposed amendment to Rule 51. The first version addresses only the issue raised in *State v. Reyes*, and clarifies that the reading of final instructions need not include those instructions already given during the course of the trial. The second version is in response to comments and observations made by Committee members during the previous two Committee meetings.

The Committee discussed the two versions. Mr. Wikstrom expressed a preference for the second version of the rule as being more comprehensive. Judge Lyle Anderson commented that it should be required that at least one copy of the instructions be in writing. After discussion, it was agreed that the rule should state that “wherever possible jury instructions shall be in writing.”

After further discussion and suggestions for modifications, Thomas Karrenberg moved

that the second version be adopted as revised and discussed during today's meeting. Cullen Battle seconded the Motion, which was approved unanimously.

III. RULE 26: STANDARDS OF PROFESSIONALISM AND CIVILITY.

Mr. Wikstrom has suggested amending Rule 26 to require that the discovery plan identify those attorneys involved in the litigation who have pledged to abide by the recently implemented Utah Standards of Professionalism and Civility.

Some members expressed reservations or opposition to the proposed amendment, noting that it does nothing to address the real problem, *i.e.*, that all lawyers should abide by rules of professionalism and civility, and judges should require lawyers to abide by such rules. Comments were also made that rules of civility and professionalism are ineffective unless district court judges require and enforce civility in their courtrooms and during litigation, with concern being expressed this was not always being done.

Mr. Lee questioned whether including this provision in Rule 26 is the proper place to deal with the problem, since transactional lawyers and other lawyers who are not litigators should also be bound by civility standards. Mr. Battle suggested that Rule 11 might be a better place to include a reference to civility and professionalism standards, and Committee members discussed this suggestion.

After extensive discussion, Mr. Wikstrom commented that there is no set time frame for considering this proposed amendment, and that his purpose in bringing the proposal at this time was simply to make members aware of it and encourage dialog.

IV. RULE 73. ATTORNEYS FEES. FEE SPLITTING.

Mr. Shea stated that the Supreme Court has asked that the Committee look at Rule 73 and the issue of fee splitting once again. He referred members to his April 19, 2004, memorandum dealing with this issue,¹ and stated that the request was prompted by an appeal that is presently before the Court. The appeal deals with a relationship between a collection agency and an attorney which potentially has the appearance of being designed to evade the prohibition on fee splitting.

The Committee discussed ways to require an attorney to certify that there has been no fee splitting. Leslie Slauch commented that the affidavit proposal appears to require providing the terms of the any agreement that might appear to be fee splitting. Mr. Lee expressed his opinion that a separate certification is not necessary.

¹This memorandum is included in the materials for the April 28, 2004 meeting.

After discussion, a motion was made that Mr. Shea's suggestions be adopted. The Motion was seconded and approved.

V. RULE 65B: EXTRAORDINARY RELIEF. REQUEST BY CLIFTON PANOS.

Mr. Clifton Panos has submitted a proposed amendment to Rule 65B. After discussion, the Committee declined the request for amendment.

VI. RULE 72. PROPERTY BONDS. REQUEST BY WALT MERRILL.

Mr. Walt Merrill has proposed that Rule 72 be amended to eliminate the requirement of providing a property security bond in expedited eviction actions where bond is set at less than \$2000.

Mr. Slaugh, who has had experience in this area, expressed concern about landlords being able to obtain an expedited eviction without posting a property or other bond. Francis Carney agreed, and commented that he is also uncomfortable with recommending such an amendment without input from attorneys who represent tenants.

After discussion, a motion was made to reject the proposed amendment. The Motion was seconded and approved unanimously.

VII. PRESUMPTION OF DELIVERY.

Mr. J. Val Roberts has requested that the Committee consider his suggestion that the "presumption of delivery" contained in the rules be abolished or, alternatively, limited to mailings by return receipt requested. After discussion, a Motion was made that no action be taken on the proposed amendment since there is no such presumption in the Rules; it is a rebuttable presumption established by common law. The Committee felt that incorporating the proposal into the Rules would not be a good idea. The Motion was seconded, and passed unanimously.

VIII. ADJOURNMENT.

The meeting adjourned at 5:30 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, May 26, 2004, at the Administrative Office of the Courts.