

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, August 23, 2006
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, James T. Blanch, Cullen Battle, Barbara Townsend, Steven Marsden, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Debora Threedy, Lori Woffinden

EXCUSED: Francis M. Wikstrom, Todd M. Shaughnessy, David W. Scofield, Honorable David O. Nuffer, Janet H. Smith

STAFF: Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Shea called the meeting to order at 4:05 p.m. Judge Waterfall moved to approve the May 24, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. CERTIFICATES OF APPRECIATION. Ginger Smith and Tom Karrenberg.

Mr. Shea presented certificates of appreciation to Ginger Smith and Tom Karrenberg. The committee members also expressed their appreciation to Ms. Smith and Mr. Karrenberg for their service.

III. WELCOME NEW MEMBERS. Barbara Townsend and Milo Marsden.

Mr. Shea welcomed Ms. Townsend and Mr. Marsden to the committee.

IV. REVIEW COMMENTS TO DRAFT RULES. FINAL ACTION.

Mr. Shea brought the public comments to the proposed changes to Rules 45, 63, 74, and Form 40 to the committee. The committee received three comments from the public relating to Rule 45, but no comments regarding Rules 63 & 74, or Form 40.

The committee initially addressed Rule 63. Judge Anderson expressed concern that if an assigned judge could take no further action after filing of a Motion to Disqualify, a scenario could result where there would be no judge available to take emergency action in the case. Mr. Slaugh indicated the parties could address the emergency action with the presiding judge. Mr.

Marsden indicated subsection (a) addresses the concern because it allows any other judge in the district to hear the matter.

The committee had no further comment regarding Rule 74 or Form 40. Mr. Shea indicated he would prepare Rules 63 & 74 and Form 40 for final action.

As to Rule 45, Snell & Wilmer's Salt Lake office expressed concern the seven day advance notice requirement would complicate a parties' ability to obtain discovery until twenty-one days after notice was given.

Mr. Shea indicated to the committee Mr. Wikstrom's suggestion that the committee may want to consider further discussion of the proposed amendments to Rule 45. Mr. Battle suggested limiting the scope of the seven day advance notice to subpoenas to request documents and not all subpoenas. The committee generally expressed concern the advance notice requirement provided an excessive time period to receive discovery. Several committee members expressed interest in an advance notice requirement, but were unsure of the appropriate time period. Mr. Marsden suggested the committee incorporate the language in Rule 5 that requires delivery of the subpoena or actual notice. Mr. Carney agreed to circulate the proposed changes regarding delivery and actual notice to the plaintiff and defense personal injury bars.

Finally, the committee addressed the comment that the phrase "in advance" in subsection (c)(2)(B) was ambiguous in that it did not state "in advance" of what — producing, copying, or gathering the documents. Mr. Battle moved to delete the sentence in lines 82 & 83 from the subsection. After some discussion, the committee voted to remove the requirement allowing the subpoenaed party to receive, in advance, the reasonable costs of production or copying.

The committee agreed to revisit Rule 45 with the above revisions at the next meeting.

V. SANCTIONS. RULES 16, 35 AND 37.

Mr. Shea and Mr. Lee brought Rules 16, 35, and 37 back to the committee.

Mr. Lee analyzed why Rule 37 carved out an exception for Rule 35 physical examinations. His research indicated Rule 35 physical examinations had been excepted to protect a party's privacy interest and bodily integrity. The committee agreed Rule 37 should continue to exclude the contempt sanction for a party's failure to follow an order to undergo a Rule 35 physical examination.

Mr. Battle questioned what the term "violation of a duty" under Rule 37 (g) meant. Mr. Blanch indicated the committee initially included the word "duty" to reinforce the Court's inherent power to sanction. Mr. Blanch suggested a committee note indicating subsection (g) was not intended to create a substantive right. Ms. McIntosh suggested recasting subsection (g) in the negative to state, "Nothing in this rule shall preclude the Court's inherent power to sanction a party." The committee expressed their approval of Ms. McIntosh's suggestion. Mr. Shea indicated he would revise subsection (g) for further discussion at the next meeting.

VI. FINALITY OF JUDGMENTS. RULE 7.

The committee briefly discussed the Supreme Court's decision to grant a petition for writ of certiorari in the *Code v. Utah Dept. of Health* case. The committee agreed to discuss the proposed changes to Rule 7 at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 5:50 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, September 27, 2006, at the Administrative Office of the Courts.