

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, October 26, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, James T. Blanch, Honorable David Nuffer, Virginia S. Smith, Paula Carr, Debora Threedy, Terrie T. McIntosh, Tom Lee, Cullen Battle, Leslie W. Slauch, David W. Scofield, Jonathan Hafen

EXCUSED: Honorable Anthony W. Schofield, R. Scott Waterfall, Todd M. Shaughnessy, Matty Branch, Lance Long, Honorable Anthony B. Quinn, Janet H. Smith, Honorable Lyle R. Anderson, Thomas R. Karrenberg

STAFF: Tim Shea, Trystan Smith, Matty Branch

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:09 p.m. Judge Nuffer moved to approve the minutes as submitted. Mr. Hafen seconded the motion. The Committee unanimously approved the minutes.

II. RULE 45. SUBPOENA & FORM 40. SUBPOENA.

Mr. Shea brought Rule 45 back to the Committee. Mr. Shea raised questions concerning the language in Rule 45 (c) (4), and Rule 45 (d) (3).

Currently, Rule 45 (c) (4) specifies that an order to compel production only protects a person “who is not a party or an officer of a party.” Mr. Battle moved that the phrase be replaced with “shall protect any person who is subject to a subpoena.” Mr. Hafen seconded the Motion, and it was unanimously approved.

Mr. Shea questioned whether the Committee should revise Rule 45 (d) (3) to make the word “information” consistent with the phrase “nature of the documents, communications, or things not produced.” Mr. Carney indicated that the same language is contained in Rule 26. The Committee commented that “information” may be a term of art and agreed not to revise the language.

Mr. Wikstrom then entertained questions and/or changes concerning the entirety of Rule 45. Mr. Wikstrom suggested a revision to Rule 45 (c) (3) (E). He suggested, “resulting from the

expert's study *that was* not made at the request of any party." The Committee agreed with the change, and asked that similar revisions be made to the form and notice for subpoenas.

Mr. Wikstrom commented that 10 days was too long for prior notice of issuance of a subpoena. Mr. Carney suggested 5 days. Mr. Battle seconded motion, and it was approved unanimously.

Mr. Wikstrom suggested the Committee replace the phrase "except that" from Rule 45 (c) (2) with "and" allowing the subsection to state, "shall comply with Rule 34(a)(b)1, *and* the person must be allowed at least 14 days to comply." The Committee unanimously approved the revision.

Mr. Battle asked for a clarification concerning what "payment of reasonable costs in advance" meant in subsection (b)(4). Did it mean in advance of delivery of documents, or in advance of preparation of documents? After some discussion, the Committee agreed the responding party could determine when in advance payment should be rendered.

Mr. Wikstrom suggested the Committee insert the deleted language in lines 126 - 141 in a separate subsection to allow a subpoenaed party to have all the bases to object in one subsection under Rule 45 (c). Mr. Wikstrom further suggested a revision to the language in line 140 to state, "the court may order appearance or production only upon specified conditions *or impose conditions*." The Committee agreed to add the subsection with the stated revision. Mr. Carney and Mr. Battle voted against the insertion of a new subsection.

Mr. Wikstrom suggested the Committee add the phrase "or harm" to subsection (c) (4) allowing the subsection to read, "from significant expense *or harm* resulting from the inspection and copying commanded." The Committee agreed with the change.

Mr. Hafen suggested the Committee attach a form declaration which complied with subsection (d). The Committee agreed.

Finally, the Committee's discussion shifted to the language in Form 40.

Mr. Slaugh suggested a revision to paragraph 1 to state: "You are commanded to copy the following documents and mail *or deliver* the copies" The Committee agreed with the change.

Mr. Wikstrom questioned if the language in paragraph 7 should be revised to require the responding party to serve notice of their objection to all parties in the litigation. The Committee agreed that a responding party should not be obligated to serve its objection to all parties, but suggested additional language should be included in paragraph 7 which required the requesting party, if it receives an objection, to notify the remaining parties.

Mr. Wikstrom asked Mr. Shea to incorporate the above revisions to Rule 45 and Form 40, and bring each back to the Committee.

III. RPC IMPACT ON URCP.

Mr. Wikstrom indicated the Supreme Court asked the Committee to review the amendments to the Rules of Professional Conduct and consider changes to the URCP it believes are needed in light of the Court's approval of the unbundling rules. Mr. Hafen and Ms. Threedy volunteered to review the amendments.

IV. ADJOURNMENT.

The meeting adjourned at 5:19 p.m. The next committee meeting will be held on Wednesday, November 16, 2005, at the Administrative Office of the Courts.

I:\My Documents\Committees\Civil Pro\Meeting Materials\Minutes\2005-10-26.wpd