

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 19, 2003
Administrative Office of the Courts

Francis Wikstrom, Presiding

PRESENT: Francis Wikstrom, Janet H. Smith, Francis J. Carney, Terrie T. McIntosh, Thomas R. Lee, Virginia S. Smith, W. Cullen Battle, Honorable Lyle R. Anderson, James T. Blanch, Honorable David O. Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: David W. Scofield, Paula Carr, Leslie W. Slauch, Thomas R. Karrenberg, R. Scott Waterfall, Glenn C. Hanni, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Todd M. Shaughnessy, Debora Threedy

GUESTS: Matty Branch
Paul Barron
Jerome Battle

I. WELCOME AND APPROVAL OF MINUTES.

Francis Wikstrom called the meeting to order at 4:00 p.m. The Minutes of the October 22, 2003, meeting were reviewed, and Thomas Lee moved that they be approved as written. The motion was seconded, and approved unanimously.

II. ELECTRONIC FILING DEMONSTRATION.

Mr. Wikstrom introduced Paul Barron and Jerome Battle of the IT Department, who led a discussion and demonstration of electronic filing. Mr. Battle began the discussion by explaining what electronic filing will entail, including that filings will be digitally signed, validated by the court clerk, and that the document will be maintained electronically by the court. Mr. Battle also discussed the differences between the state electronic filing model, and the federal electronic filing model. He stated that whereas federal electronic filing consists of e-mail with an attached .pdf file, the state model will accept documents in either Word or WordPerfect, from which the state court will then extract the document. Once the document "filed" in state court is digitally signed, it is "locked in" and cannot be changed. This adds a level of security not available where "signatures" consist of a password. The state can also guarantee that nothing will happen to the document during transmission, which the federal court cannot guarantee. Mr. Battle stated that

electronic filing will save time and money for both attorneys and for the court. In response to questions from the Committee, Mr. Battle stated that electronic filing will not be the exclusive method of filing allowed by the court. Mr. Barron then gave a demonstration of how documents can be filed electronically.

Judge David Nuffer briefly explained the federal electronic filing model that will soon be implemented in the United States District Court for the District of Utah. He stated that there will be a limit for electronic filing in that court based on the number of pages to be filed.

Committee members then discussed electronic filing and gave opinions both pro and con. Mr. Wikstrom thanked Mr. Barron and Mr. Battle for meeting with the Committee to answer questions and provide the demonstration.

III. RE-PUBLICATION OF SUPREME COURT RULES FOR COMMENT.

As discussed in earlier meetings, the recent amendments to the Rules were e-mailed to Bar members for comment, and there had been some question as to whether Bar members received those proposed amended Rules. Tim Shea informed the Committee that, in light of this, the Supreme Court has asked that the proposed amended Rules be submitted for comment a second time, which is presently being done. Comments accordingly will be accepted through the end of 2003. Mr. Shea also stated that amended Rules due to take effect on November 1, 2003, will be in effect during the extended comment period, under the Supreme Court's emergency rules.

IV. NEW JUDGE AFTER REMAND.

At the October 22, 2003, Meeting, Thomas Lee was asked to prepare a statement detailing the extensive time and efforts expended by the Committee over a period of several months in considering the "change of judge after remand" issue, and in drafting proposed Rule 63(c). At today's meeting, Mr. Lee presented the proposed statement to the Committee, and made suggestions for revisions, including suggesting that the Committee adopt Mr. Wikstrom's recommendation to delete the language in paragraph two, after "extensive discussion" and ending with "on remand." Mr. Wikstrom also suggested that wording be included pointing out that this Rule would also apply to criminal procedure. In addition, other Committee members, including Francis Carney and Judge Nuffer, made suggestions regarding the statement. Mr. Shea asked Mr. Lee to have a revised statement finalized by mid-December of 2003, which will then be circulated to Committee members.

V. MOTION TO RECONSIDER.

Mr. Carney stated that he has received an e-mail from another lawyer regarding regulating motions to reconsider. Mr. Carney commented that the e-mail caused him to ask himself whether this is such a concern that the Committee needs to consider whether there even is a "motion to

reconsider.” In response, Mr. Wikstrom posed the question of whether a “motion to reconsider” should be specifically provided for in a rule, which would require that a movant follow certain procedure. Janet H. Smith stated that she preferred a situation where discretion was left with the trial judge with regard to whether to reconsider. Mr. Lee and James Blanch agreed that greater flexibility may be preferable to a strict procedure, with Mr. Blanch pointing out that Rule 54(b) already states that all motions may be reconsidered. Judge Lyle Anderson commented that he sees both sides on this issue, and that when a responsible attorney files a motion to reconsider, he is inclined to look at it.

Mr. Wikstrom suggested that one approach might be for a movant submit a Request to Submit a Motion to Reconsider, with no response brief allowed. Judge Nuffer agreed that he would prefer a situation where a judge has the opportunity to decide whether to allow a motion to reconsider to be filed. Cullen Battle opined that having a rule that specifically allows a motion to reconsider would seem to encourage such motions, and that perhaps lawyers should have to stick their necks out if they choose to file one.

After further discussion, Mr. Wikstrom stated that there did not seem to be an overwhelming desire by the Committee to change the present practice. He asked if anyone would like to make a motion regarding adopting such a rule. There was no response, and the discussion ended.

VI. REMEDIES RULES.

The Committee discussed the proposed amendments to the remedies rules. In response to Mr. Lee’s question of whether there is a good pattern for these rules from another state, Mr. Shea stated that he has reviewed the remedies rules of many other states, and he believes that what the Committee has proposed is an improvement on those. Mr. Wikstrom suggested that the Committee send the proposed amended rules out to practitioners and others who use them on a consistent basis, such as bank lawyers and Legal Aid lawyers, and ask them to take a fresh look. It was agreed that this would be done, with written comments being requested, and with an invitation to anyone who wishes to do so to speak to the Committee in person.

The Committee then raised questions about some of the specific terms in the proposed remedies rules. Mr. Battle asked whether “earnings remain earnings after they are paid,” such as in a situation where they are placed in a savings account. Judge Nuffer commented that the practical answer is that all “earnings” are “earnings.” Virginia Smith stated that the proposed rules need to make clear that it is the defendant’s responsibility to object to a garnishment.

With regard to proposed Rule 64, Mr. Shea stated that he has spoken to the Office of Recovery Services and, based on that conversation, believes that some changes should be made. The Committee then discussed the meaning of “gain earned from capital” in proposed Rule 64, and also discussed the definition of “earnings.” After discussion, it was agreed that the term “gain derived from capital” should be deleted.

VII. ADJOURNMENT.

The meeting adjourned at 5:40 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, January 28, 2004, at the Administrative Office of the Courts.

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