

Agenda

Advisory Committee on Rules of Civil Procedure

September 22, 1999
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Welcome and Approval of Minutes.	Fran Wikstrom
"SLAPP" suits.	Tim Shea
Rule 4. Service.	Perrin Love
Definition of "courthouse" in counties with multiple district court sites.	Tim Shea
Rule 45(a)(1)(D).	Tim Shea
Rule 64D.	Peggy Gentles
Earnest money agreements in small claims cases.	Tim Shea
Rule 16. Notice to pro se litigants	Tim Shea
Rule 3	Tim Shea

Meeting Schedule

October 27
December 1
January 26, 2000
February 23
March 22
April 26
May 24
September 27
October 25
November 29 (5th Wednesday)
December: No meeting

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, September 22, 1999
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Honorable Ronald N. Boyce, Honorable Anthony B. Quinn, Tom Karrenberg, Terrie T. McIntosh, Virginia Smith, Glenn Hanni, James R. Soper, Cullen Battle, Leslie Slaugh, Paula Carr, Todd Shaughnessy, Perrin Love

EXCUSED: Mary Anne Q. Wood, Honorable K. L. McIff

STAFF: Tim Shea, Peggy Gentles, Marilyn Branch, James Blanch

I. WELCOME AND APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom welcomed Todd Shaughnessy as a new member of the Committee and introduced and welcomed James Blanch as the new secretary to the Committee. Tom Karrenberg moved to approve the minutes from the May 26, 1999 meeting. Cullen Battle seconded the motion. The minutes were approved without amendment.

II. "SLAPP" SUITS.

Tim Shea reviewed for the Committee a request from the legislature to provide comments and recommendation regarding SB 27, which created a broad affirmative defense for all actions filed in response to participation in the process of government. The legislature had merely asked whether the proposed legislation would overlap with Rule 11 in an ambiguous fashion, and Mr. Shea stated that he did not believe that would present a problem. However, Mr. Shea identified three additional potential problems with bill, which he had previously described in his September 9, 1999 memorandum to the Committee: (1) Although couched in procedural terms, the bill appears to create a very broad immunity defense for activities involving political participation that may go beyond what the bill's sponsors intended. (2) There appears to be a significant difference between the pleading required to raise the defense of participation in the process of government and the proof required to prevail on the defense. (3) The bill creates procedural problems because the defense requires inherently factual determinations, but the bill specifies that courts should consider the defense through motions for judgment on the pleadings.

Judge Boyce noted that the potential reach of the bill could be excessively broad and could interfere with the operation of the governmental immunity act. As an example, Judge Boyce

noted that the defense would apply in virtually any false arrest case because police officers' employment, by its very nature, involves participation in the process of government. James Soper and Leslie Slaugh also had negative reactions to the bill based on the fear that it is vague and that it could, as drafted, screen out numerous meritorious claims. Tom Karrenberg noted that the language of the statute was imprecise. Judge Boyce expressed a concern that the statute could have the effect of deflecting claims into federal court in the guise of § 1983 actions due to fear that the political participation defense would screen the claims out of state court. Messrs. Soper, Slaugh, and Karrenberg observed that the legislature could address the same concerns by strengthening existing substantive claims, or creating new causes of action, for abuse of process or malicious prosecution.

Mr. Soper asked whether bill would require a 2/3 vote to pass because of its impact on procedural rules. Mr. Shea responded that the statute would probably fall outside of that constitutional requirement.

The Committee agreed Mr. Wikstrom and Mr. Shea would convey the concerns of the Committee.

III. RULE 4. SERVICE.

Perrin Love reminded the Committee of previous discussions the Committee has had regarding request from the Salt Lake County Sheriff's Office to amend Rule 4 to permit service by mail. The Committee had previously discussed whether to amend Rule 4 to include waiver of service provisions similar to those in the federal rules. The Committee had been concerned (1) that nature of state filings was such that most parties would not use the provisions, and (2) that the federal timing provisions might be too long for state court.

Mr. Love stated that the Sheriff's office has asked the Committee to revisit the issue. Judge Boyce suggested that an alternative method of addressing the Sheriff's concern would be for the courts or the legislature to authorize the Sheriff to promulgate regulations limiting the circumstances in which parties could request the Sheriff to serve process. In circumstances other than those specified, parties would be required to use private process servers. Mr. Slaugh stated that he believed the idea of a waiver is a good one if the time frames are tightened up.

Mr. Wikstrom asked the Committee to comment on Oregon's approach to the issue, which provides that service is complete if a party receives service by registered or certified mail and signs the receipt. Cullen Battle stated that he believed the incentive structure in the current federal provisions (i.e., you get extra time to respond if you waive service) is desirable and should be considered for the state rules.

Judge Boyce observed that the workload Sheriffs face in serving process is a serious concern and reiterated his proposal. Tim Shea stated that he was not certain that the courts could permit the Sheriff to promulgate regulations. It might need to be legislative action.

Mr. Wikstrom proposed that the rule could be changed to permit service by first-class mail, but only permit a default judgment to be entered if service has been made personally.

Paula Carr noted that 80% of process in Second District is served by private process servers and questioned whether the concern the Committee has been asked to address is serious. Judge Quinn agreed and observed that collection agencies usually have their own process servers on staff, whom they use as a profit center.

Judge Boyce proposed that the Committee ask Sheriff Kennard to address the Committee and explain the problem more specifically, with appropriate statistics. Tim Shea will invite someone from the Sheriff's office to make such a presentation.

Based on the Committee's stated interests, Perrin Love will prepare two alternative draft rules--one permitting service by mail and the other permitting waiver of service. Todd Shaughnessy will assist him.

IV. DEFINITIONS OF "COURTHOUSE" IN COUNTIES WITH MULTIPLE DISTRICT COURT SITES.

Tim Shea outlined concerns that David Nuffer had expressed regarding confusion that occurs regarding the location of the "courthouse" in certain rural counties. The Committee declined to make any recommendations regarding the issue.

V. RULE 45(a)(1)(D).

Tom Karrenberg moved to adopt Tim Shea's proposed amendment clarifying the language of Rule 45(a)(1)(D). The proposed amendment deletes the language "Form 30 in the Appendix of Forms" from the rule and replaces it with the language "the subpoena form appended". Judge Boyce seconded the motion, and the motion was passed by the Committee unanimously.

VI. RULE 64D.

Tim Shea described a proposal to amend Rule 64D to permit employers served with garnishment proposals to deduct the garnishment fee from the amount garnished rather than requiring a check for the fee to be served with the writ. Mr. Shea acknowledged that several problems with the proposal would emerge in a variety of potential situations. The Committee declined to take any action on the proposal.

Peggy Gentles and Paula Carr described another proposed change to Rule 64D to permit checks for garnished funds to be delivered directly to the plaintiff rather than being sent through the court. This change was originally proposed in a draft circulated by Peggy Gentles to the Committee under a memorandum dated September 2, 1999. The proposed amendment appeared at lines 28-31 on page 5 of the draft. Leslie Slaugh moved (1) to amend the first portion of underlined text in lines 30-31 of the proposed amendment to read "then the plaintiff shall be entitled to the Property Subject to Garnishment", and (2) to approve the proposed rule change subject to this amendment. Tom Karrenberg seconded Mr. Slaugh's motion. The motion passed unanimously.

Mr. Slaugh stated his belief that Rule 64D as a whole should be redrafted so that it refers to "creditors" and "debtors" rather than "plaintiffs" and "defendants." Mr. Slaugh agreed to

prepare proposed revisions to Rule 64D along these lines for future consideration by the Committee.

VII. EARNEST MONEY AGREEMENTS IN SMALL CLAIMS CASES.

The Committee declined to take any action on the issues described in Tim Shea's September 10, 1999 memorandum to the Committee regarding earnest money agreements in small claims cases. The Committee will consider at a later date whether it is the appropriate body to address issues relating to Small Claims Court.

VIII. NOTICE TO PRO SE LITIGANTS.

Tim Shea explained a proposal he had received requesting that Rule 16 be amended to require that pro se litigants receive notice of the purposes of any pre-trial conference and the consequences of a failure to appear. Judge Boyce observed that the rule could create logistical difficulties in requiring court to state in each notice every matter that could possibly come up at the hearing. Mr. Shea and Mr. Wikstrom expressed a reluctance to have separate rules applicable solely to pro se litigants. The Committee declined to take any action on the proposal.

IX. RULE 3.

Tim Shea explained various proposals to eliminate two problems that exist under the 10-day summons provision in Rule 3. Both problems are described in a September 10, 1999 memorandum from Mr. Shea to the Committee. Judge Boyce suggested that the best way to deal with the problem is to eliminate the 10-day summons rule outright. Mr. Karrenberg observed that plaintiffs in collection cases do use the 10-day summons rule and find it useful. Paula Carr confirmed that a great number of collections plaintiffs do use the rule. Judge Boyce made a motion that the Committee request Tim Shea to prepare an amendment to Rule 3 striking the 10-day summons provision to be voted on at a future meeting. Mr. Hanni seconded the motion. The motion passed unanimously.

X. OTHER.

Mr. Wikstrom stated that he had reviewed a federal proposal to permit service of papers under Rule 5 by fax. Mr. Karrenberg agreed to investigate the issue for future consideration by the Committee.

Mr. Wikstrom noted that the Committee has gone through all matters pending for consideration and suggested that Committee members consider other matters the Committee might address.

The Committee meeting scheduled for December 1, 1999, has been cancelled.

XI. ADJOURNMENT.

Mr. Wikstrom adjourned the meeting at 5:35 p.m. The next meeting of the Committee will be held on October 27, 1999, at 4:00 p.m., at the Administrative Office of the Courts.