

Agenda

Advisory Committee on Rules of Civil Procedure

May 22, 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	Fran Wikstrom
Rule 3. Filing fee	Fran Wikstrom Mary Anne Wood
Rule 1. Pilot programs for electronic filing	Tim Shea
Rule 24. Notice to AG of challenge to constitutionality of a statute	
Provisional and final remedies	Tim Shea

Meeting Schedule

September 25
October 23
November 20 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 22, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Virginia Smith, Debora Threedy, Thomas R. Karrenberg, James R. Soper, Cullen Battle, Honorable Anthony B. Quinn, Terrie T. McIntosh, Thomas R. Lee, Paula Carr, Scott Waterfall, Todd Shaughnessy, Honorable Ronald N. Boyce, Honorable K. L. McIff

STAFF: Timothy M. Shea, James T. Blanch

EXCUSED: Glenn C. Hanni, Mary Anne Wood

WELCOME AND APPROVAL OF MINUTES

The meeting was called to order at 4:00 p.m. The minutes of the April 24, 2002 meeting were reviewed and approved without amendment.

RULE 52. PROVISIONAL AND FINAL REMEDIES

Tim Shea thanked the subcommittee for its work drafting the proposed revisions to the rules governing provisional and final remedies, which Mr. Shea had previously transmitted to the Committee with a May 13, 2002 cover memorandum describing the revisions. Mr. Shea then explained the subject matter and organization of the proposed revised rules.

The Committee discussed, in general terms, issues that might emerge if substantial changes to the rules were implemented. Tom Karrenberg noted that wholesale changes to the rules might render obsolete substantial bodies of case law that have developed over time.

The Committee then began working through the proposed rules one by one. Concerning the definitional section of the rules, Jim Soper proposed an additional subsection defining the term "levy." Judge Boyce suggested that "seizure" might be a preferable term to "levy" for use in the rules. The Committee considered various terms that could be employed to describe accurately the seizure of property.

Mr. Soper also proposed a definition of the term "writ," which is used throughout the proposed rules. Judge Boyce proposed that it might be preferable to use the word "order," rather than "writ," throughout the rules. Some Committee members agreed that such an approach might help further the goal of modernizing the rules of provisional and final remedies. Others thought that the term "order" might be too generic.

Many Committee members also felt that the terms “claimant” and “respondent” in the rule would work better than “plaintiff” and “defendant.” Judge Boyce recommended replacing the term “undertaking” with the term “security.”

Fran Wikstrom suggested that language should be included in the rules clarifying that an undertaking or other security does not limit the amount recoverable by the claimant. Tim Shea will work on language to this effect.

Judge Boyce suggested that the Committee consider consolidating the writs of attachment and replevin. Alternatively, Judge Boyce suggested elimination of the concept of replevin because it is duplicative of execution. Judge Boyce further suggested that the rule should specify court-appointed bailiffs as persons who can levy upon or seize property under the rules.

Tim Shea explained that the proposed rules would require the plaintiff to provide descriptions of the property to be seized for all writs.

The Committee also discussed various approaches it might take to implement electronic procedures to govern some or all of the provisional or final remedies.

Jim Soper suggested that it is confusing to use the term “summons” to describe the document directing parties to respond to writs. He noted that the term “notice of hearing” might be preferable.

Professor Threedy indicated that she had concerns over the constitutionality of those provisions of the rule permitting ex parte applications for pre-judgment writs. Judge Boyce noted that the exigencies that sometimes occur in practice require the availability of some procedure for seeking an immediate pre-judgment writ on an ex parte basis. Judge Boyce is confident that such a rule can be crafted to be consistent with constitutional requirements.

Todd Shaughnessy suggested that the section of the rule dealing with execution should include language requiring notice to third parties known to have an interest in the property.

Judge Boyce suggested that language may be necessary to protect parties in situations where property could be destroyed or irretrievably lost if not dealt with properly on an expedited basis.

Several committee members concurred with the suggestion of combining the prejudgment writs of replevin and attachments. Professor Threedy opined that it would be preferable to have only one type of writ covering all prejudgment seizures of property.

Tim Shea inquired whether the Committee felt it was necessary to require an affidavit in support of a writ. Judge Boyce and Judge McIff felt an affidavit should be required. Many other Committee members agreed.

Professor Lee expressed concern that language in the rule providing remedies for parties evading writs with intent to defraud might transcend the Committee’s authority by creating a substantive cause of action. Professor Threedy agreed that the language embodies some substantive characteristics, but believed it was properly within the province of the Committee.

Professor Thredy suggested there should be language expressly permitting parties to seek prejudgment writs for the purpose of maintaining the status quo so as to prevent depreciation of property pending the resolution of disputes.

Mr. Wikstrom thanked Tim Shea and his subcommittee for their work on these proposed rule changes. The Committee will continue its discussion of these matters at its next meeting.

RULE 52. OBJECTION TO FINDINGS

Tim Shea reported on a conversation he had had with Judge Bohling concerning proposed changes to Rule 52 requiring written objections to findings in order to preserve issues for appeal. The Committee will place the issue on hold pending further proposed amendments from Judge Bohling or others.

RULE 3. FILING FEE

Mr. Wikstrom explained the proposed changes to Rule 3 that he and Mary Anne Wood had drafted following the Supreme Court's decision not to make filing fees jurisdictional. Professor Thredy suggested that the language "validity of the action" in the proposed rule should be replaced with "effectiveness of the filing." Other Committee members felt that the additional language should refer only to payment of filing fees and should not refer to "any other step." Cullen Battle suggested the rule should only say that failure to pay the filing fee may be grounds for any action the court deems appropriate, including dismissal with prejudice. Tom Karrenberg suggested that an advisory committee note should be included explaining that dismissal with prejudice is not mandatory in circumstances where filing fees are not paid. The Committee will decide these issues at the next meeting.

RULE 1. PILOT PROGRAMS FOR ELECTRONIC FILING

Tim Shea explained his proposed language for Rule 1 permitting pilot programs for electronic filings. A motion was made and seconded to strike the final sentence of proposed Rule 1(c). With that and other minor changes to the proposed language, a motion was made and seconded to approve the proposed amendment to Rule 1. The motion passed unanimously.

ADJOURNMENT

The meeting adjourned at 6:05 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, September 25, 2002, at the Administrative Office of the Courts.