

# MINUTES

## UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 27, 2010  
Administrative Office of the Courts

**Francis M. Wikstrom, Presiding**

PRESENT: Francis M. Wikstrom, Trystan B. Smith, Barbara L. Townsend, Terrie T. McIntosh, Lori Woffinden, Steven Marsden, Janet B. Smith, Honorable David O. Neuffer, James T. Blanch, Thomas R. Lee, Lincoln L. Davies, W. Cullen Battle

TELEPHONE: Honorable Lyle R. Anderson, Honorable Derrek P. Pullan, Leslie W. Slaugh

EXCUSED: Honorable Anthony B. Quinn, Francis J. Carney, Jonathan O. Hafen

STAFF: Timothy M. Shea, Sammi V. Anderson

### **I. INTRODUCTIONS.**

Pursuant to Utah Supreme Court Rule 11-101(4), the following Committee Members formally introduced themselves: Francis M. Wikstrom, Trystan B. Smith, Terrie T. McIntosh, Janet B. Smith, Barbara L. Townsend, W. Cullen Battle, Thomas Lee, James T. Blanch, Lori Woffinden, Honorable Lyle R. Anderson, Leslie W. Slaugh, Steven Marsden, Honorable Derrek P. Pullan and Lincoln L. Davies.

### **II. APPROVAL OF MINUTES.**

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the November 18, 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.

### **III. RULES 64D AND 64E. DEADLINE FOR OBJECTION TO WRITS.**

Prior versions of the Rules contained a deadline by which a hearing was required after a judgment debtor filed an objection to a writ. Mr. Shea suggested adding to Rules 64D (Writ of Garnishment) and 64E (Writ of Execution) a deadline requiring a hearing within 14 days. The motion was duly made, seconded, and unanimously approved.

### **IV. RULE 108. OBJECTION TO COMMISSIONER'S RECOMMENDATION.**

Mr. Shea explained that the proposed rules originated with the commissioners of the Second District Court and that the Judicial Council has now suggested it be considered as a rule of civil procedure. Mr. Shea led the discussion. Judge Neuffer pointed out that the procedure to object to a commissioner's recommendation must require the objector to do some work and to identify the specific basis for the objection. Otherwise, every party would object every time and it would be difficult for the trial court to ascertain the grounds for the challenge. Mr. Lee and other Committee members expressed concern that if a party requests an evidentiary hearing, one should be held and it should be mandatory. Ms. Townsend, a former family law practitioner, noted that proffers, as opposed to evidentiary hearings, are necessary as a function of limited judicial resources. If hearings are permitted, all parties will request them. Ms. Townsend explained that proffers are generally used in temporary order situations, such as temporary custody or support orders. Full blown evidentiary hearings for these matters are impractical.

Ms. Townsend recommended that the Committee invite family law practitioners that frequently face these issues to review the proposed amendments and to provide some practical feedback. Mr. Wikstrom and the Committee agreed that practitioner feedback would be useful. Mr. Shea agreed to make the edits discussed by the Committee and to circulate the potential amendments among the interested parties.

## **V. RULE 58(b). SATISFACTION OF JUDGMENT.**

Mr. Shea led a discussion regarding changes to the rule. The amendment was intended to clarify the issue of ownership of the judgment, including that if the owner is not the original judgment creditor, proof of ownership must be filed. Mr. Shea's changes are based on the Committee's discussion at the November 18, 2009 meeting. The Committee discussed additional changes and again expressed concern regarding the "reasonable time" language. The Committee decided to eliminate the "reasonable time" language. A motion to approve Rule 58B as amended was seconded, and the motion carried. The proposal will be published for comment.

## **VI. SIMPLIFIED RULES OF CIVIL PROCEDURE.**

**Rule 1.** Mr. Lee opined that the supremacy clause language ("All laws in conflict with these rules are of no force or effect.") in Rule 1, lines 8-9 (para. B), should be removed. The Committee agreed. That sentence to be removed.

**Rule 3.** Mr. Lee pointed out that rules of civil procedure cannot confer jurisdiction, and neither can filing a complaint. The Committee agreed. Changes to be made. Mr. Wikstrom noted that the big change in Rule 3 is the elimination of the 10 day summons.

**Rule 4.** Mr. Lee noted the absence of language in (c)(2) noting that judgment by default can be entered if complaint not answered in writing. The Committee agreed language to this effect should be included in the Summons. Ms. Smith raised questions regarding the "suitable age and discretion" language and what constitutes effective service thereunder. The Committee discussed the requirements that must be met to effect service if person refuses to accept service

and further discussed what persons can be served to effect service. With regard to service on a minor, the Committee decided to retain the provision permitting serving the person with whom the minor resides if the parents cannot be found within the state. Mr. Lee proposed changes to language addressing service on corporation. Judge Pullan asked if LLC's will be served in the same manner as corporations and, if so, whether language to that effect should be included. Mr. Lee pointed out that (d)(1)(E) addressed "unincorporated associations...subject to suit under a common name..." The Committee discussed whether to specifically include LLC's, LC's, LLP's, etc, to make it more express than "unincorporated association." Mr. Slauch noted the new changes in Federal Rules do not address this issue.

**Rule 8.** Mr. Wikstrom led the discussion regarding more particularized fact pleading and the compromise language settled upon at the last meeting. Mr. Lee pointed out the problems with getting too close to old, technical code pleading requirements, and that specific times, places, people and events may not always be material to the action. The Committee renewed the concern that a cottage industry in motions to dismiss not be encouraged. Ms. Smith suggested that the language in the rule be illustrative, rather than mandatory. The Committee discussed the alternative of solving the specificity problem with the disclosures, rather than the pleading requirements. Judge Pullan noted that if the material facts come out early through disclosures, perhaps changes to the pleading requirements are less germane. Mr. Wikstrom proposed changes based upon this discussion and the Committee approved. Mr. Lee offered to draft some language for the Advisory Committee Note.

**Rule 16.** The Committee discussed whether parties would be mandated to attend pre-trial conferences. Judge Neuffer suggested leaving it to the Court's discretion whether to require parties to attend. Mr. Shea indicated that Rule 16 is intended to apply to conferences generally, not to any one type specifically.

**Rule 26.** The Committee discussed several items regarding Rule 26. These items included: the standard governing the relevance of information to be disclosed under the initial disclosures and subsequent discovery, issues that could arise where a party knows the witnesses they will call but do not have access to those witnesses, the provision that deals with statements or admissions regarding subject matter of the action, proportionality and how it impacts the disclosures and additional discovery, the factors to be considered in reaching a conclusion as to what additional discovery is warranted under a proportionality analysis, protective orders and cost-shifting provisions. Judge Pullan agreed to draft an advisory note on the relevance standard. Mr. Shea indicated he would make the changes discussed and circulate the revisions in advance of the next meeting.

**Rule 35.** Mr. Wikstrom led a brief discussion regarding physical examinations. The Committee determined that if the examiner is going to testify, the examiner will have to be disclosed under the expert disclosure requirements.

## **VII. ADJOURNMENT.**

The meeting adjourned at 6:00 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, February 24, 2010, at the Administrative Office of the Courts.