

# Agenda

## Advisory Committee on Rules of Civil Procedure

March 27, 2002  
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
Monthly meeting schedule; Email	Tim Shea
Supreme Court action on Rule 30 amendments	Fran Wikstrom
Rule 52. Objection to findings	Judge Bohling
Rule 3. Filing fee as a jurisdictional requisite	Tim Shea
Rule 47. Questions by jurors	Tim Shea
Rule 1. Pilot programs for electronic filing	Tim Shea
Rule 10. "Pica" size	Tim Shea
Rule 24. Notice to AG of challenge to constitutionality of a statute	Tim Shea
Rule 26(b). Privilege log	Tom Karrenberg
Provisional and final remedies	Tim Shea

### Meeting Schedule

April 24  
May 22  
September 25  
October 23  
November 20 (3<sup>rd</sup> Wednesday)

## **MINUTES**

### **UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE**

**Wednesday, March 27, 2002  
Administrative Office of the Courts**

**Francis M. Wikstrom, Presiding**

**PRESENT:** Francis M. Wikstrom, Cullen Battle, Terrie T. McIntosh, Glenn C. Hanni, Debora Threedy, Leslie W. Slauch, Honorable Anthony B. Quinn, Honorable Darwin C. Hansen, K. L. McIff, R. Scott Waterfall, Paula Carr, Virginia Smith

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

**EXCUSED:** James R. Soper, Todd M. Shaughnessy, Magistrate Judge Ronald N. Boyce, Thomas R. Lee, Thomas R. Karrenberg, Mary Anne Q. Wood

#### **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 23, 2002 meeting were reviewed and approved without amendment.

#### **MONTHLY MEETING SCHEDULE**

Tim Shea reported that the Committee will return to a monthly meeting schedule. Mr. Shea will distribute meeting materials by e-mail, rather than regular mail, for all future meetings.

#### **SUPREME COURT ACTION ON RULE 30 AMENDMENTS**

Mr. Wikstrom reported that the Supreme Court has decided to adopt the Committee's proposed change to Rule 30 imposing a presumptive 7-hour time limit on depositions.

#### **RULE 52. OBJECTIONS TO FINDINGS**

Mr. Wikstrom reported that the Committee will consider this issue at the next meeting, when Judge Bohling can be present to offer comments.

#### **RULE 3: FILING FEE AS A JURISDICTIONAL REQUIREMENT**

Mr. Wikstrom distributed a letter from the Appellate Rules Committee to the Supreme Court objecting to the Supreme Court's proposed change to the appellate rules making filing fees for appeals jurisdictional. Mr. Wikstrom reported that the Supreme Court has decided to consider the advisability both of that change and of a corresponding change in the Rules of Civil Procedure making filing fees for complaints jurisdictional.

The Committee discussed potential approaches to the issue. Mr. Wikstrom proposed an approach granting district courts broad discretion to deal with delinquent filing fees as they see fit. Judge Quinn suggested an approach whereby a case filed without a fee would be deemed dismissed automatically after a specific period of time. Glenn Hanni suggested that district courts already have discretion in this area and that the Supreme Court's change of the rule was therefore unnecessary. Leslie Slaugh favored language authorizing courts to impose sanctions for failure to remit filing fees.

Judge McIff noted that it is important to include language reminding parties that the filing fee must be paid. Professor Threedy stated that she is opposed to characterizing the filing fee as jurisdictional because it introduces too much uncertainty into the process.

Professor Threedy moved to recommend that the Supreme Court not make the filing fee jurisdictional and instead adopt language similar to the appellate rules committee's recommendation. The motion was seconded, and it passed unanimously.

#### RULE 47: QUESTIONS BY JURORS

Tim Shea explained his memorandum to the Committee dated February 20, 2002, regarding the recommendation by the Committee on Improving Jury Service for a rule setting forth a procedure for allowing questions by jurors in criminal trials.

The Committee discussed whether a similar change would be desirable in the civil rules. Mr. Wikstrom expressed a concern that the rule could be interpreted to encourage juror questioning, rather than merely permitting and regulating it. Tim Shea noted that Utah case law already allows this practice and that the change will merely codify this case law. He stated that many members of the jury committee feel that juror questioning is a good practice.

Professor Threedy suggested that the rule could be worded in such a way that it would not imply that judges necessarily should employ the practice of permitting questions from jurors.

Judge McIff explained the process that he uses to permit juror questions in his courtroom. He indicated that he has never had a problem using the process. He stated that he believes it is a good thing to provide a vehicle whereby jurors can ask for clarification in areas of confusion.

Leslie Slaugh stated that paragraph 2 of the proposed rule should grant the judge greater discretion in dealing with the process. He further stated that the rule should expressly permit judges to change their practice regarding jury questioning even in mid-trial if it becomes apparent that their initial approach to the issue is unsatisfactory.

Judge Hansen queried whether the proposed rule was adequate as drafted to accommodate situations in which judges and lawyers disagree about whether to permit jury questions.

Mr. Wikstrom expressed his view that the adversary system works best when presentation of evidence is left to the lawyers and the party with the burden of proof bears the risk of not satisfying the jury. Glenn Hanni stated that he agrees with Mr. Wikstrom.

Judge Hansen stated that there have been times in his experience with bench trials when he wanted information that lawyers did not elicit in order to frame findings and conclusions properly. He thought jurors might similarly find it helpful to have an opportunity to elicit information they feel they need in order to render proper verdicts.

Cullen Battle proposed inserting the words “if possible” between the words “should” and “advise” in the second paragraph of the proposed rule. With that suggestion, Mr. Battle moved that the Committee adopt the rule as written, with an appropriate explanatory comment. Leslie Slaugh seconded the motion.

Judge Quinn amended the motion to approve the rule in concept but to review the language of the amended rule for approval at a later meeting. The motion, as amended by Judge Quinn, was seconded, and it passed unanimously.

#### PILOT PROGRAMS FOR ELECTRONIC FILING

Tim Shea updated the Committee regarding various proposals to permit electronic communication and filing with the courts. Mr. Shea explained that it is presently unclear what rules will have to be changed to accommodate electronic filing. Mr. Shea went through various proposed approaches for electronic filing and some of the rules that the various approaches would affect. In most proposals, electronic .pdf files would replace hard-copy court files. As to receipt, the electronic version will be treated as if it were sent by mail.

Leslie Slaugh expressed concern that electronic records should continue to be accessible to the public. Tim Shea responded that the Judicial Counsel is presently addressing that issue and is taking the matter seriously.

Terrie McIntosh mentioned that it might be preferable to include electronic filing rules in Rule 5 rather than in Rule 1.

Judge Quinn expressed concern about the complexity of the proposals under consideration. He moved that the Committee adopt a simple broad statement in Rule 1 merely stating that the rules shall not be construed to prohibit pilot programs experimenting with electronic filing. Leslie Slaugh seconded the motion. It passed unanimously.

#### RULE 10. “PICA” SIZE

A motion was made and seconded to adopt the change outlined in Tim Shea’s memorandum dated February 20, 2002 eliminating the reference to “pica” size in Rule 10. It passed unanimously.

#### RULE 24. NOTICE TO AG OF CHALLENGE TO CONSTITUTIONALITY OF A STATUTE

Tim Shea explained the proposed change detailed in Judge Nehring’s memorandum dated February 5, 2002, requiring notice to the attorney general’s office of a challenge to the constitutionality of a state statute.

Terrie McIntosh expressed concern that the proposed rule was vague.

The Committee will consider the issue further at a later meeting.

#### RULE 26(B). PRIVILEGE LOG

Mr. Wikstrom advised the Committee of a letter Tom Karrenberg had received questioning why Utah's Rule 26(b) does not require parties to prepare privilege logs. The institutional memory of the Committee was that the Committee had not considered the issue in connection with its previous amendments of Rule 26.

Scott Waterfall moved to amend Rule 26(b) to require privilege logs. The motion was seconded, and it passed unanimously.

#### PROVISIONAL AND FINAL REMEDIES

Tim Shea reported the results of his research into the laws of other states governing provisional and final remedies. His research revealed that the large majority of states use the same concepts present under the Utah rules. Few states have undertaken to "modernize" these doctrines. Nevertheless, Mr. Shea outlined several potential approaches to simplifying the Utah rules. These are set forth in Mr. Shea's memorandum to the Committee on this topic dated February 20, 2002. Mr. Shea suggested that he undertake to simplify the various components of the rules and present them to the Committee for more careful consideration at a later date. The Committee will consider the issue further at future meetings.

#### ADJOURNMENT

The meeting adjourned at 5:45 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, April 24, 2002, at the Administrative Office of the Courts.