

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 24, 2003
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: David W. Scofield, Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Thomas R. Lee, R. Scott Waterfall, Virginia S. Smith, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Todd M. Shaughnessy, James Blanch, Honorable David O. Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Francis M. Wikstrom, Glenn C. Hanni, Thomas R. Karrenberg, W. Cullen Battle, Honorable Anthony W. Schofield, Janet H. Smith, Debora Threedy

GUESTS: Matty Branch

I. WELCOME AND APPROVAL OF MINUTES.

Tim Shea called the meeting to order at 4:00 p.m. The Minutes of the August 27, 2003 meeting were reviewed, and R. Scott Waterfall moved that they be approved as written. The motion was seconded, and approved unanimously.

II. RULE MAKING PROCESS.

Mr. Shea reported on the issue raised at the August 27, 2003, meeting as to whether members of the Bar have received recent notices of proposed rules changes. He stated that the Utah Supreme Court has been notified that there may have been a deficiency in the last distribution of proposed rules changes, in part because spam filters may be filtering out mass e-mail filings.

Mr. Shea stated that the next batch of rules changes is in the process of being distributed, and already have been distributed to judges. E-mail notices to Bar members advising of proposed rules changes will be sent out in smaller batches to attempt to avoid spam filters. A brief notice in the Utah Bar Journal will also advise Bar members that proposed rules changes can be found on the website.

Mr. Shea stated that there has been a suggestion that the Committee distribute proposed rules changes for comment as they are approved, rather than sending them out in large batches.

He pointed out that the downside to this is that the Utah Code volume and supplement containing rules will be nearly continually out of date, although the latest version of the rules would be available electronically. Mr. Shea discussed this issue with Francis Wikstrom prior to today's meeting.

Members voiced opinions on this issue. Thomas Lee expressed concern that Bar members may be more likely to ignore proposed rules changes if they are sent out more frequently. Judge David Nuffer favored the incremental publication of proposed rules, with effective dates only once or twice a year. Frank Carney commented that incremental publication may be chaotic and that Bar members may find it difficult to keep up with constant changes. Responding to Mr. Carney's concerns, Judge Nuffer stated that these concerns would be alleviated if Bar members knew that rules changes would be effective only once or twice a year. Todd Shaughnessy asked whether the incremental method would require the Supreme Court to go through its review process more frequently. Mr. Shea stated that this would not be required if the effective dates were limited to only once or twice a year.

After further discussion, Mr. Lee moved that the Committee give itself the prerogative to distribute proposed rules for comment more frequently, but that there be only one or two effective dates per year. Judge Anthony Quinn seconded the motion, which was approved unanimously.

III. CHANGE OF JUDGE AFTER REMAND.

Mr. Shea stated that prior to today's meeting, he discussed with Mr. Wikstrom the issue of whether the Committee should continue to consider a rule that would allow a party to request automatic disqualification of a judge after remand. Mr. Wikstrom agreed with Mr. Shea that there does not appear to be sufficient support by Committee members for such a rule.

The Committee again discussed the parameters of such a rule. Leslie Slaugh stated that he generally believes that a rule is a good idea, and that judges should recuse more often. That said, he cannot think of a way to effectively draft a rule stating that judges should exercise discretion, and in any event case law already requires that judges exercise discretion. He expressed his concern that the only way at present to have a judge removed is to allege bias, and stated that it would be helpful to allow parties to give a reason other than bias. Mr. Carney stated that he also is in favor of a rule in theory, but also has been unable to come up with an effective way of wording it.

The Committee discussed whether it would be useful to appoint a subcommittee to prepare a position statement on this issue. Judge Quinn commented that there does not appear to be a consensus as to exactly why this rule would be a bad idea and suggested that, at the least, the Committee should provide the Legislature with its reasons for not proposing such a rule. Judge Nuffer suggested that the Committee consider amending Rule 63 to allow both parties, after remand, to agree to a new judge. Mr. Lee commented that this may not resolve the issue because

the parties may not agree. Judge Lyle Anderson pointed out that there also is a concern in small localities with any rule requiring automatic disqualification. Mr. Waterfall commented that there is a need to get away from judges having to concede bias in order for there to be recusal. Mr. Lee stated that he personally does not agree with a requirement of automatic recusal, but that he sees some merit in Mr. Slauch's comment about bias. Mr. Lee suggested considering a rule that would set forth a method for judges to assess whether they should recuse following remand. For example, a judge might be required to balance perceived bias, with efficiency and familiarity with the case.

After extensive discussion, Mr. Shea stated that there did not appear to be support for a rule requiring automatic recusal but that based on comments, the Committee might want to consider this issue further. David Scofield suggested that the Committee consider Mr. Lee's suggestion for a balancing requirement. It was agreed that Mr. Lee would work on this, with other members to contact him with any suggestions.

IV. REMEDIES RULES.

Mr. Shea discussed the Committee's past progress on reorganizing rules related to remedies, *i.e.*, writs. The Committee discussed the timing of filing various writs, and the meanings of various terms in the rules. Mr. Shea suggested that it may be useful to ask for volunteers who work with these rules on a regular basis, to review them and make suggestions.

Committee members posed and discussed various questions about the proposed rules, including posting of security, the term "improvidently issued," *ex parte* writs, service by publication, and notification and/or joinder of all known claimants to property. Members also pointed out specific portions of the proposed rules where changes should be made.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, October 22, 2003, at the Administrative Office of the Courts.