

# MINUTES

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

Wednesday, October 27, 2004  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Glenn Hanni, Cullen Battle, Francis J. Carney, David W. Scofield, Terrie T. McIntosh, Virginia S. Smith, R. Scott Waterfall, James T. Blanch, Lance Long, Honorable Lyle R. Anderson (via telephone)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Janet H. Smith, Leslie W. Slaugh, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable David Nuffer, Paula Carr, Thomas R. Karrenberg, Todd M. Shaughnessy, Debora Threedy

GUESTS: Gary Thorup  
Keith Teel (via telephone)

### I. APPROVAL OF MINUTES.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the September 22, 2004 meeting were reviewed, and R. Scott Waterfall moved that they be approved as submitted. The Motion was seconded by James T. Blanch, and approved unanimously.

### II. RULE 7. MOTION TO RECONSIDER.

Cullen Battle led a discussion of proposed Rule 7, which was drafted as a way to recognize a motion for reconsideration while at the same time restricting briefing. The primary focus of the discussion was whether this rule is needed, and/or whether having this rule would simply legitimize frivolous motions. Committee members commented that these motions are already being filed under other guises, and liked the fact that the proposed rule would prohibit responses until authorized by the judge. Members also discussed how this proposed rule would impact administrative law. After discussion, it was agreed that Lance Long will conduct research to determine whether and how other states have dealt with motions for reconsideration. The proposed rule will be discussed again at the next Committee meeting.

### III. RULE 62: CAP ON SUPERSEDEAS BONDS.

The Committee discussed revisions to Rule 62 which are intended to limit the monetary amount of supersedeas bonds. Keith Teel, an attorney with the law firm of Covington & Burling, and who addressed the Committee at the September 22, 2004, meeting, questioned the practicality of part (j)(1)(A) of proposed Rule 62. He suggested that there is little likelihood that a judge who oversees a trial will believe that a defendant has a “likelihood of success on appeal.” Several members disagreed, commenting that a judge may not always agree with a jury’s verdict.

The principal focus of discussion about proposed Rule 62 was part (j)(3)(A), which would allow the trial judge to prohibit payment of dividends in situations where a bond of less than the total judgment (except for punitive damages) is allowed. Several members commented that for a judge to prohibit a corporation’s paying dividends could be devastating to publicly held corporations. David Scofield commented that there is no point in prohibiting payment of dividends for publicly held corporations, whereas there is reason to do so for closely held corporations. Mr. Wikstrom commented that shareholders are not entitled to dividends, and questioned why dividends should be paid when a company has a large judgment pending. Virginia Smith and Mr. Battle commented that they believe that companies should not be prohibited from paying dividends.

After extensive discussion, Tim Shea stated that he will work on redrafting the proposed rule to comport with the members’ consensus from today’s meeting.

#### **IV. RULE 9. NAMING PERSONS FOR ALLOCATION OF FAULT.**

Mr. Shea stated that the only real change in the version of Rule 9 that is before the Committee today is from the beginning of line 67 to the end of that paragraph. Members discussed whether: (1) 90 days is sufficient time for filing a supplemental answer to identify those to whom fault would be allocated; (2) whether “reasonable diligence” is a strong enough standard; and (3) whether “supplemental answer” should be changed to “notice” in line 67. Committee members voted unanimously to adopt proposed Rule 9 with the only change being to change “supplemental answer” to “notice” in line 67.

#### **V. RULE 47. PEREMPTORY CHALLENGES FOR MULTIPLE PARTIES.**

Frank Carney gave the background for the proposed changes to Rule 47. He stated that Judge David Nuffer had recommended looking to the comparable federal rule for guidance. Mr. Carney stated that after reviewing the federal rule, he deleted confusing language from proposed Rule 47 and included language from the federal rule and Utah case law in lines 36-37. The Committee voted unanimously to adopt the proposed changes and the proposed rule.

#### **VI. RULE 101. MOTIONS BEFORE COURT COMMISSIONERS.**

The Committee discussed proposed Rule 101. Terrie McIntosh recommended that the word “new” be deleted from the phrase “new matters raised in the response” in line 15. Virginia Smith moved that the proposed rule be approved, with the one change, and submitted for

comment. James Blanch seconded the motion, which was approved unanimously.

**VII. RULE 106. TEMPORARY ORDERS DURING MODIFICATION OF DIVORCE DECREES.**

Mr. Shea stated that the revision of Rule 106 is an attempt to clarify confusing issues in case law. Mr. Scofield recommended that line 4 be changed to read “service of the petition or motion upon.” It was agreed that this change should be made. Mr. Carney moved that the proposed rule, as modified, be approved and submitted for comment. Glenn Hanni seconded the motion, which was approved unanimously.

**VII. 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, November 17, 2004, at the Administrative Office of the Courts.