

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 25, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Glenn C. Hanni, Terrie T. McIntosh, Leslie W. Slauch, Virginia S. Smith, R. Scott Waterfall, Paula Carr, Honorable Lyle R. Anderson (via telephone), James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable David Nuffer, David W. Scofield, Janet H. Smith, Tom Lee

GUEST: Chief Justice Durham

EXCUSED: Thomas R. Karrenberg, Honorable Anthony W. Schofield, Debora Threedy, Todd M. Shaughnessy, Matty Branch

STAFF: Tim Shea, Trystan Smith

I. CERTIFICATE TO GLENN HANNI.

Chairman Wikstrom called the meeting to order at 4:05 p.m. Chief Justice Durham acknowledged Mr. Hanni and thanked him for his 30 years plus service on the committee. Mr. Hanni received a plaque acknowledging his service.

Mr. Wikstrom acknowledged and welcomed back Tom Lee to the committee. Mr. Lee returned to the committee after a stint at the Department of Justice.

II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained a motion to approve the April 27, 2005 minutes as submitted. Mr. Waterfall moved to approve the minutes. Mr. Hanni seconded the motion, and the motion was approved unanimously.

III. RULE 64C. ATTACHMENTS.

Mr. Shea brought Rule 64C back to the committee. Zachary Shaw attended the meeting from the Utah Attorney General's office. Mr. Shea presented a revised Rule 64C(b)(2) that included the former language: "upon a contract *or a judgment.*"

Mr. Wikstrom reiterated the concerns presented in the April 27th meeting that a pre-judgment writ of attachment should not be available for actions on a judgment. The committee

re-expressed its concerns as well. Mr. Scofield stated the Uniform Fraudulent Transfer Act (“FTA”) should govern. Mr. Scofield noted a restraining order against further disposition of property would be the proper form of relief. Mr. Shaw stated the FTA allowed for restraining orders, but did not allow for seizure of assets. The committee considered the language of the FTA and reached the opposite conclusion. Mr. Wikstrom suggested an amendment to subsection (b)(2), “upon a contract or *upon a statute*” referencing the FTA. Mr. Shaw mentioned that other states, for example Nevada, have adopted the “upon a contract or upon a statute” language.

Mr. Slauch questioned why pre-judgment writs were limited to contract actions. Mr. Scofield and Mr. Wikstrom stated the reason is because a contract is for a sum certain. Mr. Slauch again questioned why the language was so narrow. Mr. Scofield responded that with a contract there is some equity involved because presumably there has been a quid pro quo between the parties. Mr. Long indicated that broadening the rule is problematic when you do not have a sum certain.

Mr. Carney reviewed American Jurisprudence (“Am Jur”). According to Am Jur, pre-judgment writs have not been allowed in actions where the sums are not certain because of the risk that a party could attach more than they were ultimately entitled to. Mr. Shaw told the committee only two or three states have limited pre-judgment writs to contract actions, five states allow for writs in any civil action, and a few states have limited writs to only those actions where there is a sum certain. Mr. Scofield mentioned the committee should not act as a policy-maker, but leave the circumstances in which a party can obtain a pre-judgment writ to the Legislature.

Mr. Scofield suggested the committee adopt the “upon a contract or *a statute that authorizes attachments*” language. Mr. Wikstrom suggested the committee remove “judgment” from the proposed amendment.

Mr. Lee suggested the committee remove the “not a resident of this state” or “a foreign corporation” language. Judge Nuffer noted that removal of this language would prevent a trial court from attaching property based on quasi in rem jurisdiction.

Mr. Scofield moved that the committee amend Rule 64C(b)(2) to state “upon a contract or upon a statute that authorizes attachments.” Ms. Smith seconded the motion. The committee approved the motion unanimously.

IV. RULE 74. WITHDRAWAL OF ATTORNEY

Mr. Shea presented on Rule 74 in Mr. Shaughnessy’s absence.

Ms. Smith asked why would the committee be opposed to allowing a party to object to a withdrawal. Mr. Wikstrom asked for a sense of where the committee members stood regarding the proposed amendment.

Judge Quinn stated stability in the Rules should be encouraged. He noted that with or without the objection language lawyers may abuse the rule. Mr. Long expressed concern about preventing a lawyer from withdrawing when they were not being paid. Mr. Blanch expressed concern about allowing an attorney or party to weigh in on whether opposing counsel may withdraw. He stated the decision to withdraw should be between the lawyer and his client.

Mr. Wikstrom asked the committee if there was any support for the proposed amendment, and seeing no support, no vote was called for.

V. RULE 45. SUBPOENA

Mr. Shea brought back to the committee the proposed amendment allowing for a ten day notice requirement before service of a subpoena. Mr. Shea first asked the committee to consider whether it should do more than just delete the committee note. Mr. Shea mentioned the Supreme Court placed authority over the committee notes under the committee's purview.

Judge Nuffer began the discussion suggesting the ten day notice requirement be adopted. Mr. Hanni agreed a party should give notice before a subpoena issued explaining that notice gives an opposing party a chance to object, or stop production of the documents.

Mr. Wikstrom asked whether the subpoenaed party, instead of the requesting party, should be given the choice to mail documents without attending a records deposition. The committee members expressed concern that leaving the choice with the subpoenaed party would be impractical.

Mr. Battle asked whether the notice requirement would only apply to requests for documents. The committee reiterated the notice requirement would only apply to documents. Mr. Scofield suggested five business day's notice, instead of ten days. Several committee members mentioned that they did not want to allow a party to file an objection and unilaterally stop production of the documents.

Mr. Wikstrom suggested the notice requirement should be tied in with a requirement that the producing party certify the authenticity of the records. Mr. Wikstrom suggested the business records language in Utah Rule of Evidence 902 be included. He suggested the committee prepare a checklist in affidavit form tracking URE 902.

Several committee members expressed concern that some subpoenaed records may not be business records. Judge Quinn suggested it would be better to have the producing party verify that they are complete and accurate. The committee reached a consensus that it should not include the business records language.

Mr. Wikstrom suggested that the last word on line 144 be changed from "subpoena" to demand. Ms. McIntosh suggested lines 85 - 95 (the certification requirements) should be placed

under subsection (d) "Duties in responding to subpoena." Several committee members suggested deleting lines 94 - 98, and moving subsections (a) - (c) and (g) to subsection (d).

Mr. Shea agreed to incorporate the suggested changes and bring the revisions back to committee. Mr. Shea asked the committee to confirm if it wanted the requesting party to decide whether the responding party could copy and mail documents, or produce documents at their offices. The committee agreed to keep the notice requirement at ten days. The committee will revisit the remainder of the proposed revisions at the next meeting.

VI. E-FILING RULES.

Mr. Shea addressed e-filing.

The committee agreed Rule 10(a) should be revised to state "Every pleading and other paper filed with the court" Several committee members expressed concern that Rule 10(a) as drafted would not require a plaintiff to provide his address, just his name. The committee questioned why and whether names and addresses should be included.

Mr. Carney asked why the opposing party should not served with the cover sheet. The committee asked Mr. Shea to revise Rule 10(a) to allow all parties to receive the cover sheet. Mr. Wikstrom suggested "formatted" be substituted for "created" in Rule 10(d) line 45.

The committee generally revisited the format of e-filed documents: (1) the committee questioned font sizes, (2) suggested one and a half inch spacing, instead of double spacing, and (3) revisited page limits versus a word count. The committee ultimately decided to retain the current "look" of the documents, i.e., to leave the double spacing requirement and the current specifications for margins for e-filing.

Mr. Shea noted the Administrative Office of the Courts is considering whether a party submitting a digitally signed paper should include a "wet" signature (or graphic signature) to prevent fraud. Because of time constraints, the committee decided to revisit e-filing at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:05 p.m. The next committee meeting will be held on Wednesday, July 27, 2005, at the Administrative Office of the Courts.