

Agenda

Advisory Committee on Rules of Civil Procedure

February 21, 2001
4:00 to 6:00 p.m.

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

Approval of minutes	Fran Wikstrom
Rule 47(m). Jury	Tim Shea
Simplified rules of procedure for small claims cases	Peggy Gentles
Rule 64D. Garnishment forms	Peggy Gentles
Rule 4. Service. Committee note.	Peggy Gentles
Proposed federal rules	Tom Lee
Rule 63A. Change of judge upon remand after appeal	Tom Karrenberg

Meeting Schedule

March 28
April 18
May 16
September 26
October 24
November 28
December: No meeting

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

**Wednesday, February 21, 2001
Administrative Office of the Courts**

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, W. Cullen Battle, Honorable K. L. McIff, Honorable Darwin C. Hansen, Anthony B. Quinn, Paula Carr, Terrie T. McIntosh, R. Scott Waterfall, Thomas R. Lee, Honorable Ronald N. Boyce, Todd M. Shaughnessy, Thomas R. Karrenberg, James R. Soper, Leslie W. Slaugh, Virginia S. Smith

STAFF: Timothy M. Shea, Peggy Gentles, James T. Blanch, Marilyn M. Branch

EXCUSED: Glenn C. Hanni, Mary Anne Q. Wood

I. WELCOME AND APPROVAL OF MINUTES

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the January 24, 2001 meeting were reviewed and approved without amendment.

II. PERSONNEL CHANGE

Mr. Wikstrom announced that Peggy Gentles would be leaving to accept a position in Nebraska. Judge McIff made a motion for a resolution of commendation expressing appreciation for Ms. Gentles' service. The motion passed unanimously.

III. TEN-DAY SUMMONS

Marilyn Branch announced that the Utah Supreme Court had declined to adopt the Committee's proposed amendment to Rule 3, eliminating the 10-day summons procedure.

IV. RULE 47(M). JURY

Tim Shea explained certain amendments that the Criminal Procedure Committee had suggested to the Civil Procedure Committee's proposed changes to Rule 47(m). Mr. Shea had previously outlined these changes in his memorandum to the Committee dated February 13, 2001. Mr. Wikstrom added a minor grammatical correction to the language suggested by the Criminal Procedure Committee. Todd Shaughnessy expressed concern that the Rule could be misconstrued as providing that deposition transcripts constitute "exhibits" to be provided to the jury. The Committee discussed this issue and concluded that there was not a significant

likelihood of confusion in that regard. Tom Karrenberg moved to approve the Rule with the suggested changes. The motion was seconded, and it passed unanimously.

V. SIMPLIFIED RULES OF PROCEDURE FOR SMALL CLAIMS CASES

Peggy Gentles proposed a minor change to paragraph (c) of Rule 81 of the small claims rules. Ms. Gentles had previously explained this proposed change in her memorandum to the Committee dated February 12, 2001. A motion was made and seconded to approve the proposed change. It passed unanimously.

VI. RULE 64D. GARNISHMENT FORMS

Peggy Gentles explained a problem concerning the reconciliation between Rule 64D and its official form. Ms. Gentles had previously described an anomaly in a memorandum to the Committee dated February 14, 2001. Ms. Gentles and Terrie McIntosh proposed to solve the problem by amending the rule, rather than the form, and allowing a garnishee under Rule 64D to pay the garnished funds to the plaintiff if the garnishee does not receive a notice of hearing during the prescribed waiting period. The Committee considered specific wording changes that could be made to Rule 64D to accomplish this objective. Ms. Gentles observed that several aspects of the current rule are unclear, making it difficult to work with the existing language. Mr. Wikstrom expressed his opinion that an overall rewrite of Rule 64D would be an appropriate future task for the Committee.

Several members of the Committee expressed concern that the new language for Rule 64D proposed by Ms. Gentles was not sufficiently clear. Virginia Smith suggested that the new language in the official forms could be simplified. The Committee approved of the concepts proposed by Ms. Gentles. She will generate another draft change within two or three days to be sent out for publication. A motion was made and seconded to publish the proposed changes to Rule 64D. It passed unanimously.

VII. RULE 4. SERVICE. COMMITTEE NOTE

Peggy Gentles explained that the Advisory Committee Note for the revised Rule 4 needs to be approved by the Committee. The Committee discussed the contents of the proposed Advisory Committee Note. Mr. Wikstrom inquired whether the note should clarify that service by a local commercial courier service is acceptable, as well as national services such as FedEx or UPS. The Committee concluded that the language of the Rule already adequately covers this issue. The Committee decided to delete the sentence from page 6 of the proposed amendment to the Advisory Committee Note proscribing service by a courier under the control of a party.

Thomas Lee noted an apparent incongruity in the rule between acceptable domestic service by mail and acceptable foreign service by mail. The Committee concluded that there are satisfactory reasons for maintaining the distinction embodied in the rule.

The Committee next considered the proposed additional language contained in page 7 of the draft Advisory Committee Note. Leslie Slaugh, Tim Shea, and Fran Wikstrom proposed minor clarifying amendments to the language of the note, which the Committee approved.

Cullen Battle moved to approve the Advisory Committee Note, as amended. Todd Shaughnessy seconded the motion, which passed unanimously.

VIII. RULE 63A. CHANGE OF JUDGE UPON REMAND AFTER APPEAL

Tom Karrenberg explained that he has conducted research indicating that approximately nine states have rules permitting or requiring reassignment of cases to new judges after remand. Judge Boyce indicated that he is very troubled by the proposal to adopt such a rule in Utah. He indicated that we should solicit input from the state judges on the proposal. He further stated that all we have now is anecdotal evidence concerning the alleged bias of judges following remand, and he is concerned that a rule requiring or permitting reassignment would presumptively dilute the integrity of the state judges. Judge McIff stated that he would raise the proposal with state trial judges and solicit their comments, but he expressed concern that the proposed rule would encourage forum shopping, particularly in smaller districts.

Judge Hansen indicated that he concurs with comments received by Mr. Wikstrom from Judge Orme, who had stated that any rule would have to permit remand to the same judge for more specific findings and other additional proceedings.

Judge Boyce stated that he disagrees with what he believes to be the underlying premise of the proposed rule—i.e., that state trial judges lack integrity and can be expected to refuse or fail to follow the dictates of higher courts.

Judge McIff stated that in his experience, judges are quite capable of accepting reversal by appellate courts and continue to preside impartially over the cases in question.

Judge Boyce stated that in addition to addressing his other concerns, the Committee would have to conduct some form of study to consider the burden such a rule would impose on the judicial process.

Thomas Lee stated that he is fundamentally opposed to the proposal to reassign judges on remand and believes it should be voted down now, rather than being sent back for further consideration. Tom Karrenberg replied that it is worth considering the view of the state court judges and the burden that a changed rule would impose on the system.

Judge Hansen stated his concern that the rule would, if adopted, impugn the integrity of the judiciary as a whole. He stated that any real concerns over lack of integrity and impartiality of individual judges can already be addressed under the rules through affidavits of prejudice and requests for recusal. Judge McIff agreed and reiterated his concerns over forums shopping.

Leslie Slaugh indicated that if any rule along these lines should be considered, it should perhaps be considered by the appellate rules committee, which could address whether a party could request a different judge on remand as part of the appeal.

Mr. Wikstrom asked the Committee to vote on whether it desires to consider the issue further. The Committee voted (unanimously with one abstention) to table the proposal and not consider it further.

IX. PROPOSED FEDERAL RULES

Thomas Lee explained several recent amendments to the Federal Rules of Civil Procedure, with comparisons to the corresponding provisions of the Utah rules.

The Committee expressed consensus that it would consider amending Rule 30(d) of the Utah rules to impose a seven-hour presumptive time limit for depositions. Thomas Lee will prepare an amended Rule 30(d) for future consideration by the Committee.

Thomas Lee will also prepare proposed language to amend the sanctions provisions in Rule 37 to bring them in line with the federal rule. The Committee will consider this at a future meeting.

X. OFFICIAL WAIVER OF SERVICE FORM

Peggy Gentles distributed and explained the proposed official form for a Notice of Lawsuit and Request for Waiver of Service of Process under the new Rule 4, which is based on the official federal form. The Committee approved the form for publication.

XI. ADJOURNMENT

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held on Wednesday, March 28, 2001, at the Administrative Office of the Courts.