

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

January 25, 2012

PRESENT: Francis M. Wikstrom, Chair, Lincoln L. Davies, Honorable John Baxter, Barbara L. Townsend, Terrie T. McIntosh, W. Cullen Battle, Leslie W. Slauch, Francis J. Carney, Honorable David O. Nuffer, Honorable Lyle Anderson, Robert J. Shelby, James T. Blanch, Honorable Kate Toomey, David Moore, Honorable Derek P. Pullan, Jonathan O. Hafen

PHONE: Lori Woffinden, David W. Scofield

EXCUSED: Janet H. Smith, Trystan B. Smith

STAFF: Timothy Shea, Sammi V. Anderson, Diane Abegglen

I. INTRODUCTION OF COMMITTEE MEMBERS.

Committee members introduced themselves to the committee as required by the rules of the Utah Supreme Court.

II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the November 30, 2011 minutes. The committee unanimously approved the minutes.

III. RULE 83. VEXATIOUS LITIGANTS.

Judge Toomey presented Rule 83 as proposed by the Board of District Court Judges. The Board's desire is that the Rule be approved. Prior to the committee meeting, Mr. Shea circulated a memo addressing the comments and responses to the Rule posted by members of the Bar. Messrs. Slauch and Battle discussed the concern that the rule as written may inadvertently capture some institutional litigants, *e.g.*, collections agencies. Messrs. Slauch and Battle expressed the concern that these parties could fall within the definition of having lost a certain number of cases, even though the party had also won many cases in the same time frame, just by virtue of the party having a large number of actions in the legal system in any time frame. The committee discussed ensuring that the court has discretion to address any such situation. Motion to include the words "The Court may find a person to be a vexatious litigant if the person...." in paragraph a(1). The committee approved the motion unanimously. Judge Pullan questioned what is driving the rule and why we cannot simply trust judges to enforce Rule 11. Judge Toomey noted

that the Board's originating concern was repeated lawsuits against trial judges, but opined that the rule could apply to other situations as well. Judge Pullan inquired as to whether we really need the rule. Judge Nuffer discussed facing similar problems at the federal level. The federal courts have no applicable rule but there is a very developed body of case law, which does not exist at the state level. Mr. Shea noted his opinion that the district court judges are simply seeking guidance because they are empowered through other means to act. A motion was made to approve the Rule as amended. The committee passed the motion with two dissenting votes.

IV. RULE 58A(d).

The Supreme Court requested that the committee review the potential due process implications of the interplay between 58A(d) "[a] copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by this requirement" and Rule 4 of the Rules of Appellate Procedure, which provides a fixed time to appeal a judgment triggered by the date judgment is entered. The Court also asked the committee to consider whether Rule 60(b) or any other provisions of the civil rules vindicate due process where notice of entry of judgment is not provided. The concern appears to be that the losing party, who bears the burden to timely appeal, in some ways is at the mercy of the prevailing party, who is responsible to provide notice of the entry of the judgment, and entry of the judgment triggers the time running for the appeal. Mr. Shea led a discussion concerning the history of amendments and proposed amendments to this rule and others addressing this issue. Mr. Wikstrom suggested removing the above-cited clause from Rule 5 and tinkering with Rule 60(b) to identify failure to serve a copy of the judgment as grounds for an excusable neglect extension under Rule 60(b). The committee discussed whether the appropriate change should really go to Appellate Rule 4, which governs the deadline for filing an appeal. The committee discussed the nature of the Court's request as being one for the committee's reasoned consideration, not necessarily a change to the Rules of Civil Procedure. Judge Pullan queried whether the committee is looking for a solution where it doesn't fully understand the problem. Mr. Wikstrom tabled the issue until next month's meeting for further discussion and consideration.

V. RULE 37. SANCTION FOR DENIAL OF MOTIONS.

Mr. Carney led a discussion regarding earlier changes/consolidation to Rule 37 and a potential omission. In subparagraph (d), line 61, it appears the committee has left out the word "denied" and, in doing so unintentionally removed the power of a court to award attorney's fees as a sanction where a motion to compel is denied. Mr. Carney moved to insert the words "or denied" to correct the inadvertent omission. The committee unanimously approved the motion.

VI. RULE 26(a)(4)(a).

Rule 26(a)(4)(a) references a witness who will testify under Rules of Evidence 702 or 703. It should also say Rule 705 (as it did originally) but does not due to a typographical error during the earlier revisions to the rules. There was a motion to correct the error by adding “705” to the third line of sub-paragraph (a)(4)(A). The motion was unanimously approved.

VII. CONFLICT BETWEEN RULE 11(d) and RULE 26(e).

Rule 11(d) states that it does not apply to disclosures and discovery requests, responses, objections and motions that are the subject to the provisions of Rules 26 through 37. However, Rule 26(e) states that an attorney’s signature is a certification under Rule 11, which subjects the attorney to the provisions of Rule 11. Ms. McIntosh moved to strike the language in 11(d) as inconsistent. This gives a practitioner the ability to seek relief under Rule 11 or Rule 37. The committee unanimously approved the motion.

VIII. RULE 5.

Judge Shaughnessy proposed adding language to Rule 5 requiring that each pleading filed with a court have an attached Certificate of Service. Judge Toomey led the discussion on the proposed changes. The Board of District Judges has recommended that the attached Certificate of Service also identify the name of the document, the date and manner in which it was served and the parties upon whom it was served in that manner. This is proposed because litigants have apparently been filing unattached, stand-alone Certificates of Service that refer to a host of different pleadings filed/served, and litigants sometimes do not name the specific pleading in the Certificate of Service. This creates problems if the Certificate of Service gets separated in the court’s file. It is then difficult to decipher what pleading was filed and served on what date and in what fashion. Judge Toomey and Mr. Battle proposed adding a subsection 5(f) entitled “Certificate of Service,” requiring the name of the pleading served, the manner in which it was served and the party upon whom it was served. The motion was unanimously approved.

IX. LOCAL SUPPLEMENTAL RULE 10-1-306.

Judge Toomey advised the committee that the Fourth District has adopted the Rule on an interim basis. Half of the Second District has also adopted the Rule. The Board of District Judges has recommended that the Rule be ratified by the Council and considered for statewide adoption.

X. RULE 26.2.

The Committee discussed its consensus that specialty rule 26.2 is applicable as of November 1, 2011, as part of the new rules. The committee will include this in an advisory note to the Rule.

XI. ADJOURNMENT.

The meeting adjourned at 5:45 p.m. The next meeting will be held on February 22, 2012 at 4:00 p.m. at the Administrative Office of the Courts.