

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, October 22, 2003
Administrative Office of the Courts

Francis Wikstrom, Presiding

PRESENT: Francis Wikstrom, David W. Scofield, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Thomas R. Lee, Thomas R. Karrenberg, R. Scott Waterfall, Virginia S. Smith, W. Cullen Battle, Honorable Lyle R. Anderson, James Blanch, Honorable David O. Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Francis J. Carney, Glenn C. Hanni, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Todd M. Shaughnessy, Janet H. Smith, Debora Threedy

GUESTS: Matty Branch

I. WELCOME AND APPROVAL OF MINUTES.

Francis Wikstrom called the meeting to order at 4:00 p.m. The Minutes of the September 24, 2003 meeting were reviewed, and Thomas Lee moved that they be approved as written. The motion was seconded by James Blanch, and approved unanimously.

II. CHANGE OF JUDGE AFTER REMAND.

Mr. Lee led the discussion of his proposed rule dealing with recusal of a judge after remand.¹ Mr. Lee stated that he initially was not in favor of such a rule, but that after consideration he believes that a rule couched in the proposed language is a good idea. The proposed rule balances two issues: a judge's previous investment in the case and whether recusal would impede a timely resolution of the issues v. perception of bias.

Several members voiced approval of the proposed rule, including: (1) Thomas Karrenberg, who stated that he believes the proposed rule is a "first rate job" and gives a party a way to seek recusal without attacking the judge, (2) Cullen Battle, who stated that he is

¹After extensive discussion during the September 24, 2003 meeting, Mr. Lee agreed to work on a proposed rule dealing with change of judge after remand. His suggested rule was circulated to members prior to the October 22, 2003 meeting.

comfortable with the rule's language, (3) Virginia Smith, who noted that the proposed rule gives judges "permission" to recuse without making it appear as though those who decide to recuse are shirking their duty, and (4) Judge David Nuffer, who stated that he believes that the proposed rule is good, and who suggested minor changes in wording.

Mr. Wikstrom asked Mr. Shea whether there had been any feedback about the proposed rule from judges who are members of the Committee, and Mr. Shea stated that there has not been. Judge Lyle Anderson then expressed his opinion that the proposed rule is "alright," and that it raises the level of consciousness about this issue without providing "great opportunities" for gamesmanship by attorneys.

After additional discussion and comments by Committee members, Mr. Slauch moved that the proposed rule be adopted. Mr. Karrenberg seconded the motion, which was approved unanimously. Mr. Lee will prepare a statement on the extensive time and efforts expended by the Committee over a period of several months in considering this issue and in drafting a proposed rule.

III. REMEDIES RULES.

In response to Mr. Battle's question of whether there is some way to deal with proposed changes to the remedies rules prior to a meeting, Mr. Wikstrom commented that he believes that there is considerable merit in going through the entire process during a meeting and thus hearing the opinions of everyone. Mr. Shea agreed with Mr. Wikstrom, noting that he believes that the rules have been improved each time that the Committee has gone through them. Mr. Battle agreed with Mr. Shea that the rules have been improved with input from members. Mr. Wikstrom then stated that the Committee will first go through each remedies rule, and then will send them out for comment to practitioners who deal with the rules on a frequent basis.

A. Rule 69C. Redemption of Real Property After Sale.

Judge Anderson asked what the term "subsequent redemption" is intended to mean. After comments and explanations by Mr. Shea and Judge Nuffer, Judge Anderson stated that he believes it would be helpful to clarify this term's meaning. Judge Nuffer agreed, noting that there is little common law on this issue.

After more questions by the members about how subsequent redemption would work, Mr. Wikstrom stated that he believes that the Committee should educate itself on this issue.

B. Rule 64. Writs in General.

Mr. Slauch expressed concerns about the definitions of "earnings" (page 6), and how long "earnings" retain their character. He commented that it appears that once earnings have been deposited into a savings account, they no longer are "earnings." Virginia Smith agreed, stating

that she acted as counsel for a bank for several years, and that in her experience a bank would see it that way. Mr. Slauch asked Ms. Smith whether this means that if a person receives pay from an employer in cash, the bank would not see the cash as “earnings.” Ms. Smith said yes. Mr. Slauch then stated that the Committee should clarify the rule to address this. Judge Anderson agreed, commenting that unless there is a cessation period, everything arguably is “earnings.” Mr. Shea stated that he would research this issue.

Committee members also discussed Mr. Slauch’s question about “earnings” in the context of child support. Judge Anderson commented that, ordinarily, only 25% of “earnings” can be garnished, but this increases to 50% for child support obligations. After additional comments, Mr. Slauch stated that he would look into this issue.

Mr. Battle suggested that the words “earned by an individual” should be inserted after “compensation” (page 6, line 9), so as not to allow corporations to avail themselves of this limitation. Mr. Karrenberg asked whether the proposed additional language would allow a sole proprietorship to use the limitation.

Mr. Wikstrom and Mr. Slauch suggested a change in the “writ wrongfully obtained” language on page 4, line 14. Referring to page 7, line 18, Mr. Slauch questioned the use of the language that “The motion shall be served on the surety.” After discussion, Mr. Shea suggested that the language be changed to read that the clerk be directed to send copies to the surety.

The members expressed other questions on the proposed rule, including: (1) whether page 10, lines 11 and 14, should read “file security” or “post security,” and (2) the use and meaning of the term “sufficiency” (page 7).

C. Rule 64A. Prejudgment Writs in General.

With regard to language on page 12, lines 16-17, Judge Nuffer suggested that the term “is reasonably calculated to expeditiously give notice of the hearing” be substituted for “will expeditiously give actual notice of the hearing.”

Mr. Battle questioned whether there is a clear statement of what actually must be done in order to obtain a writ, and suggested that this be spelled out in detail. Judge Anderson and Judge Nuffer agreed with Mr. Battle’s comment, noting that the rule never actually says what must be done to obtain a particular writ. In response, Mr. Shea commented that the purpose of Rule 64A is to include in all **common** requirements in one rule. Judge Anderson then stated that his concern is that Rule 64A(b) appears to imply that all that must be done to obtain a writ is to file an affidavit. Similarly, Judge Nuffer noted that Rule 64A(g) sounds as though all a party must do to obtain a writ is to prove the facts set forth in the affidavit, whereas in reality the party must prove the elements of the writ. Mr. Battle agreed with Judge Nuffer’s assessment, commenting that the elements of the writs must be established in this rule because they cannot be found anywhere else.

After additional discussion, Mr. Shea stated that he will work on the proposed rule in light of the concerns raised.

D. Rule 64B (Writ of Replevin), Rule 64C (Writ of Attachment), and Rule 64D (Writ of Garnishment).

The Committee discussed the language in proposed Rules 64B, 64C, and 64D. Mr. Shea stated that he will compare the rules in light of members' comments, and make sure that language in the rules is accurate.

IV. ADJOURNMENT.

The meeting adjourned at 5:45 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, November 19, 2003, at the Administrative Office of the Courts.

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