

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

October 26, 2011

PRESENT: Francis M. Wikstrom, Chair, David W. Scofield, Trystan B. Smith, Terrie T. McIntosh, Barbara L. Townsend, Honorable David O. Nuffer, Honorable John Baxter, W. Cullen Battle, Honorable Kate Toomey, Francis J. Carney, Jonathan O. Hafen, Honorable Lyle Anderson, James T. Blanch, Robert J. Shelby, Honorable W. Todd Shaughnessy, Honorable Derek P. Pullan, Leslie W. Slaugh

TELEPHONE: David Moore

EXCUSED: Janet Smith, Lori Woffinden

STAFF: Timothy Shea, Sammi V. Anderson, Diane Abegglen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the September 28, 2011 minutes. The committee unanimously approved the minutes.

II. RULE 65(c).

Judge Toomey led a discussion about potential revisions to Rule 65(c), which would address the appointment of pro bono counsel in post-conviction relief cases. Judge Toomey reported some concern by the Appellate Rules committee about citing the statute in the rule. The proposal is to return to the earlier draft of the rule, but strike the citation to the statute in the rule. Mr. Shea explained that the statute exists whether the rule cites to it, and that the statute is too complicated to mirror the language in the rule. Mr. Hafen moved to remove the last sentence, which includes the citation to the statute, and to move that reference to a Committee Note. Mr. Wikstrom discussed the issue related to compensation of counsel appointed in these instances. The committee discussed whether to strike the "pro bono" language from the proposed rule, leaving open the issue of whether counsel asked by the court to represent an indigent petitioner should or would be compensated. Mr. Battle pointed out that the language is not compulsory. It simply gives the court the option to appoint counsel pro bono. Judge Nuffer likes removing the language regarding "pro bono" because it preserves the right of that lawyer to later make a claim for compensation. Judge Shaughnessy pointed out that the committee does not want to create the impression that the judicial branch will somehow be able to assume an obligation to pay counsel to take these cases. The motion was unanimously approved. Mr. Shea then discussed whether the rule should be republished for comment. Because the language has been changed, but the substance of the rule remains exactly the same, the committee decided it was not necessary to republish for comment. The proposed revisions will be sent to the Court for approval.

III. RULES 101 and 108. Motion Practice and Objections before Court Commissioners.

Mr. Shea explained that additional amendments have been proposed by the Executive Committee of the Family Law section and the Board of District Judges. The Board of District Judges recommends that the Court "may" hold a hearing on any objection where a hearing is requested. The Executive Committee of the Family Law Section wants the language to be mandatory, requiring that a hearing "shall" be held. Mr. Slauch noted that objections are routinely filed and hearings will be requested. The concern remains one of due process. Mr. Wikstrom circled back to the suggestion that the rule state a hearing shall be held "upon request". The committee discussed the impact of temporary orders in domestic cases, specifically involving custody and temporary support orders. Judge Anderson noted that the impact of temporary orders can be minimized by getting to trial as soon as possible and judicial resources are sometimes used inefficiently to hear mini-trials on temporary orders, when a full trial will be required a few months later. The Board of District Court Judges would prefer that the language requiring hearings be discretionary, not mandatory. The Judges feel like Commissioners were designed to weed things out and if a hearing reviewing their decisions is held routinely, the Commissioners really don't serve a purpose. After much discussion, Mr. Wikstrom asked for a motion. Mr. Shea pointed out that custody issues require a hearing upon objection under Rule 108(d)(3). Judge Toomey moved to approve as amended. The committee approved and the revisions were sent to the Court for approval.

IV. RULE 25. SUBSTITUTION OF PARTIES.

Mr. Slauch introduced and led the discussion, suggesting that the rule be amended to strike "together with notice of hearing" from the language because a non-party cannot give notice of a hearing without the Court's approval. The proposed revisions were prompted by a situation where a party died and the widow filed a substitution of parties. Judge Nuffer suggested amending the rule to require service of the motion motion to substitute and "any notice of hearing" by the movant. The motion was seconded and duly approved. The revisions will be published for comment.

V. RULE 5(d).

Mr. Shea noted that Rule 5(d) should contain a cross-reference to Rule 26(f), not 26(i). The amendment was so moved, seconded and unanimously approved. The committee recommended that this technical revisions be sent to the Court for approval.

VI. SIMPLIFIED DISCOVERY RULES.

A. Rule 26.2.

Messrs. Carney and Smith noted their general impression that the Bar is pleased about the proposed Rule 26.2. Both noted the question of whether Section 321 arbitrations will fall under Tier I. Mr. Carney noted that plaintiffs with potential recovery under uninsured motorists coverage will file under Tier III, not Tier I. Amendment to the uninsured motorist statute could

address this issue. Other concerns include whether you have to disclose all medical providers even when irrelevant to the cause of action. Mr. Burgess also noted concerns, including concerns about the social security number disclosures and some requests for increased disclosures for medical records and bills. In sum, Messrs. Carney and Smith felt 26.2 is ready with some minor tweaking. The committee discussed and agreed to move the next meeting from November 16 to November 30, 2011, so that comments on Rule 26.2, due November 28, can be considered at the next meeting.

B. Public Forum for Questions & Answers.

Mr. Wikstrom raised the issue of a forum to discuss questions and issues raised by members of the Bar regarding the revised rules. Judge Pullan noted a preference that the committee prepare articles, best practices or frequently asked questions and answers, as opposed to a blog. The committee discussed a FAQ section on the committee website and/or Bar Journal article summarizing most frequently asked, recurring issues, together with summary responses. Mr. Smith also suggested publishing decisions interpreting the new rules. Mr. Hafen echoed the suggestion to create a decision bank. Mr. Wikstrom wondered aloud whether the new rules would lend themselves to carefully crafted written opinions or expedited discovery resolution based on short written submissions. Judge Pullan opined that where discovery deadlines are not tolled, most courts would be using teleconferences to get disputes resolved quickly. Judge Shaughnessy noted that the questions raised in the presentations should be catalogued and later answered uniformly by the committee. Mr. Wikstrom asked committee members to forward along questions worthy of consideration and asked Mr. Shea to keep track of those questions.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting will be November 30, 2011 at 4:00 p.m. at the Administrative Office of the Courts.