

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 29, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Todd M. Shaughnessy, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Thomas R. Lee, Judge R. Scott Waterfall, Cullen Battle, Barbara Townsend, Leslie W. Slaugh, Honorable Anthony W. Schofield

EXCUSED: Honorable Anthony B. Quinn, Francis J. Carney, Jonathan Hafen, Debora Threedy, David W. Scofield, Steven Marsden, Lori Woffinden

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:04 p.m. Mr. Slaugh moved to approve the October 25, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. COMMENTS TO RULES. Rules 5, 17, 74, 75.

Mr. Shea brought the comments to Rules 5, 17, 74, and 75 back to the committee. Mr. Shea indicated there were few substantive comments with the exception of whether Rule 74 should be further amended to require leave of court to withdraw if the preparation of an order is pending. Mr. Wikstrom indicated that he read Rule 74 to currently address this issue.

Ms. Smith moved to approve the rules as drafted. The committee unanimously approved the changes to the subject rules.

III. E-DISCOVERY. RULES 16, 26, 33, 34, 37, 45.

Judge Nuffer brought the e-discovery rules back to the committee and provided us with an overview and history of the federal e-discovery rules. He also elicited comments from the other members of the e-discovery subcommittee.

Judge Nuffer initially discussed the planning stages of e-discovery under Rules 16 and 26. The e-discovery subcommittee suggested parroting the federal amendments to Rules 16 and 26 with the exception of adding "preservation" to Rule 16(b)(6) and Rule 26(f)(2) (C) and (D). The subcommittee also suggested adding "electronically stored information" to the categories of items to be produced in a party's initial disclosures under Rule 26(a)(1)(B).

Mr. Battle discussed the scope and safe harbor rules of e-discovery under Rules 26(b)(2)(B) and Rule 37(f). Mr. Battle discussed the advisability of defining the phrase “electronically stored information.” The subcommittee indicated it was unnecessary.

Mr. Battle further discussed the addition of Rule 26(b)(2) which is a deviation from the federal rules. Rule 26(b)(2) would add a requirement for specificity in a claim of inaccessibility. In the federal rule, the only requirement is that a party identify that the source is not reasonably accessible. The subcommittee’s proposal is that the party “shall expressly make the claim that the source is not reasonably accessible, describing the source, the reasons it is not reasonably accessible and the nature of the information not provided in a manner that will enable other parties to assess the claim.”

Mr. Lee suggested a revision to the proposed language stating: The parties shall expressly make “any” claim that the source is not reasonably accessible the reasons it is not reasonably accessible and the nature of the information not provided “and other information necessary” that will enable other parties to assess the claim.

The committee discussed whether it was necessary to deviate from the federal rule and if it is necessary for a party to specify a claim of inaccessibility. Mr. Lee moved to adopt his proposed amendment. The committee approved Mr. Lee’s proposed amendment to Rule 26(b)(2).

Mr. Battle discussed Rule 37(g) with the committee. Mr. Battle expressed his concern regarding the last sentence of Rule 37(g) which states, “Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Mr. Lee questioned whether this provision was necessary. Mr. Shaughnessy suggested the provision is designed to protect companies who routinely tape over or destroy electronically stored information. Ms. McIntosh indicated it was a huge cost for companies to maintain and keep back-up tapes with electronically stored information. The committee discussed the mechanics of how tapes with electronically stored information are created and maintained. The subcommittee suggested it was preferable to adopt the changes in the federal rules to follow the case law adopted by federal courts.

Mr. Shaughnessy discussed Rules 33 and 34 with the committee. The subcommittee suggested the committee adopt the federal amendments to Rules 33 and 34. The committee did not suggest any revision to the proposed changes.

Judge Nuffer discussed claims of privilege under Rule 26(b)(5)(A) and (B). The subcommittee suggested the committee adopt the federal language proposed in Rule 26(b)(5) (B). The federal rule change did not anticipate inadvertent disclosures. Under subsection (B), a party may produce material without reviewing the production for privilege.

Ms. Townsend discussed e-discovery under Rule 45. The federal rule changes incorporated “electronically stored information” where applicable, and addressed e-discovery

where applicable. Ms. Townsend suggested the committee adopt the federal language revising Rule 45. Mr. Shea recommended the committee incorporate the e-discovery changes to Rule 45 and republish Rule 45 for public comment. The committee agreed.

Judge Nuffer moved the committee adopt the proposed e-discovery rules with the changes suggested above. The committee unanimously approved the motion.

IV. RULE 78. REQUIREMENT TO INFORM COURT OF ADDRESS.

Mr. Shea drafted the proposed Rule 78 at the suggestion of Second District Judge Rodney Page who indicated his concern regarding a trial court's ability to dismiss a suit because of a party's failure to maintain current contact information. Mr. Shea suggested language requiring a party or a party's lawyer to provide to the court clerk the party's address, e-mail address, and phone number. The rule would further require a party to inform the court clerk of a change in that party's contact information.

Mr. Slaugh questioned the need for Rule 78. Mr. Slaugh suggested the Court had the inherent authority to dismiss a suit if a party failed to maintain contact information or failed to attend a hearing. Judge Nuffer recommended the committee consider an amendment to Rule 10 to require a change of address to be updated. Mr. Wikstrom suggested a separate rule for pro se parties which would require the parties to provide and update their contact information.

Judge Schofield volunteered to contact Judge Page to discuss his concerns and report back to the committee.

V. ADJOURNMENT.

The meeting adjourned at 5:36 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, January 24, 2007, at the Administrative Office of the Courts.