

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 27, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis J. Carney, Terrie T. McIntosh, Leslie W. Slauch, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, Cullen Battle, Barbara Townsend, Steven Marsden, Francis M. Wikstrom, Honorable Anthony B. Quinn, Lori Woffinden, Todd M. Shaughnessy

EXCUSED: James T. Blanch, Honorable Anthony W. Schofield, Debora Threedy, Honorable Lyle R. Anderson, David W. Scofield, Matty Branch

STAFF: Tim Shea, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:05 p.m. Judge Waterfall moved to approve the September 27, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. CODE v. DOH. FINALITY OF JUDGMENTS.

Mr. Shea indicated the Utah Supreme Court granted a petition for certiorari in the *Code v. DOH* case. Mr. Shea expressed his desire that the committee wait to address a revision to Rule 7 concerning the finality of judgments until the Supreme Court ruled.

III. RULE 45. SUBPOENA.

Mr. Shea brought Rule 45 back to the committee. Mr. Wikstrom asked for the committee's comments on the proposed changes.

Mr. Wikstrom suggested the committee delete the phrase "or contemporaneously with" in Rule 45(b)(3). Seeing no objection, the committee agreed to delete the phrase.

Mr. Wikstrom questioned whether the committee should keep the phrase "reasonable cost of producing or copying" in Rule 45(c)(2)(b). After some discussion as to what costs a subpoenaed party may request payment for, the committee agreed to keep the phrase.

Mr. Lee suggested the phrase “Notice to Persons Served with a Subpoena” in subsection (a)(1)(D) should be placed in lower case. Mr. Wikstrom suggested the subsection should state “include” instead of “set forth.” The committee agreed with both suggestions.

Mr. Slauch indicated a party cannot issue a subpoena only an attorney can issue a subpoena. Mr. Lee moved to revise the language contained throughout Rule 45 from the “party or attorney issuing” the subpoena to “the party or attorney responsible for issuing the subpoena.” The committee unanimously approved the motion.

Mr. Carney expressed concern about the perjury language contained in the declarations under Rule 45(f)(1). Mr. Lee suggested replacing the word “perjury” to “penalty of law” in subsection (f)(1) and in the declaration. The committee agreed with the changes.

Mr. Carney also expressed concern that a party does not have to serve trial subpoenas. The committee debated whether under Rule 5 trial subpoenas are “other papers.” After discussing the committee member’s conflicting opinions, the committee agreed to discuss this concern and the remainder of Rule 45 after receiving comments from the plaintiff and defense bars.

IV. SPOILIATION; SANCTIONS. RULES 16, 35 AND 37.

Mr. Shea brought Rules 16, 35 and 37 back to the committee.

The committee debated whether it should strike “or effect of what the evidence would have been” in Rule 37(b)(2)(F). The committee further debated striking “or both of them” from subsection (b)(2)(D) suggesting the phrase was redundant. The committee agreed to revise both subsections.

Mr. Wikstrom suggested the committee reverse the order of subsections (1) and (2) under Rule 37(d). The committee agreed with the change.

The committee further discussed whether under Rule 37(d) if a party can move for sanctions, instead of a motion to compel, if a party fails to respond to written discovery or attend a deposition. After some discussion, the committee did not feel it needed to change the subsection.

The committee reviewed the revised language in subsection (g) which placed the spoliation sanction in the negative. The committee indicated its initial approval to the changes to Rule 37, including subsection (g), subject to possible additional changes to accommodate the rules for e-discovery.

Mr. Carney and Mr. Lee agreed to serve on a subcommittee to revise the language contained in Rule 35.

V. E-DISCOVERY.

Judge Nuffer provided the committee with an overview of the proposed federal e-discovery rules.

Judge Nuffer suggested early on during the Rule 26 attorney's planning meeting the parties discuss and plan for the discovery of electronic documents.

Judge Nuffer further discussed the form in which the electronic documents will be produced. He indicated the form of production is the central issue with e-discovery.

Judge Nuffer further indicated that parties can enter into agreements to return privileged documents if inadvertently produced.

Finally, Judge Nuffer spoke to the sanctions safe harbor if a party fails to produce certain e-discovery.

Mr. Wikstrom asked that Judge Nuffer head a subcommittee consisting of Mr. Hafen, Mr. Battle, Ms. Townsend, Mr. Shaughnessy, and Mr. Marsden to provide the committee background and proposals for the e-discovery rules.

VI. RULE 23.1. DERIVATIVE ACTIONS BY SHAREHOLDERS.

The committee agreed to discuss Rule 23.1 at the next meeting.

VII. RULE 17. FILINGS BY EMANCIPATED MINORS.

Mr. Shea brought proposed changes to Rule 17(b) to the committee suggesting subsection (b) should be amended to state, "An emancipated minor shall appear personally or by counsel."

Mr. Wikstrom suggested the first sentence of subsection (b) should be amended to state an "emancipated minor must appear personally." The committee agreed to the change.

VIII. 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, October 25, 2006, at the Administrative Office of the Courts.