

Agenda

Advisory Committee on Rules of Civil Procedure

October 27, 1999
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Welcome and Approval of Minutes.	Fran Wikstrom
Rule 4. Service. (Please bring with you the letters from the Salt Lake County Sheriff's Office explaining the issues and Perrin Love's research.)	Perrin Love Todd Shaughnessy Capt. Bruce Thayne
Rule 64D.	Leslie Slaugh
Rule 3.	Tim Shea
Service out of state; 30 days to answer.	Tim Shea
Conference of parties prior to protective order, motion to compel.	Todd Shaughnessy
File answer with motion to dismiss less than all claims.	Todd Shaughnessy

Meeting Schedule

January 26, 2000
February 23
March 22
April 26
May 24
September 27
October 25
November 29 (5th Wednesday)
December: No meeting

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, October 27, 1999
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Honorable Ronald N. Boyce, Honorable K. L. McIff (via telephone), Leslie Slauch, Todd Shaughnessy, James R. Soper, Terrie T. McIntosh, Virginia Smith, Tom Karrenberg, Cullen Battle, Paula Carr

EXCUSED: Glenn Hanni, Mary Anne Q. Wood

GUESTS: Lieutenant Jensen and Sergeant Jackson from Salt Lake County Sheriff's Office

STAFF: Tim Shea, Peggy Gentles, Marilyn Branch, James Blanch

I. WELCOME AND APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. Todd Shaughnessy moved to approve the minutes from the September 22, 1999 meeting. The motion was seconded, and the minutes were approved without amendment.

II. RULE 4. SERVICE.

Lieutenant Jensen and Sergeant Jackson appeared on behalf of Sheriff Aaron Kennard to explain the burdens faced by the Sheriff's office in serving process. Lieutenant Jensen reported that the Sheriff's office's practical objective is to limit the Sheriff's responsibility for service to papers served by government entities. The Sheriff has a statutory duty to effect service when requested but believes an amendment to Rule 4 would help achieve this goal as a practical matter. Sergeant Jackson presented statistical information and anecdotal examples of the burdens associated with service of process. Sergeant Jackson indicated that the District Attorney's office generates 3,500 to 4,000 summonses per year and stated that the Sheriff's office has had difficulty keeping up with those considering the private summonses they are requested to serve. Sergeant Jackson indicated that he and others at the Sheriff's office have experienced great success in simply mailing summonses (including criminal summonses) to parties and requesting them to respond voluntarily. In the experience of the Sheriff's office, such a procedure obviates the need for personal service in approximately 10-15 % of cases. Sergeant Jackson and Lieutenant Jensen suggested that Rule 4 should be amended to permit such a procedure explicitly, in a manner similar to the waiver of service provisions in Fed. R. Civ. P. 4. Lieutenant Jensen reported that costs of accomplishing service were creating budget pressures directly as well as costing the

County money because many government papers have had to be served by private constables because of workload issues.

Lieutenant Jensen indicated that many parties contact the Sheriff's office to inquire about the authority of non-uniformed private constables to serve process. Despite this inconvenience, Lieutenant Jensen stated that private constables provide a valuable service in meeting needs for service of process.

Tim Shea noted that parties are currently prohibited by rule from serving process themselves, but Mr. Shea indicated that the rules could be amended to permit parties to mail process seeking a waiver of personal service or to channel such mailings through the Sheriff's office. Mr. Shea further noted that a draft amendment to Rule 4 permitting waiver of service was put out for comment by the Committee approximately two years ago but had not been addressed further.

Peggy Gentles distributed proposed draft rules, one of which mirrors the federal rule in requesting affirmative waiver of service, and the other of which simply permits service by registered or certified mail. Lieutenant Jensen stated that he believed it would be preferable to have a system permitting mailing, coupled with a voluntary waiver of service, followed by personal service on those who don't respond.

Mr. Wikstrom excused Lieutenant Jensen and Sergeant Jackson after they concluded their comments and thanked them for their input.

Mr. Wikstrom inquired how the service by mail system had worked in the bankruptcy context. Mr. Slaugh indicated his view that it worked well. Terrie McIntosh related experiences in which she had encountered logistical difficulties with service by mail from jurisdictions permitting such a procedure. Judge Boyce noted that these problems could largely be solved by altering parties' expectations about what their responsibilities are when they receive service by mail. Peggy Gentles noted that the draft proposal she had distributed would ensure actual notice to served parties by requiring registered or certified mail. Leslie Slaugh stated that in his experience, certified mail is often refused, but he nevertheless expressed his support for permitting service by mail. Judge Boyce stated that in his view, the waiver of service provision had worked extremely well in the federal system.

Leslie Slaugh noted that the service by mail rule would solve certain notice problems by requiring the defendant or other person upon whom personal service could be made to be the one who signs the certified mail receipt. Judge Boyce noted that the federal approach would not permit a default after service by mail because the rule merely requests a waiver. Mr. Slaugh stated that Utah should go one step further and permit actual effective service by certified mail, upon which a default judgment can be entered. Cullen Battle, Terrie McIntosh, and others expressed concern that this would result in defaults of defendants who do not receive actual notice. Mr. Slaugh stated his opinion that the potential benefits of the approach would outweigh such difficulties. Cullen Battle stated that he preferred the less ambitious waiver approach under the federal rule, which is what Lieutenant Jensen suggested. The Committee was largely in agreement that if actual service by mail is to be permitted, the rule should require a return receipt

to be signed by one of the designated individuals upon whom personal service can be made under Rule 4.

The Committee decided that Peggy Gentles should draft a proposed rule combining various approaches and permitting either (1) a request for a waiver of service, (2) actual effective service by certified mail, or (3) traditional personal service. The Committee decided that the waiver of service option should, if accepted by the served party, allow the served party additional time to answer. The Committee will consider the draft rule at a future meeting.

III. RULE 64D.

Leslie Slaugh distributed a partial rough draft of a revised garnishment rule clarifying the requirements of the rule. Mr. Slaugh indicated that he was still in the preliminary stages of revising the rule and requested the Committee's input about whether the revisions should be continued. Virginia Smith stated that although the current rule is somewhat unwieldy, most people know how to use it and have settled expectations about how it operates. Mr. Slaugh agreed to continue working on revisions for consideration by the Committee at a later date.

IV. RULE 3.

Tim Shea reviewed for the Committee a proposed revision to Rules 3 and 4 that he had drafted eliminating the 10-day summons rule. The Committee had requested Mr. Shea to prepare the draft at the September 22, 1999 meeting. Judge Boyce expressed his approval for the amendment and moved that it be adopted. Cullen Battle seconded the motion. The motion passed unanimously. The Committee will send the amendment out for comment this Spring.

V. SERVICE OUT OF STATE.

Tim Shea reviewed for the Committee a proposed amendment to Rule 12 clarifying that out-of-state defendants have 30 days to answer a complaint. Other aspects of the amendment eliminate masculine pronouns in the Rule. Peggy Gentles noted that the official summons form should be amended to reflect the 30-day rule for out-of-state defendants. Mr. Karrenberg moved to pass the amendment. Judge Boyce seconded the motion, and it passed unanimously.

VI. CONFERENCE OF PARTIES.

Todd Shaughnessy suggested that Rules 26 and 37 should require parties to certify that they have conferred in good faith prior to filing a discovery motion in an effort to avoid the necessity of filing the motion. Such a requirement is present in the current federal version of Rules 26 and 37. Mr. Shaughnessy expressed concern over the timing of the idea because Rules 26 and 37 have just been amended. Judge Boyce and Virginia Smith stated that the idea is sufficiently important that it should be incorporated now anyway. The Committee agreed that Mr. Shaughnessy will prepare draft amendments for consideration at the next meeting.

VII. FILE ANSWER WITH MOTION TO DISMISS LESS THAN ALL CLAIMS.

Todd Shaughnessy reported that he has encountered frequent confusion over whether a party who files a Rule 12(b)(6) motion as to less than all claims for relief in a complaint is required to file an answer with respect to the remaining claims. Mr. Wikstrom and Judge Boyce stated that the preferable approach would be to require an answer with respect to all claims not subject to the motion to dismiss. Cullen Battle and Tom Karrenberg noted that such a requirement would be contrary to accepted and customary practice. Other members of the Committee expressed concern that requiring multiple answers (i.e., before and after the resolution of an unsuccessful 12(b)(6) motion) might create administrative difficulties. Judge Boyce stated that there should be language in the rule to address and clarify the issue, regardless of which approach is selected. Judge McIff stated that significant comment from the Bar should be solicited. The Committee agreed that Mr. Shaughnessy will, as a tentative step, prepare a draft amendment to Rule 12 for future consideration by the Committee.

VIII. OTHER.

Mr. Karrenberg stated that he would prepare a proposal regarding service by facsimile for consideration at the next meeting.

IX. ADJOURNMENT.

Mr. Wikstrom adjourned the meeting at 5:50 p.m. The next meeting of the Committee will be held on January 26, 2000, at 4:00 p.m., at the Administrative Office of the Courts.