

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, April 24, 1996, 4:00 p.m.
Administrative Office of the Courts

Timothy R. Shea, Presiding

PRESENT: Honorable Boyd Bunnell, James R. Soper, Cullen W. Battle, Terri T. McIntosh, Honorable Ronald N. Boyce, Honorable Anne M. Stirba, Perrin R. Love

EXCUSED: Virginia S. Smith, Terry S. Kogan, M. Karlyn Hinman, Thomas R. Karrenberg, Francis M. Wikstrom, Mary Anne Q. Wood, John L. Young, David K. Isom, Glen C. Hanni

STAFF: Craig Dunlap

I. WELCOME AND APPROVAL OF MINUTES

Mr. Shea welcomed Committee members to the meeting.

II. APPEARANCE PRO HAC VICE

Mr. Shea began the discussion indicating that the proposed pro hac vice rule was drafted so that admission pro hac vice is presumed unless an opposing party makes a showing to the contrary. The court may not be able to contest admission pro hac vice.

Magistrate Boyce responded that the court may want to contest admission pro hac vice because it may know of attorneys that are problematic. For example, an Iowa trial court excluded Ramsey Clark sua sponte. The exclusion was upheld by the Iowa Supreme Court.

Mr. Shea asked whether the Committee was uncomfortable with the presumption of admission. Judge Stirba suggested that the person seeking admission pro hac vice provide information necessary to determine whether they should be admitted.

Mr. Shea indicated that the proposed draft of the pro hac vice rule covered appearances before administrative agencies as well as before courts. Magistrate Boyce indicated that the Committee did not have the power to direct administrative agencies regarding who can appear. Mr. Shea suggested deleting that portion from the proposed rule.

Mr. Shea suggested that the proposed pro hac vice rule be placed in the Code of Judicial Administration. He indicated that the rule should be published by Michie and

available on Westlaw to enable out of state counsel to find it.

The Committee discussed what fee should be assessed for admission pro hac vice and whether the fee should be annual or charged for each appearance. Mr. Battle indicated that admission pro hac vice fee should be for one case only. Mr. Shea responded that he would make that clear in the proposed pro hac vice rule.

Magistrate Boyce reported that in the federal system, government attorneys pay a one time fee for admission pro hac vice while other attorneys pay a fee for every case. Mr. Shea asked whether the proposed pro hac vice rule should have a similar exception for government attorneys. Judge Stirba responded that out of state government attorneys rarely appear in state cases so a fee exception may not be needed.

Mr. Battle suggested the proposed pro hac vice rule consider the number of past appearances and whether requiring bar admission would be a hardship. Mr. Shea indicated that the proposed pro hac vice rule already provided discretion regarding circumvention of bar admission. Magistrate Boyce voiced concern about considering the number of appearances and hardship when determining whether an attorney could appear pro hac vice. For some people in outlying Utah communities, the only available representation is out of state counsel. Disallowing the appearance of out of state counsel in Utah courts would greatly impair their access to representation.

Judge Stirba raised a practical problem with the proposed pro hac vice rule. If a motion to admit out of state counsel pro hac vice is made and no objection is stated, can the court approve the motion or is the court under an affirmative duty to review the file for compliance with the proposed rule? Magistrate Boyce responded that the proposed pro hac vice rule did not appear to create an affirmative duty. Judge Stirba asked whether someone had to certify compliance with the proposed rule. Judge Bunnell suggested that by signing a pro hac vice application, out of state counsel may be certifying compliance with the proposed pro hac vice rule under rule 11. Judge Stirba requested that the proposed pro hac vice rule be clarified regarding who certifies compliance with the proposed rule. Magistrate Boyce suggested that the attorney moving to admit out of state counsel have the responsibility of compliance with the proposed rule and reported that the federal system uses a form to show compliance. Mr. Shea responded that under the proposed pro hac vice rule, the applicant, not the local attorney, submits the application.

Mr. Soper suggested that pro hac vice admission be by motion, accompanied by the required fee, rather than by submission to the Utah Supreme Court. Judge Stirba agreed and suggested that the proposed rule require the local attorney to file a motion and certify compliance with the proposed pro hac vice rule. Judge Bunnell indicated that rule 11 may enforce the certification.

Magistrate Boyce reported that the federal pro hac vice rule requires both local and out of state counsel to sign the form certifying compliance with the rule. Mr. Shea

indicated that the proposed pro hac vice rule gives the court discretion to waive the presence of local counsel.

Mr. Shea volunteered to incorporate the Committee's comments into the proposed pro hac vice rule and indicated he would have a final draft circulated for comment at the next meeting.

III. MAILING ORDERS AND JUDGMENTS

Mr. Shea began the discussion and introduced proposed rules 58A, 60, 77(d), and CJA 4-504. Judge Bunnell asked why orders are included in proposed rule 58A(d) because rule 5 already states that orders will be served. Judge Bunnell indicated that judges do not enforce orders against parties who have not been served with them. Judge Bunnell was concerned that including "orders" in proposed rule 58A(d) would be too broad because it would require multiple mailings in complicated cases. He suggested deleting references to orders throughout proposed rule 58A so that proposed rule 58A only applies to judgments as defined in the rules.

Mr. Shea responded that "order" was included in proposed rule 58A to ensure that parties were served with the order. However, rule 5 may cover service of orders. Mr. Battle indicated that the existing and proposed rules are unclear as to who is required to mail orders. Mr. Shea suggested eliminating proposed rule 58A(d) and amending rule 5 to specify who is responsible for mailing orders.

Judge Stirba suggested directing people to rule 58A(d) because its more specific. Magistrate Boyce suggested that Mr. Shea look at alternatives for mailing orders and come up with a proposal. Judge Bunnell suggested putting language in proposed rule 58A that would exclude orders mailed by the judge.

Judge Bunnell asked what "prevailing party" means as used in proposed rule 58A(d).

Mr. Battle asked whether the proposed rule should require mailing of routine orders, like discovery orders. Mr. Shea responded that rule 5 only requires the mailing of orders which by their terms are to be served. He indicated that therefore the mailing of orders is controlled by the court.

Mr. Shea volunteered to redraft rule 5 taking into consideration other rules, and the meaning of "prevailing party."

Magistrate Boyce indicated that before an execution is served, the sheriff's office checks to make sure everything, including the judgment and proof of service, is in order.

Mr. Battle suggested hiring a private association to mail orders and charge the cost to the recipient. If the recipient does not pay, he will not receive the order.

Mr. Shea indicated that there was concern about providing a non-prevailing party sufficient time to appeal an order. This problem could be addressed by either: 1) amending rule 60 to change the effective date of the order, or 2) amending appellate rule 4 to expand the definition of "excusable neglect." However, Mr. Shea noted that both alternatives contradict existing case law which rigidly interprets appellate deadlines. He indicated that the Utah Supreme Court may reject these alternatives.

Mr. Shea indicated that any amendments to appellate rules would fall to the appellate rules committee. Magistrate Boyce suggested asking the Utah Supreme Court whether the Committee could amend appellate rule 4.

The Committee agreed that it was preferable to amend appellate rule 4, rather than create a new process under rule 60 and that the appellate rules committee should be approached with this idea.

IV. RULE 4: SERVICE OF PROCESS

Magistrate Boyce reported that recently the sheriff's office mailed 100 letters to defendants requesting that they come to the sheriff's office and sign for complaints. Over one-third of the defendants signed for complaints alleviating the need for personal service.

Magistrate Boyce suggested that the discussion of rule 4 be postponed until more Committee members were present. Those present acquiesced.

V. RULE 64C: AMOUNT OF BOND

No discussion was held.

VI. FORMS

No discussion was held.

VII. NEW MATTERS

Judge Stirba indicated that under rule 41(a)(1)(ii), if a stipulation for dismissal is mailed to the court when no service has been effected, the case will be dismissed pursuant to the stipulation without an order of dismissal. However, the clerks are trained to request an order of dismissal. Judge Stirba indicated that either the training or the rule should be changed so that the two are consistent.

Mr. Love raised an additional problem with rule 41. Under the current rule a second voluntary dismissal is with prejudice. This can lead to an unjust result if counsel is unaware of a prior voluntary dismissal obtained by a prior attorney or in another jurisdiction.

VII. CONCLUSION

There being no further business, Mr. Shea adjourned the Committee until the next meeting scheduled for 4:00 p.m., Wednesday, May 22, 1996 at the Administrative Office of the Courts.