

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

SEPTEMBER 26, 2012

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Lincoln L. Davies, Terrie T. McIntosh, Leslie W. Slaugh, Janet H. Smith, Francis J. Carney, W. Cullen Battle, Honorable Kate Toomey, Honorable Robert J. Shelby, Honorable James T. Blanch, David W. Scofield, Barbara L. Townsend, Honorable Todd W. Shaughnessy, Jonathan O. Hafen

PHONE: Honorable Lyle R. Anderson, Professor David Moore

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

GUESTS: Michael Zimmerman, Debra Moore

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the May 23, 2012 minutes. The committee unanimously approved the minutes.

II. RULE 26.2 REVISIONS.

Mr. Carney recapped for the committee the revisions to Rule 26.2, which were intended to clarify permissible uses for social security numbers and other personal information. The revisions have been out for public comment and no substantive comments were received. A motion to approve the revisions was made and the committee unanimously approved the motion.

III. SMALL CLAIMS PROCEDURE RULE 3.

Mr. Shea discussed proposed revisions to Small Claims Procedure Rule 3. The justice courts have asked that the rule be revised to require that service be effectuated pursuant to Rule 4 of the Rules of Civil Procedure. Mr. Slaugh clarified some issues regarding alternative service methods now available pursuant to Rule 4. The committee voted unanimously to send the proposed revisions out for public comment.

IV. COURT GENERATED DEADLINE NOTICES.

Debra Moore, Court Administrator, joined the committee to discuss court-generated deadline notices. The notices are sent from the court and designed to provide estimated completion dates to parties and counsel in light of the new,

simplified rules of discovery. Ms. Moore explained the evolution of the process for devising and sending notices, as well as the way dates are calculated, *ie*, always using outside dates (holidays, weekends, etc.) and including 3 days mailing. The judges on the committee emphasized the need to have deadlines, especially for fact discovery, in the court file. Ms. Moore also explained the desire to educate and remind the Bar that the new rules are in effect and may have a dramatic impact on the timing of the case.

The committee considered a number of different options to address ambiguity in the dates and potential confusion among the Bar when they receive a notice that may contain slightly different dates than required by the rules, including the option that the “notice” become an Order by the court, informing parties that these dates will govern the case, unless stipulation or motion to the court. The committee next discussed keying all dates in the notice from the filing of the Answer. Once the Answer is filed, dates can be calculated with a higher degree of precision. The notice will still function only as a notice, as opposed to an Order, so that parties can stipulate around the dates, if they so elect, without seeking relief from the court. Three days mailing can be eliminated because due dates would be keyed from date of filing, as opposed to service.

Judge Blanch agreed to revise the notice for further discussion at the next meeting. The committee also approved a motion to change the word "service" on line 30 of Rule 26 to "filing".

V. RULE 58A.

Mr. Battle led a discussion concerning the potential due process implications associated with notice of the judgment not being served and a party’s consequent failure to timely appeal the judgment. Mr. Battle described the history of discussions with the Appellate Rules committee and the conclusion that a resolution would have to be found within the Rules of Civil Procedure. Mr. Battle explained the reasoning behind the proposed changes and raised additional questions for the committee's consideration, including whether the judgment should be vacated in its entirety or only “re-entered” with respect to the aggrieved party. Vacation of the judgment could affect other parties and priority of judgment liens, among other things. Judge Shaughnessy opined that the judgment should not be vacated under these circumstances because vacation would have all sorts of untoward consequences that would extend beyond the aggrieved party's harm.

Mr. Battle posed the question whether there should be a hard deadline by which a motion seeking relief from the judgment has to be made. Also whether the ability to seek relief should include only the right to appeal, or to make post-trial motions? The committee discussed that the narrowest possible solution would be to allow parties who lacked notice, but could show they had exercised due diligence, to seek re-entry of the judgment only as to them and only for purposes of the right to appeal or for such other purposes as the court may order.

Mr. Wikstrom proposed tabling the action item until next month so that committee members can further consider the various issues associated with the proposed amendment. The committee agreed.

VI. RULE 37.

Judge Shaughnessy directed the Committee's attention to Rule 37(e)(2), which makes available particular sanctions for the failure to follow Court's orders. Subpart (h) establishes the sanctions available for failure to disclose evidence, but, Judge Shaughnessy pointed out, the last sentence allows a court to consider imposing a (e)(2) sanction for failure to disclose. Judge Shaughnessy's concern is that the (e)(2) sanctions are really intended for situations of bad faith and/or prejudice. If a party fails to turn over a document that is helpful to their case, the sanction should only be exclusion of the evidence, not the more severe sanctions such as stricken pleadings or termination of the case. That being said, where a party fails to turn over a document that hurts their case, a sanction of excluding the document is not sufficient because it only helps the violating party. In that situation, the court should be able to enter (e)(2) sanctions.

The committee discussed splitting subsection (h) into a sub-provision that governs disclosures of information that is helpful to the party's case, *e.g.*, initial disclosures, and a sub-provision that governs a party's failure to respond to the other side's discovery request and/or to supplement previous requests. The sanction for the former is exclusion, for the latter, the sanctions available under (e)(2).

VII. RULE 5(e).

Mr. Scofield explained that the state e-filing system does not affix the date to the filed pleading. This is inconsistent with rule, which states "the filing shall be noted on the paper." The committee voted no action was necessary after Mr. Shea explained that the paper does contain the filing date.

VIII. RULE 7(c)(1).

Mr. Scofield raised an issue with respect to requests for overlength memoranda, noting an inconsistency between 7(c)(2) and 7(c)(1). The committee decided that no action was necessary.

IX. ADJOURNMENT.

The meeting adjourned at 6:05 pm. The next meeting will be held on October 24, 2012 at 4:00 p.m. at the Administrative Office of the Courts.