

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 18, 2009
Administrative Office of the Courts
Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Honorable Derrek P. Pullan, Jonathan O. Hafen, Lori Woffinden, W. Cullen Battle, David W. Scofield, Terrie T. McIntosh, Leslie W. Slauch, Honorable Lyle R. Anderson, Honorable Anthony B. Quinn, Janet H. Smith, Francis J. Carney, Trystan B. Smith

ABSENT: Barbara L. Townsend, Honorable David O. Nuffer, Lincoln L. Davies, James T. Blanch

STAFF: Timothy M. Shea, Sammi V. Anderson

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the September 23, 2009 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. RULE 65C. FINAL RECOMMENDATIONS.

Mr. Wikstrom explained that Rule 65C had been published for comment. A motion to submit Rule 65C as amended was duly made and seconded, and unanimously approved.

III. RULE 64D. ANSWERS TO GARNISHMENT INTERROGATORIES.

Ms. Woffinden proposed that Rule 64D be amended to eliminate the need for filing Answers to Garnishment Interrogatories. She explained that the Clerk's Office is exploring ways to cut down on paperwork. The clerks do not review the Answers, and judges also generally do not, absent a challenge. Mr. Slauch requested that Answers to Garnishment Interrogatories be made part of any request for hearing. Mr. Wikstrom suggested amending Rule 64D(h)(1) to require that Answers be attached to any request for hearing. Ms. Woffinden moved for amendment of Rule 64D consistent with the Committee's discussion. The motion was duly seconded and unanimously approved.

IV. RULE 58B. SATISFACTION OF JUDGMENT.

Mr. Shea led a discussion regarding proposed changes to Rule 58B. The proposed

amendments were previously circulated among collections lawyers, who were generally supportive. Mr. Shea explained that the primary purpose of the proposed amendments is to delete unnecessary language and to simplify the process. The Committee discussed additional changes including language intended to address any distinction between judgment creditor and the judgment owner. The Committee's concern was that if a party is not the original judgment creditor, that the party be required to submit proof of ownership of the judgment along with the Satisfaction of Judgment. Mr. Wikstrom asked Mr. Shea to make the changes discussed and to bring it back for further action at the next meeting.

V. REPORT ON FALL FORUM DISCUSSION ON SIMPLIFIED RULES.

Judge Pullan and Messrs. Hafen, Carney and Blanch reported to the Committee on the Fall Forum discussion regarding simplifying the Rules of Civil Procedure. The group reported that attorneys generally liked the idea of proportionality and agreed that active early judicial involvement is helpful. Attorneys are skeptical that judicial involvement will occur, however, in light of heavy judicial case loads and staffing deficiencies. Mr. Hafen pointed out that the frustration was not because attorneys like the system as it currently exists. To the contrary, lawyers appear to agree that things need to be fixed – they are just not sure how to fix it and there is significant debate on how to go about this. Many suggested simply raising the small claim limit, including up to \$100,000. Judge Pullan noted that people seem to agree with managing different cases differently, that one set of rules does not necessarily fit all cases.

VI. DISCUSSION ON SIMPLIFIED RULES.

Ms. McIntosh questioned whether the Committee may be going beyond the core mission statement earlier articulated regarding rule changes. This prompted Committee discussion on the scope of the proposed simplifications. Ms. McIntosh talked about case law developed around existing language and noted the ramifications of unintended consequences. Mr. Shea challenged the Committee to go further and to simplify the language of the rules to make them more user-friendly. Judge Quinn stated that he favors stability in the rules, noting his observation that it takes considerable time for rule changes to trickle down to all practitioners. Judge Quinn noted it is sometimes preferable to have stable rules as opposed to perfect rules.

Mr. Slaugh asked about the increasing number of pro se litigants. Mr. Shea stated that part of his job is the communication of various laws, forms, explanations, etc., to pro se litigants - this informs his approach. Judge Pullan emphasized that the genesis of this process is the question of how to get access to courts for people that have only \$50,000 at stake - people to whom that is a lot of money. Judge Pullan emphasized that tinkering will not get it done, that discovery is too expensive even with the proposed changes. Judge Pullan stated that we need a set of rules targeted at that case type. The Committee discussed a pilot project to test the simplified rules. Mr. Wikstrom pointed out that a problem with the pilot project is that lawyers and parties would be subject to one set of rules in one forum and a different set of rules elsewhere. Mr. Slaugh advocated cleaning up the language now to reinforce substantive changes and to have it all done at once.

Mr. Wikstrom asked the Committee for thoughts regarding the model that is driving the changes now: Front-end loaded disclosure of documents and witnesses. This will be the respective parties' cases in chief. Disclosures will be followed by a limited quantity and time frame for discovery. If it is a big, complex case, or if a party can convince the judge otherwise, parties will opt out of the simplified rules and engage in traditional discovery. If opting out, lawyers will have to certify to the court that they have reviewed the discovery budget with the client and the client is on board with the fees and costs. Mr. Wikstrom argued that clients and the market will enforce this mechanism. Judge Quinn predicted that most cases will simply opt out. Mr. Slauch disagreed. His sense is that people agree to discovery because they think the judge will allow it, even if they fight it. Mr. Slauch stated that under these changes, the default as to what constitutes adequate discovery will be different - attorneys will be more likely to refuse anything beyond the core disclosures and limited discovery because they believe the judge will back them up. Judge Pullan described the cultural shift as from a scenario where a party gets everything they can show is reasonably likely to lead to anything, to one where a party gets nothing beyond up-front disclosures, unless they can show a need and that the information sought is proportional. Mr. Battle noted the practitioner's preference for gradual change. Judge Pullan said the model is right and that it will effect a cultural change. Mr. Wikstrom's personal feeling is the system is broken and that it has created a whole generation of lawyers that know nothing more than how to discover. As a result only wealthy parties get access to justice. Mr. Wikstrom emphasized that at a minimum, the changes would require a strong consensus of this Committee. Mr. Wikstrom sought to confirm that consensus exists. The Committee expressed renewed willingness to proceed.

The Committee discussed specific proposed changes. It expressed consensus to eliminate the 10 day summons. Mr. Shea led a discussion regarding changes to the Rule 8 pleading requirements. The Committee expressed the desire to incorporate a notice-plus pleading standard to complement the front-end initial disclosures anticipated under the simplified rules. The idea is that the Complaint and Answer contain sufficient detail regarding the factual and legal bases for the claims and defenses such that, when considered in conjunction with the disclosures, parties can generally appraise the other side's case without need of significant additional discovery. Judge Quinn and Mr. Wikstrom suggested that the amended Rule 8 include a Committee Note to clarify that the purpose of the amendment is not to impose technical pleading requirements (and not to encourage motions to dismiss), but to alleviate the need for extensive discovery. The Committee also discussed proposed changes regarding expert disclosures, including their application to treating physicians. Mr. Carney suggested that the amended rule track Federal Rule 26 as it pertains to treating physicians. Mr. Wikstrom asked Mr. Shea to make the changes suggested by the Committee and to circulate a clean copy of the amended rule.

VI. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, January 27, 2010, at the Administrative Office of the Courts.