

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 23, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Glenn C. Hanni, Francis J. Carney, Cullen Battle, Thomas R. Karrenberg, Paula Carr, Terrie T. McIntosh, Virginia S. Smith, R. Scott Waterfall, Leslie W. Slauch, James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David Nuffer

EXCUSED: Honorable Anthony W. Schofield, David W. Scofield, Janet H. Smith, Todd M. Shaughnessy, Debora Threedy

STAFF: Tim Shea, Judith Wolferts, Trystan Smith

I. APPROVAL OF MINUTES.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the January 26, 2005 meeting were reviewed, and R. Scott Waterfall moved that they be approved as submitted. The motion was seconded by Francis J. Carney, and approved unanimously.

II. STAFF CHANGE.

Mr. Wikstrom introduced Trystan Smith, who will take Judith Wolferts' place as secretary to the Committee effective March 1, 2005. Mr. Wikstrom expressed his appreciation to Ms. Wolferts for her past service to the Committee.

III. RULE 7. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS, OBJECTION TO COMMISSIONER'S ORDER.

Tim Shea introduced an amendment that would add the following language to Rule 7: "All orders shall be prepared as separate documents and shall not include any matter by reference unless permitted by the court." This amendment would require that all orders be separate documents, complete in and of themselves. Mr. Shea stated that the proposed amendment was prompted by complaints from judges that it is becoming common for attorneys to simply place a proposed order for the judge's signature at the end of a motion, rather than submitting a separate order. For example, an attorney might include a signature line and language at the end of a motion stating "based on the foregoing, the motion is granted."

Cullen Battle and Leslie Slaugh asked whether this amendment would mean that orders could not incorporate by reference the arguments in motions. Thomas Karrenberg pointed out that the amendment would also apply to judgments. The Committee also discussed whether the proposed amendment would prohibit exhibits such as a property description from being attached to an order, and agreed that a judge could still allow this. A change in language was suggested to state “unless otherwise ordered by the court.”

After discussion, Mr. Blanch moved that the amendment be adopted with the language changes suggested by Committee members. The motion was seconded and approved, with one member voting no.

IV. FAX FILING.

Mr. Shea introduced a proposed amendment to Rule 5 that would specifically allow filing by fax. He stated that there seems to be agreement that state courts are presently permitting filing by fax, and there is a need to devise a rule that will assure uniformity. Mr. Wikstrom asked whether the amendment was requested by the Supreme Court. Mr. Shea responded that the district court in St. George has started to allow fax filing, and that this has come to the Supreme Court’s attention with the result that the Court asked the Committee to address the issue. According to Mr. Shea, the proposed amendment has met with mixed opinion but general approval by the judiciary. There would be no fee for fax filing, and any fees presently required for a pleading or other document would have to be paid for by credit card at the time of filing.

Mr. Carney asked the meaning of the term “acceptance by the clerk” as used in the amendment. Mr. Shea explained that “acceptance” is when the clerk actually date-stamps the brief or pleading that has been faxed. Paula Carr commented that this proposed amendment has been discussed at Clerks of Court, and that concerns have been expressed that allowing this will create more work for court staff. Mr. Blanch expressed his opinion that the process for allowing e-filing is so far along that fax filing is now obsolete. Some members opposed any rule that would allow filing by fax and believe that it should not be encouraged. Other members suggested that fax filing is practical in some areas of the state and in some situations. One member commented that even though he is not in favor of fax filing, there should be a rule to regulate it if it is presently being allowed. Judge Nuffer stated that the resolution of faxed papers might be difficult to read when scanned.

After considerable discussion, Mr. Wikstrom asked for a show of hands as to those in favor of a rule that would allow fax filing statewide, and those who believe it should be allowed only by local rule in certain parts of the state. The vote was nearly evenly split, with some members in total opposition to a rule that would allow fax filing. In light of this result, Mr. Wikstrom stated that further discussion will be deferred to a later date in order to give the Committee an opportunity to see what kind of reception the concept of fax filing receives in other committees.

V. OFFER OF JUDGMENT.

At the January 2005 Committee meeting, Representative LaVar Christensen appeared and suggested that the Committee consider amending Rule 68 so that it applies to offers of judgment by plaintiffs as well as those by defendants. Mr. Wikstrom directed the Committee at that time to work on an amendment that would do so.¹

The Committee's revision of Rule 68 was presented. Some members felt that the proposed amendment would promote settlement. Other members felt that it is too pro-defense. After discussion, Mr. Wikstrom directed Mr. Shea to incorporate into the proposed amendment the changes suggested by the Committee, after which Mr. Carney is to submit the proposed amendment for comments to both plaintiffs' and defense lawyers in the litigation section to ascertain their views.

VI. TEMPORARY STAY IN EXECUTION OF JUDGMENT.

Mr. Carney has proposed an amendment to Rule 62(a) which would prohibit execution on a judgment until ten (10) days after entry of judgment. He stated that he is proposing the amendment because of situations of which he is aware where, even though the plaintiff knew there would be an appeal, the plaintiff nevertheless immediately garnished assets. After discussion, Mr. Slaugh moved to adopt the amendment. Mr. Carney seconded the motion, and it was approved unanimously.

VII. JURY DEMAND.

Mr. Carney has withdrawn his proposed amendment to Rule 38 concerning jury demands.

VIII. E-FILING RULES.

Mr. Shea stated that since the demonstration of e-filing presented to the Committee several months ago, the Administrative Office has been allowing e-filing in the Second and Third Districts in debt collection matters. The debt collection area was selected because matters generally are uncontested. It is anticipated that the e-filing process will now move to civil litigation in general. Davis County will be the first area for general e-filing in civil cases, and the Administrative Office has spoken to Davis County judges and identified several lawyers who will be part of the pilot program. This means that e-filing rules are necessary. Mr. Shea noted that there is nothing in the present rules that would prevent e-filing. He suggested that e-filing rules be kept to a minimum at first, that the courts be allowed to learn as they go, and that rules be adjusted as it becomes necessary.

¹Representative Christensen subsequently filed H.B. 127, which deals with offers of settlement by plaintiffs, and provides for 10% interest on any offer that is rejected if the plaintiff's subsequent recovery exceeds the offer. Leslie Slaugh reported that H.B. 127 has been referred to a legislative interim committee for study.

A question was asked as to how close the proposed Utah e-filing rules are to the federal e-filing rules. Judge David Nuffer commented that they conceptually are the same. Mr. Carney raised the issue of privacy, noting that due to the wider range of matters litigated in state court versus federal court, it is more difficult to maintain the privacy of personal information in state court. Mr. Shea agreed that filings in state court are more likely to include personal information, such as drivers license numbers and social security numbers. Judge Nuffer commented that the federal court requires that such private information be redacted before filing, but that this is not always possible in state court filings due to the nature of the litigation. Committee members expressed concern about such private information being available in documents that are available on-line. In addition to privacy issues, the Committee also discussed whether to set filing deadlines, such as prohibiting filing by e-mail after 5 p.m. on Fridays and before 8 a.m. on Mondays.

The discussion was ended due to the press of time. The matter will be revisited at the next meeting.

IX. 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, March 23, 2005, at the Administrative Office of the Courts.