

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 22, 2006
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, Terrie T. McIntosh, Cullen Battle, David W. Scofield, Leslie W. Slaugh, R. Scott Waterfall, Todd M. Shaughnessy, Honorable Anthony B. Quinn, Janet H. Smith, Honorable Lyle R. Anderson

EXCUSED: Honorable Anthony W. Schofield, Thomas R. Karrenberg, Debora Threedy, Tom Lee, Leslie W. Slaugh, Jonathan Hafen

STAFF: Tim Shea, Trystan Smith, Matty Branch

GUEST: Colin King

Mr. Wikstrom called the meeting to order at 4:00 p.m., at which time he introduced Chief Justice Durham. Justice Durham recognized Paula Carr for nearly ten years of service on the committee. On behalf of the committee, Mr. Wikstrom also expressed his thanks for Ms. Carr's service.

I. APPROVAL OF MINUTES.

Mr. Scofield moved to approve the minutes with a minor grammatical change suggested by Ms. Carr. The committee unanimously approved the minutes.

II. RULE 37. SPOILIATION OF EVIDENCE.

Mr. Wikstrom introduced Colin King. Mr. King addressed a suggested addition to Rule 37 providing sanctions for spoliation of evidence. The addition would be included as subsection (g) to Rule 37. The addition would allow a trial court to sanction a party and/or instruct the jury regarding an adverse inference, if a party destroys, conceals, alters, tampers or fails to preserve or produce evidence required to be disclosed under Rules 26(a) and 26(e)(1). Mr. King indicated the sanction amendment is supported by both the plaintiff and defense bars.

Mr. King acknowledged that trial courts had inherent authority to address spoliation. However, he indicated there was a need for a supplementation of that authority, and also a need to give trial courts and practitioners guidance. Mr. King noted there was no recognized tort for spoliation. Mr. King also indicated that he was not aware of any other states that have included

a spoliation sanction under Rule 37, even though these state court's cite to Rule 37 as providing trial courts with this inherent authority.

Mr. King made the distinction between the Court's inherent authority to address pre-litigation spoliation and spoliation after filing. Mr. King indicated that similar amendments will be proposed to the Jury Instruction committee and Evidence committee. He further indicated that there is a current bill introduced in the House (Bill 421) making it a crime if someone intentionally or knowingly alters, tampers or destroys evidence in the context of a civil suit.

Mr. Carney expressed concern that the duty to disclose under Rule 26(a) is a duty to disclose documents or tangible items which **support** a party's claims. He therefore suggested broader language such as "when there is a duty to preserve." Mr. King agreed the current language was too narrow and suggested the committee delete the reference to Rule 26(a). Judge Quinn indicated a trial court may have sufficient inherent power to address the issue. Mr. Shaughnessy indicated that subsection (f) may provide the Court with a sufficient mechanism to address the issue. Mr. Wikstrom suggested a change to Rule 34 indicating that the documents should not be altered, tampered, or destroyed tied to an amendment to subsection (f). The committee indicated it did not want to go to the extent of codifying the trial court's inherent authority to sanction.

Judge Quinn expressed further concern that any change to Rule 37 needs to be specific. He expressed concern that counsel would use the rule as a sword to set up a spoliation argument. A number of committee members expressed concern about "satellite litigation" in cases regarding spoliation.

Mr. Wikstrom suggested the committee further examine the spoliation sanction, but proceed in parallel with the Evidence committee. For future discussion, the committee adopted Judge Nuffer's suggested changes to the proposed amendment to Rule 37.

III. RULE 63. DISQUALIFICATION.

Mr. Shea suggested an amendment to Rule 63(b)(2) which would require a judge facing a pending motion to disqualify to do nothing until the motion is acted on. Mr. Shea suggested the phrase "or proceedings" should be added to the second clause of the subsection. Judge Quinn indicated that there was a recent ethical opinion concerning the issue. The committee asked to review the ethical opinion before further considering the amendment.

Mr. Wikstrom asked that the committee reconsider the amendment at the next meeting.

IV. URCP 7(f)(2) REGARDING FINALITY OF JUDGMENTS.

Mr. Blanch brought Rule 7(f)(2) to the committee. He expressed concern that practitioners may be confused about when a final judgment has been rendered. He suggested that the committee may want to adopt a more precise practice, similar to the federal rules, rendering a ruling to a judgment.

Mr. Wikstrom gauged the committee's interest in a revision to the rule. The committee expressed little interest in a revision.

V. RULE 8. WRITING UNDER PENALTY OF PERJURY.

Mr. Shea proposed to the committee an addition to Rule 8 which would allow a party to substitute a declaration under penalty of perjury whenever an affidavit is required or permitted. This would be similar to federal practice under a specific federal statute. The committee discussed the fact that the current Utah perjury statute would not apply to a declaration since it would not be a statement "under oath or affirmation." Under Utah law, a false declaration would only be a misdemeanor "false statement."

Mr. Wikstrom suggested the committee revisit the need to amend Rule 8 if and when Utah's perjury statute is revised.

VI. ADJOURNMENT.

The meeting adjourned at 5:32 p.m. The next committee meeting will be held on Wednesday, March 22, 2006, at the Administrative Office of the Courts.