

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 26, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable David O. Nuffer, Jonathan Hafen, Thomas R. Lee, Virginia S. Smith, Todd M. Shaughnessy, Honorable Anthony B. Quinn, David W. Scofield, Lori Woffinden, Cullen Battle

EXCUSED: Thomas R. Karrenberg, Francis J. Carney, Honorable Anthony W. Schofield, Debora Threedy, Honorable Lyle R. Anderson, Janet H. Smith, Judge R. Scott Waterfall

STAFF: Tim Shea, Trystan B. Smith, Matty Branch

Mr. Wikstrom called the meeting to order at 4:00 p.m. and welcomed new member Lori Woffinden to the committee. Ms. Woffinden is a clerk in Fourth District.

I. APPROVAL OF MINUTES.

Mr. Blanch moved to approve the March 22, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. RULE 37. SPOILIATION OF EVIDENCE.

Mr. Wikstrom brought Rule 37 back to the committee.

Ms. McIntosh began the discussion recommending a revision to the beginning of subsection (b)(2)(D) to make the rule consistent with the corresponding subsections. She suggested the phrase “an order requiring the parties.” The committee agreed with the change.

As to Subsection (g), Mr. Battle expressed concern about how subsection (g) may affect electronic discovery. Mr. Battle also expressed concern the word “duty” may have too broad a meaning, and the committee may create substantive law with the use of the term.

Mr. Blanch suggested the intent of the subsection is not to provide a heightened duty. The intent is to explicitly codify the Court’s inherent power.

Mr. Shaughnessy recommended the committee parallel its changes to Rule 37 to Federal Rule 37 which would allow practitioners to rely on the established case law in the 10th circuit regarding spoliation.

Mr. Scofield recommended striking “and produce” from the first sentence of subsection (g) citing concern that a party may not have a duty to produce.

Mr. Lee suggested starting the last sentence of subsection (g) with “The Court” and striking the word “And.” Mr. Lee further recommended striking the references to the various subsections in line 129 and simply stating (b)(2). The committee supported the suggestion adding that the reference to subsection (b)(2) is meant to be inclusive of the subparagraphs of (b)(2).

Judge Nuffer moved to replace the phrase “which the party had a duty to preserve” in the first sentence of subsection (g) with “in violation of a duty.” The committee approved the change.

Mr. Shea indicated he will include the reference to Rule 35(a) in subsection (b)(2)(F) in the first paragraph of subsection (b)(2).

Ms. McIntosh moved to revisit the revisions at the next meeting. Seeing a consensus, Mr. Wikstrom asked the committee to revisit Rule 37 at the next meeting.

III. LIMITED APPEARANCE RULES. RULES 5, 11, 74, 75.

Mr. Hafen brought the unbundling rules back to the committee.

As to Rule 75, Mr. Scofield expressed concern about the language "general appearance" in subsection (d). Judge Schofield suggested adding language in subsection (b) that would indicate the pro se litigant would appear for all other matters.

Judge Quinn moved to replace "shall enter a general appearance" in subsection (d) with "remains responsible for all other aspects of the litigation not specifically identified in the notice of limited appearance."

Mr. Wikstrom suggested replacing "client" with "party" in subsection (b), line 15.

Mr. Lee moved that the committee add the language Judge Quinn suggested in subsection (d) to subsection (b) and include such language with the Notice to help the pro se litigant to understand the significance of the rule.

As to Rule 74, Mr. Hafen discussed the two proposed alternatives, but recommended the alternative that requires an attorney to file a formal withdrawal. The committee unanimously approved the recommendation.

Mr. Slauch recommended a change to the beginning of subsection (c) to state, "If an attorney withdraws, other than under subsection (b), dies," The committee approved the change.

As for Rule 5, the committee discussed the two proposed alternatives to subsection (b)(1) for service in light of a limited appearance. The committee agreed on the alternative that requires service upon the attorney and the party with the following changes, "upon the attorney and the party within the scope of the notice of limited appearance."

As for Rule 11, the committee thoroughly discussed the ethics of ghost writing. The committee discussed various factual scenarios where an attorney assists with a filing prior to a deadline. Judge Nuffer indicated his concern was full disclosure. He did not have as much concern about Rule 11 sanctions.

The committee discussed why it was important to disclose. One reason is the perception that Courts may make concessions for pro se parties. Judge Nuffer further indicated it was helpful to understand the full facts behind a pleading.

Judge Quinn indicated he did not know what he would do differently if he knew who ghost wrote a pleading. Judge Schofield agreed and added he thought ghost writing should be treated as an ethical issue.

Mr. Lee suggested defining the word "presenting" in subsection (b). Mr. Wikstrom indicated the parenthetical in subsection (b) "(whether by signing, filing, submitting, or later advocating)" adequately defined "presenting."

Mr. Slauch moved to amend Rule 11 (b) to state, "By presenting to the Court (signing, filing, submitting, or later advocating), a pleading" The committee did not act on the motion.

After extensive discussion, the committee concluded it did not object to ghost writing, and did not want it addressed in Rule 11. Mr. Wikstrom asked Mr. Shea to bring the approved revisions to Rule 11 back to the committee.

IV. SB 148. PUNITIVE DAMAGES; DISCOVERY OF WEALTH.

Mr. Shea presented the legislation enacted this May concerning the parameters in which a party can conduct discovery of a party's wealth or financial condition.

Mr. Shea asked the committee if it wanted to deal with the new legislation as a rule of procedure. Mr. Wikstrom asked the committee to consider if it wanted to address the legislation at the next meeting.

V. FINALITY OF JUDGMENTS.

Mr. Slaugh brought Rule 7 to the committee.

The committee debated the need to amend Rule 7 to clarify when a trial court's ruling becomes a final order. Mr. Slaugh suggested an amendment to Rule 7 that would not require a party to submit a proposed order, unless otherwise directed by the Court.

Mr. Blanch suggested an amendment that would clarify that unless the ruling states it is a final order, the prevailing party would need to submit a final order or judgment.

Mr. Slaugh volunteered to redraft Rule 7 in light of Mr. Blanch's suggestion.

VI. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting is scheduled for 4:00 p.m. on Wednesday, May 24, 2006, at the Administrative Office of the Courts.