

Agenda

Advisory Committee on Rules of Civil Procedure

January 26, 2000
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
Rule 4. Service.	Peggy Gentles Perrin Love Todd Shaughnessy
Serving papers by fax.	Tom Karrenberg
Conference of parties prior to protective order, motion to compel. Rules 26 and 37.	Todd Shaughnessy
File answer with motion to dismiss less than all claims. Rule 12	Todd Shaughnessy
Civil Discovery Corrections: Rules 26(a)(5); 30(2); 37(f)	Tim Shea
Kawamoto v. Fratto. Simplified rules of procedure and evidence for small claims cases.	Tim Shea

Meeting Schedule

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, January 26, 2000
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Honorable Darwin Hansen, Paula Carr, Terrie T. McIntosh, Mary Anne Q. Wood, Honorable Anthony Quinn, Glenn Hanni, Thomas Karrenberg, Honorable Ronald N. Boyce, James R. Soper, Perrin Love, Cullen Battle, Todd Shaughnessy

EXCUSED: Leslie Slaugh

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. Judge Anthony Quinn asked that the minutes from the October 27, 1999, meeting be amended to list him as excused. Tom Karrenberg moved that the minutes be approved with that amendment. The motion was seconded, and the minutes were approved, as amended.

II. RULE 4. SERVICE.

Peggy Gentles reviewed the proposed amendments to Rule 4, which she had distributed to the Committee with her memorandum dated January 18, 2000. The proposed changes eliminate the 10-day summons rule and include a waiver of service provision similar to that contained in the Rule 4 of the federal rules.

Todd Shaughnessy noted that the method of proof of service is cumbersome under the current Rule 4 because of the requirement of endorsing the service. Mr. Shaughnessy proposed that the method of proof of service be changed to be consistent with the federal rule. Francis Wikstrom observed that the endorsement requirement can be helpful in calculating when a response is due.

Mr. Wikstrom proposed that the final sentence in paragraph (c)(1) of Ms. Gentles' proposed amendment to Rule 4 (lines 18-20) be omitted. Judge Boyce moved to eliminate the sentence. The motion was seconded, and it passed unanimously.

The Committee then discussed the more fundamental issue of whether Rule 4 should be amended to permit effective service by mail, rather than merely allowing for waiver of service, as

permitted in the federal rule and in Ms. Gentles' proposed amendments. Mary Anne Wood noted that the current federal rule has worked well in her experience. She expressed concern that allowing service by mail, with a signed receipt, would create a new level of uncertainty. Mr. Wikstrom noted that the Sheriff's office's representatives had stated at a prior Committee meeting that they had had good success with parties voluntarily appearing and picking up summonses following notification by mail that they should do so.

Glenn Hanni stated that he believed permitting a default judgment following service by mail is too severe. He stated that he favored a waiver of service approach similar to that under the federal rule, but not permitting a default judgment to be entered if a waiver has not been obtained.

Judge Boyce stated that in the federal system, the waiver of service approach is used in approximately 20-25% of cases. He observed that it is usually used for out-of-state defendants.

Judge Quinn inquired who would be responsible for demonstrating, in the context of a request for a default judgment, that the party signing the certified mail receipt was in fact an authorized agent of the defendant.

Judge Boyce noted that companies with large mail rooms often have problems being sufficiently sensitive to the importance of legally significant documents. Perrin Love noted that similar problems exist with personal service.

Judge Hansen stated that service by mail has the potential to achieve the goal of making legal practice more efficient and less expensive. He stated that judges could be counted on to set aside defaults if circumstances made it unfair not to do so. Judge Boyce indicated that he would like to see more information about whether service by mail has worked well in other jurisdictions, such as California. He proposed that we contact personnel at the California State Bar to inquire about such information.

Perrin Love stated that the rule could simply provide that a default judgment cannot be taken following service by mail. Judge Boyce expressed concern that this would decrease the efficacy of service by mail. Judge Quinn stated that if a party cannot obtain a default following service by mail, it does not really constitute "service" in a meaningful sense.

Todd Shaughnessy observed that there is an inherent limitation on the ability to obtain a default judgment following service by mail because you can only obtain a default from the clerk of the court (as opposed to the judge) if service had been made personally.

Mr. Wikstrom polled the Committee to determine the level of interest in amending the rule to permit service by mail. The majority of the Committee expressed interest in continuing the inquiry and studying the experience that other jurisdictions have had with service by mail. The issue will be researched for discussion at a future meeting. No changes to Rule 4 were formally approved at this meeting. The option of waiver, similar to the federal provision, will continue to be considered as an alternative to service by mail.

III. SERVING PAPERS BY FAX.

Thomas Karrenberg explained the proposed alternatives for Rule 5 service of papers by fax or e-mail as outlined in his memorandum dated January 17, 2000. Mr. Karrenberg stated that the key issues are whether the rule should require consent by the party receiving service and whether Rule 5 should be amended formally or whether the issue should merely be addressed in the Committee note. The current proposal would require consent of the parties and would involve an amendment to the language of the rule. Cullen Battle inquired whether a hard-copy should still be required to follow by mail. Mr. Karrenberg responded that that issue is still open. Some Committee members expressed concern that parties could alter documents that are received by e-mail.

Judge Boyce remarked that these issues can perhaps best be handled by informal arrangements among parties and expressed concern that addressing the issue expressly would complicate matters.

Other members of the Committee expressed concern that the rule should require that service by electronic means be during normal business hours to be effective. Tom Karrenberg stated that he would revise his proposed amendment to address this issue.

Todd Shaughnessy stated that Rule 5 should be amended to clarify that delivery by FedEx or a similar service constitutes effective service by mail. Judge Quinn proposed to address this issue by defining the term "mail" in Rule 5 to include such services.

The majority of the Committee agreed that Rule 5 should be amended to permit service by electronic means with consent of the parties. Tom Karrenberg will revise his proposed amendment to address at the next meeting.

IV. CONFERENCE OF PARTIES PRIOR TO PROTECTIVE ORDER, MOTION TO COMPEL. RULES 26 AND 37.

Todd Shaughnessy explained his proposed amendments to Rule 26 to require that parties meet and confer prior to filing motions for protective orders. These proposed amendments, which are similar to the federal rule, are contained in Mr. Shaughnessy's memorandum dated January 13, 2000. Judge Quinn moved to adopt the proposed changes, and Tom Karrenberg seconded the motion. The motion passed unanimously. The amendments will be published for comment.

Mr. Shaughnessy then explained similar proposed changes in Rule 37 requiring parties to meet and confer prior to filing motions to compel and motions for sanctions. The Committee noted and corrected three clerical errors in the proposed amendments. Mr. Shaughnessy noted that one aspect of the proposed amendments would permit sanctions to be awarded if a party complied with the other party's discovery demands only after that party filed a motion to compel. Judge Boyce suggested that aspects of the proposed amendments should be changed to permit sanctions to be awarded against a party, the party's attorney, or both. With those changes, Tom Karrenberg moved to approve the amendments to Rule 37. Judge Hansen seconded the motion. The motion passed unanimously. The amendments will be published for comment.

V. FILE ANSWER WITH MOTION TO DISMISS LESS THAN ALL CLAIMS. RULE 12.

Todd Shaughnessy explained his proposed amendment to Rule 12 clarifying that a motion to dismiss less than all claims for relief does not alter the timeframe for filing an answer responding to the remaining claims. Cullen Battle noted that this would be contrary to usual practice. Judge Boyce and Tom Karrenberg moved to approve the amendment. Cullen Battle seconded the motion. The motion passed unanimously. The amendment will be published for comment.

VI. CIVIL DISCOVERYCORRECTIONS: RULES 26(A)(5); 30(2); 37(F).

Tim Shea explained the ministerial changes to these rules as outlined in his memorandum dated January 13, 2000. The changes were unanimously adopted by the Committee.

VII. KAWAMOTO V. FRATTO. SIMPLIFIED RULES OF PROCEDURE AND EVIDENCE FOR SMALL CLAIMS CASES.

Tim Shea explained a recent Supreme Court case directing the Committee to make recommendations to the Supreme Court regarding simplified rules of procedure in small claims court, as required in Utah Code Ann. § 78-16-1(7). Mr. Shea explained the alternative approaches to this issue as set forth in his memorandum dated January 13, 2000.

Judge Boyce observed that other jurisdictions have separate sets of rules for small claims court that Utah can use as models for its own rules. Judge Boyce and Cullen Battle expressed the opinion that rules should be developed for small claims court that do not vest excessive discretion in small claims judges.

Judge Quinn and Tom Karrenberg stated that the Committee should start from scratch to develop new rules. Judge Quinn proposed that a subcommittee be appointed to address this matter and codify the practice that is typically followed in such cases. Judge Quinn will chair the subcommittee. Leslie Slaugh and Paula Carr will serve on the subcommittee. Scott Sabey and Tom Mullen will also be asked to serve on the subcommittee. The subcommittee will develop procedures for consideration at a future meeting.

IX. ADJOURNMENT.

Mr. Wikstrom adjourned the meeting at 5:55 p.m. The next meeting of the Committee will be held on Thursday, February 24, 2000, at 4:00 p.m., at the Administrative Office of the Courts.