Agenda

Advisory Committee on Rules of Civil Procedure

April 24, 2002
4:00 to 6:00 p.m.

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

Approval of minutes	Fran Wikstrom
Rule 52. Objection to findings	Judge Bohling
Rule 3. Filing fee	Terrie McIntosh Cullen Battle
Rule 47. Questions by jurors	Tim Shea
Rule 1, 5. Pilot programs for electronic filing	Tim Shea
Rule 24. Notice to AG of challenge to constitutionality of a statute	Tim Shea
Provisional and final remedies	Tim Shea

Meeting Schedule

May 22
September 25
October 23
November 20 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 24, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Honorable Darwin C. Hansen, Mary Anne Q. Wood, Cullen Battle, Thomas R. Karrenberg, Honorable Ronald N. Boyce, Debora Threedy, Paula Carr, Honorable K. L. McIff, Leslie W. Slaugh, Virginia Smith

STAFF: Timothy M. Shea, James T. Blanch

EXCUSED: Glenn C. Hanni, Terrie T. McIntosh, Honorable Anthony B. Quinn, Thomas R. Lee, Scott Waterfall, Perrin R. Love

GUEST: Honorable William B. Bohling

WELCOME AND APPROVAL OF MINUTES

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the March 27, 2002 meeting were reviewed and approved without amendment.

RULE 52. OBJECTION TO FINDINGS

Francis Wikstrom welcomed Judge William Bohling to the meeting. Judge Bohling addressed the Committee and explained his view that it is advisable to amend Rule 52 of the Utah Rules of Civil Procedure to require parties to object to judges' findings in writing to preserve their objections for appeal. Judge Bohling stated it would be wise to require this of parties and counsel rather than allowing them to remain silent and then pursue appeals without first having given trial courts the opportunity to correct problems.

Judge Boyce expressed concern that issues regarding what is or is not waived on appeal might appropriately be the province of the Appellate Rules Committee. Some Committee members expressed that it would be proper at least to include the requirement of written objections in Rule 52 if the Committee were so inclined, even if the amendment did not address the issue of waiver on appeal.

Judge Boyce also expressed concern that such an amendment would, as a practical matter, prompt losing parties to make pro forma objections to all findings merely to preserve issues for appeal. Judge Boyce feared this would create significant unnecessary work for both counsel and judges. Mr. Wikstrom agreed that this was a concern and added that losing parties might conclude that it is not only appropriate, but procedurally necessary, to reargue all of the

issues they have already lost. Judge Bohling replied that he did not believe this "Pandora's Box" would really be opened. He felt trial courts would have the ability to address such matters in a reasonable manner.

Tom Karrenberg proposed that it might be feasible to fashion a compromise approach that would encourage parties to object to technical flaws in findings but would stop short of imposing the severe procedural penalty of waiver on parties who do not file written objections because they know that they simply have serious substantive disagreements with the trial court concerning the correctness of the findings.

Judge Hansen observed that Rule 4-504 of the Code of Judicial Administration already requires parties to submit findings to the opposing party for review and possible objections prior to submitting them to the Court. Thus, Judge Hansen's view, an amendment to Rule 52 should not be necessary.

Francis Wikstrom stated that although he is in favor of allowing trial courts every opportunity to get things right, it would be unwise to require parties to reassert points they have already argued and clearly lost merely to preserve the right to raise them on appeal. Mr. Wikstrom likened such a procedure to the former requirement of taking "exceptions" to evidentiary rulings, a requirement that was a trap for the unwary and has been eliminated from trial practice.

Mary Anne Wood stated that if a requirement for written objections were included in Rule 52, some provision should be made to deal with those who abuse the objection process by objecting to everything as a matter of course and making the litigation process excessively burdensome.

Leslie Slaugh stated that in his view, the real problem in this area in practice lies not with losing parties, but with prevailing parties who overreach in their proposed findings that thus fail in their duty to submit proper proposed findings to the court.

Mr. Wikstrom thanked Judge Bohling for his input and indicated that the Committee will consider the issue further at the next meeting.

RULE 3. FILING FEE

Mr. Wikstrom reported that the Utah Supreme Court had met with Cullen Battle, Terrie McIntosh and various members of the Appellate Rules Committee to discuss various concerns regarding the Supreme Court's proposal to make filing fees jurisdictional. Based on the concerns expressed at this meeting, the Supreme Court decided not to amend Rule 3 to make the filing fee jurisdictional.

The Court urged the Committee to draft proposed amendments to strengthen Rule 3 short of making the filing fee jurisdictional. Francis Wikstrom and Mary Anne Wood will formulate potential approaches to this issue for discussion at the next meeting.

RULE 47. QUESTIONS BY JURORS

Tim Shea addressed the Committee and explained the proposed amendments and draft committee note he had prepared concerning Rule 47, attached to his memorandum to the Committee dated April 17, 2002.

Judge McIff stated that he felt the rule should not require jury questions to come "after the examination of a witness is complete," but rather "at a convenient time."

Judge Boyce expressed concern that the process of jury questioning could get out of hand if not carefully limited, with jurors becoming inquisitors and advocates rather than passive participants who listen to and adjudicate the case. Judge Boyce felt that in extreme circumstances, this could undermine the constitutional right to a jury trial.

Leslie Slaugh moved to amend subsection (j)(2) of the proposed rule by replacing the phrase "after the examination of a witness is complete." with the phrase "for transmittal to the judge." The motion was seconded, and it passed unanimously.

The Committee engaged in extensive discussion revisiting the basic question of whether it is a good idea to amend Rule 47 expressly to permit questions from the jury. Cullen Battle suggested that it might be wise to solicit input from Bar members regarding whether they would favor the amendment to Rule 47. Mr. Battle suggested doing this in advance even of publishing a proposed rule. Other members felt it would be preferable to solicit input from the Bar by proceeding to the published amendment and putting it out for comment.

A motion was made and seconded to eliminate the words "with counsel" from the fourth line of the committee note and to make minor technical and grammatical changes. The motion was seconded, and it passed unanimously.

A motion was made and seconded to remove the reference to the "clerk" in Rule (j)(2). It passed unanimously.

A motion was made and seconded to replace the word "asked" with "allowed" in subsection (j)(2). It passed unanimously.

A motion was made and seconded to approve the proposed changes to Rule 47, as amended by the Committee. The motion passed.

RULE 1, 5. PILOT PROGRAMS FOR ELECTRONIC FILING

Tim Shea explained his proposed amendments regarding pilot programs for electronic filing, described in his April 17, 2002 memorandum to the Committee. The Committee discussed which of the alternative proposed approaches is preferable. The consensus of the Committee was that the better approach is to permit the programs in the language of Rule 1, with certain adjustments to Tim Shea's proposed language to address various concerns of the Committee.

The Committee will address the issue further at a future meeting.

COMMITTEE ON CODE OF JUDICIAL ADMINISTRATION

Cullen Battle reported on the first meeting of the committee considering potential amendments incorporating all or part of the Code of Judicial Administration into the various sets of procedural rules.

Mr. Battle described the various approaches to this project that the Committee is considering. Mr. Battle will identify those components of the CJA most appropriately within the purview of this Committee and will develop potential approaches to amending, streamlining, or incorporating these rules into the Rules of Civil Procedure.

The Committee will discuss these matters at a future meeting. Tom Karrenberg will assist Mr. Battle with this project.

RULE 24. NOTICE TO AG OF CHALLENGE TO CONSTITUTIONALITY OF A STATUTE

Tim Shea explained his draft amendment to Rule 24 requiring parties to notify the Utah Attorney General of challenges to the constitutionality of state statutes.

Judge Hansen expressed his view that the Committee should seek input from the Attorney General's Office and other involved parties concerning their views on this issue before going down the road of amending the rule.

Mr. Wikstrom will send a letter to the Attorney General's Office seeking its views on this issue.

PROVISIONAL AND FINAL REMEDIES

Tim Shea reported that there had been a productive meeting of the subcommittee considering possible amendments to the rules governing provisional and final remedies. Mr. Shea will report further on the progress of this subcommittee at future meetings.

ADJOURNMENT

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, May 22, 2002, at the Administrative Office of the Courts.