

Agenda

Advisory Committee on Rules of Civil Procedure

September 25, 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
Introduction of new members	Fran Wikstrom
Provisional and final remedies	Tim Shea
Rule 3. Filing fee	Fran Wikstrom
Rule 24. Notice to AG of challenge to constitutionality of a statute	Fran Wikstrom
Rule changes suggested by Christopher Daines	Tim Shea
Soldiers' & Sailors' Relief Act affidavit for default judgment	Tim Shea
Proposed meeting schedule (see below)	Fran Wikstrom

Meeting Schedule

October 23
November 20 (3rd Wednesday)
January 22, 2003
February 26
March 26
April 23
May 28
September 24
October 22
November 19 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 25, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, David W. Scofield, Thomas R. Karrenberg, Cullen Battle, Francis J. Carney, R. Scott Waterfall, Terrie T. McIntosh, Honorable Ronald N. Boyce, Honorable Anthony W. Schofield, Leslie W. Slaugh, Thomas R. Lee, Todd M. Shaughnessy, Virginia Smith, Glenn C. Hanni

STAFF: Tim Shea, Esther Chelsea-McCarty

EXCUSED: Honorable K. L. McIff, Paula Carr, Debora Threedy, Honorable Anthony B. Quinn

WELCOME AND APPROVAL OF MINUTES

The meeting was called to order at 4:00 p.m. The minutes of the May 22, 2002, meeting were reviewed and approved.

INTRODUCTION OF NEW MEMBERS

Francis Wikstrom welcomed Judge Schofield, James Blanch, Frank Carney, David Scofield, and Jan Smith as new members of the Committee. Mr. Wikstrom also reported that Judge McIff will be resigning from the Committee and that Judy Wolferts will be the new secretary of the Committee.

REPORT ON SUPREME COURT ACTION

Mr. Wikstrom reported that he had met recently with the Supreme Court and that the Court had approved the various changes to the Rules recommended by the Committee. The changes will be effective November 1.

CODE OF JUDICIAL ADMINISTRATION

Cullen Battle reported on recent activities of the Committee considering incorporating the Rules of Judicial Administration into the various sets of procedural rules. The Committee is recommending incorporation of some of those rules into the Rules of Civil Procedure. One suggestion is that these rules could be numbered 100 and higher. The Civil Procedure Committee will need to decide whether to recommend adopting such an approach and what input should be provided from this Committee concerning such revisions to the rules. Tim Shea will work on various approaches to this issue for the Committee to consider. Mr. Wikstrom will approach various probate practitioners and domestic relations practitioners to enlist their

cooperation on subcommittees in considering how to deal with the rules that relate to those practice areas.

RULE CHANGES SUGGESTED BY CHRISTOPHER DAINES

Tim Shea discussed the proposed rule changes suggested by Christopher Daines in his letter to the Committee dated May 1, 2002. Mr. Daines suggested rule changes requiring parties to submit proposed orders in connection with motions and requiring parties to meet and confer prior to filing any motion.

Mr. Wikstrom suggested that it may be premature to discuss these proposals prior to the contemplated incorporation of portions of the Rules of Judicial Administration into the Rules of Civil Procedure.

Many Committee members expressed skepticism concerning the proposal requiring counsel to meet and confer prior to filing motions. Committee members were divided on whether it is advisable to require proposed orders to be submitted in connection with motions. The Committee will discuss these issues further at future meetings.

PROVISIONAL AND FINAL REMEDIES

Tim Shea recapped the Committee's work to date in considering potential wholesale revisions to the Rule 64 series governing provisional and final remedies. These topics were the subject of Mr. Shea's memorandum to the Committee dated September 3, 2002.

Mr. Shea summarized his memorandum, explaining the various areas of potential revision that are before the Committee for consideration.

The Committee discussed Professor Lee's concern that draft Rule 64(o), permitting attachment in contract cases due to impairment of a plaintiff's remedy, but prior to any actual or anticipatory breach by defendant, permits unripe actions in violations of Utah's jurisdictional statutes. Professor Lee moved to eliminate Rule 64(o) from the draft rules. The motion was seconded, and it passed unanimously.

Mr. Shea explained that he favors including a rule that a party seeking a prejudgment writ must show substantial likelihood of success on the merits. He also recommended a rule requiring appraisal of real estate prior to judicial sales and permitting sale only if the defendant's equity in the property exceeds 20% of the appraised value. Following discussion, the Committee agreed that Mr. Shea will incorporate into future drafts of the proposed rules a requirement for a showing of likelihood of success on the merits. Concerning the proposed prohibition on real property sales where the defendant's equity is less than 20% of the appraised value, the Committee determined not to include such a provision in the rules.

The Committee discussed whether the Rules can be reformatted in such a way that they will be more readable. Leslie Slaugh proposed potential renumbering of the rules, but other Committee members expressed concern that we would lose the ability easily to research the same rules in other jurisdictions. Many Committee members believe that the rules can simply be reformatted physically, with the same numbers, so that different levels of subsections are indented differently from the left-hand margin. Mr. Shea will discuss this with the publisher.

The Committee turned its attention to the specific language of the proposed rules. The Committee decided to use the term “seize,” rather than “levy,” throughout the proposed rules. The Committee also decided to use the term “writ” throughout.

Concerning the definition of “claim,” the Committee decided to eliminate the definition because the term is already defined in Rule 8.

Many Committee members felt the use of the term “defendant” is confusing in the Rule because it does not necessarily refer to the party defendant in the action. The Committee will consider potential alternative terms to use instead of “defendant.”

Leslie Slaugh suggested that Rule 1.3 should merely require written notice, rather than requiring mailing. The Committee adopted this change so as to make clear that hand-delivery of a notice is permissible.

The Committee discussed various approaches to amending the definition of “property” subject to seizure under section 1.10 of the rules. Tom Karrenberg suggested that the definition should refer to the defendant’s “assets,” rather than the defendant’s “property.” Tom Karrenberg also stated that he felt certain types of personal services currently omitted from the definition of “property” should not be exempt from execution. Leslie Slaugh proposed that the definition should merely be “all forms of property recognized by law.” Following further discussion, the Committee crafted a definition of “property” addressing many of the Committee members’ concerns. Tim Shea will incorporate this definition into future drafts of the rule.

Concerning paragraph 2.1 of the draft rules, the Committee considered whether to provide that security should be sufficient to cover attorney’s fees, as well as costs. Frank Carney suggested that the language from the rule governing injunction bonds could simply be incorporated into the rules governing attachment.

The Committee will return to the issue of provisional and final remedies in future meetings.

FILING FEE

Tim Shea reminded the Committee of its prior work on the filing fee issue. The Committee then considered Mr. Shea’s proposed revision to Rule 3 attached to his memorandum to the Committee dated September 3, 2002. Some Committee members expressed concern that the proposed revision of the rule is confusing. Following discussion, the Committee agreed upon revised language that Mr. Shea will incorporate into the rule and present to the Committee for consideration.

NOTICE TO ATTORNEY GENERAL of challenge to constitutionality of a statute

Tim Shea explained his proposed addition to Rule 24 requiring notice to the Attorney General of actions drawing into question the constitutionality of state statutes. Some Committee members suggested that subsection (d)(4), expressly permitting courts to reconsider orders if the rule is not followed, should be dropped. Many Committee members felt courts would have discretion to do this anyway and that it would be unwise expressly to invite the filing of such motions. Upon motion duly made and seconded, the Committee voted unanimously to drop subsection (d)(4) from the proposed rule.

The Committee further voted unanimously to strike the language “affecting the public interest” and to replace the language “draws into question” with “questions.” The Committee also voted unanimously to strike the language following “intervene” in subsections (d)(1) and (d)(2). The Committee also voted unanimously to drop subsection (d)(3) of the proposed rule. Tim Shea will generate another draft of the amendment for the Committee to consider, including language borrowed from the rule’s federal counterpart providing that failure to comply does not affect the validity of the action.

ADJOURNMENT

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, October 23, 2002, at the Administrative Office of the Courts.