MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, October 23, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Thomas R. Karrenberg, Janet H. Smith, Francis J. Carney, R. Scott Waterfall, Terrie T. McIntosh, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Paula Carr, Todd M. Shaughnessy, Cullen Battle, Thomas R. Lee, Leslie W. Slaugh, Virginia Smith, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Honorable Ronald N. Boyce, Glenn C. Hanni, Debora Threedy

GUESTS: Michael D. Zimmerman, Esther Chelsea-McCarty

I. WELCOME AND REPORT ON THE HONORABLE RONALD N. BOYCE

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom then reported on the condition of the Honorable Ronald N. Boyce, who has pneumonia and is in the intensive care unit at University of Utah Hospital. A card wishing Judge Boyce well was circulated for signatures. Mr. Wikstrom will deliver the card to Judge Boyce.

II. APPROVAL OF MINUTES

The minutes of the September 25, 2002, meeting were reviewed and approved.

III. INTRODUCTION

Mr. Wikstrom introduced Judy Wolferts as the new secretary to the Committee. Ms. Wolferts is an attorney with Snow, Christensen & Martineau.

IV. FORMATTING OF COURT RULES

Tim Shea reported on issues concerning formatting of court rules. The formatting issue was precipitated by comments from several attorneys that it is sometimes difficult to follow the court rules when all paragraphs are indented equally.

Mr. Shea described the options for formatting. It was suggested that the formatting form presented at the bottom of page 7 of the Agenda may be the simplest solution. Leslie Slaugh commented that the option on page 7 avoids white spaces and makes information easier to locate. Mr. Shea pointed out that other rules committees will weigh in with their own comments on this, and that it is likely that this Committee will have to coordinate with other committees.

Mr. Slaugh moved that the Committee support the formatting solution provided on page 7 of the Agenda. The motion was seconded and passed unanimously.

Frank Carney then expressed concern that the format approved might require a greater amount of space, resulting in more pages being needed to print the rules. Mr. Wikstrom stated he does not believe that would occur. Mr. Shea then stated that if there is a difference of opinion on formatting, the committees could ask the Utah Supreme Court's preference. Mr. Wikstrom asked Mr. Shea to check with other committees and report back as to their preferences.

V. RULE 3 FILING FEE

The Committee considered a proposed amendment to Rule 3 which would deal with situations where a check issued to pay a filing fee and deposited by the clerk's office, is returned unpaid. The proposed language refers to a "party's" "dishonoring" a check. Mr. Wikstrom discussed whether Rule 3 as proposed should be more specific, and Mr. Slaugh asked whether a "party" or a party's bank "dishonors" a check. Judy Wolferts commented that a bank typically "dishonors" a check if it is drawn on an account with insufficient funds, but that a "party" might also dishonor a check by placing a stop payment, whereupon the bank would return the check unpaid. Mr. Slaugh suggested that placing the language of the proposed amendment in the passive voice might remove any confusion. Mr. Wikstrom suggested the language of the proposed amendment be changed to read as follows:

> <u>if a check or other form of payment tendered for a filing fee is dishonored, the party shall make valid payment upon notification by the court. Dishonoring of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.</u>

Judge Anthony Quinn made a motion to adopt the language as changed, which was seconded. Janet Smith then asked whether the court is notified that a check has been dishonored, and was told that it is. A vote was taken and the motion was approved unanimously.

VI. RULE 24: NOTICE OF CHALLENGE TO CONSTITUTIONALITY OF A STATUTE

The Committee next considered a proposed amendment to Rule 24 which would require a party challenging the constitutionality of a statute to notify the Utah Attorney General, or to notify a county or municipal attorney if challenging the constitutionality of a county or municipal ordinance. James Blanch posed a question about paragraphs (1) and (2) of the amendment, which give the state, county, or municipality absolute right to intervene. He suggested the language be changed to read that "the court shall grant any timely motion of the state to intervene." Mr. Slaugh questioned whether it was necessary to include the "timely" language. Mr. Blanch stated that untimely intervention should not be allowed, but this change would give the court discretion to permit intervention.

The Committee then discussed whether the state should be allowed to intervene at the last minute. Ms. Smith suggested the language simply read "as provided herein" regarding intervention. Mr. Blanch stated he does not think the state or municipality is required to go through typical requirements to intervene, but that they should be required to intervene in a timely manner. Ms. Smith suggested the language might read that the state or municipality "may" intervene rather than "shall" be allowed to intervene.

Mr. Wikstrom pointed out regarding subsection (3) that it makes no sense to include a provision that the state, county, or municipality "has all the rights and liabilities of a party as to court costs," and wondered whether this is really needed. Cullen Battle agreed this provision does not make sense, and Mr. Shea, Mr. Carney, and Mr. Slaugh stated it is superfluous.

David Scofield expressed concerns about subsection (4)'s "constitutional **right**" language. Mr. Battle and Thomas Lee agreed that it may be confusing to use the word "right."

It was then questioned whether this proposed amendment is even needed. Mr. Shea commented that Judge Ronald E. Nehring had suggested there be a state rule comparable to the federal rule. Mr. Wikstrom stated the issue is how to change this rule, but still preserve the challenge. Mr. Carney commented that the federal rule requires the court, and not the parties, to give timely notice.

A vote was taken concerning whether the language of subparagraph (4) should read "invalidate" or "waiver." The vote was a tie. Mr. Blanch then suggested the Committee stick with the federal language.

A motion was made to change "right" to "challenge" in subparagraph (4). The motion was seconded, and passed unanimously. No other action was taken by the Committee on the proposed amendment.

VII. UNLAWFUL DETAINER STATUTE

Mr. Wikstrom introduced former Utah Supreme Court Chief Justice Michael D. Zimmerman. Mr. Zimmerman had asked to discuss with the Committee a recent opinion by the Utah Court of Appeals dealing with the unlawful detainer statute. The opinion is *Parkside Salt Lake Corp. v. Insure-Rite, Inc.*, 434 Utah Adv. Rep. 26, 37 P.3d 1202 (Utah Ct. App. 2001), *cert. granted,* 42 P.3d 951 (Utah Mar. 6, 2002) (table). Mr. Zimmerman stated that the case has since settled, so the Utah Court of Appeals ruling stands.

Mr. Zimmerman explained that *Parkside* holds that the requirement that a summons in an unlawful detainer action contain an indorsement by the trial court as to the number of days within which the tenant has to appear and defend the action, means that the judge must write the number of days on the summons in his or her own hand. By contrast, the judge may use either signature or the equivalent (*e.g.*, stamp), to certify that the indorsement number of days was made by the judge and not counsel. Mr. Zimmerman stated that if the tenant makes a challenge, the burden is on the landlord to provide an affidavit stating the indorsement is handwritten by the judge. Mr. Zimmerman stated this likely would mean the judge or judge's clerk must provide the affidavit.

Mr. Zimmerman pointed out the repercussions of *Parkside.* He stated that it means that on-line unlawful detainer forms are inconsistent with *Parkside*, and thus invalid. He also stated that it means that evictions can be set aside as improperly commenced, since this is an issue of subject matter jurisdiction. If evictions are set aside, it may involve refunding fees previously awarded. Mr. Zimmerman commented that tenants' attorneys have already picked up on *Parkside*, and are having past evictions invalidated. He stated there are two possible ways to proceed: (1) change on-line forms and accept *Parkside*, or (2) amend the unlawful detainer statute, with retroactive application specified in the statute.

The Committee discussed the amendment option. Mr. Slaugh asked whether the statutory term "indorse" could be defined in the Civil Rules, and Mr. Lee stated that in his opinion this could not be done.

The Committee also discussed whether simply changing on-line forms would help, and it was concluded that it would not. Mr. Wikstrom questioned whether the Committee even had authority to change on-line forms, and after discussion, it was agreed the Committee probably did not. Mr. Zimmerman stated that even changing on-line forms would not be sufficient, since the previous forms are subject to challenge.

Mr. Zimmerman stated that the only real remedy is to amend the statute and to specify retroactive application. He commented that this is the only situation where a judge must handwrite in the number of days on a summons. Mr. Slaugh asked whether the Committee could even make a recommendation to the legislature. Mr. Shea stated

that the legislature occasionally asks the Committee's opinion, but he does not know that the Committee could initiate a recommendation. Mr. Wikstrom asked Mr. Shea to speak to the legislative liaison, and ask whether there could be a sponsor for an amendment. Mr. Shea then asked whether such an amendment could even be retroactive. Mr. Zimmerman stated that it could be since it is procedural, but that it must be explicitly stated in the statute.

Mr. Wikstrom asked whether the Committee should recommend to the Administrative Office of the Courts that the forms be changed now. The consensus was that this recommendation should be made. Mr. Zimmerman reiterated that it is most appropriate to amend with retroactive application, but that the judges and clerks should know about this issue in the meantime.

VIII. SELECTIVE RECODIFICATION OF CODE OF JUDICIAL ADMINISTRATION INTO RULES OF CIVIL PROCEDURE

Mr. Wikstrom stated that recodification of the Code of Judicial Administration into the Rules of Civil Procedure is a pressing issue and must be wrapped up soon. Mr. Battle agreed to continue to work with Mr. Shea on the general rules of judicial administration, but commented that he thought persons with more expertise in domestic and probate matters should deal with those issues. Mr. Shea responded that the proposals on probate and domestic matters have already been sent to lawyers, and to the Probate and Domestic Committees to get their opinions.

There was a discussion as to whether the CJA constitutes "local rules." It was agreed that they are state-wide rules, and procedural rules which can be included in the Rules of Civil Procedure.

Mr. Wikstrom asked for volunteers to work on family law. Mr. Shea agreed to do this, and Mr. Slaugh agreed to assist with divorce issues. Mr. Carney and Scott Waterfall volunteered to help with probate.

IX. PROVISIONAL AND FINAL REMEDIES

Mr. Wikstrom suggested that the Committee put off discussing the provisional rules and final remedies to another time. It was agreed that if the Committee is unable to get through this material at the November 20, 2002, meeting, a meeting will be held December 18, 2002, at 4:00 p.m. to do this.

X. STATEMENT OF THE CASE AS PART OF RULE 26 DISCOVERY PLAN

The Committee considered changes to Rule 26 which would require a statement of the case as part of the Rule 26 discovery plan. Judge Schofield and Judge Quinn both

commented that they did not see a need for this, and the Committee agreed that there did not seem to be a need for a judge to be concerned about the nature of the case if the parties had agreed to a discovery plan. There was also a discussion about a word limit for a statement of the case, and the implications if a party fails to include a claim or defense.

After Committee members continued to question the need for a statement of the case, it was agreed that Mr. Wikstrom would speak to Judge Timothy Hanson before the Committee proceeds further. Judge Hanson had suggested the amendment.

XI. SOLDIERS AND SAILORS RELIEF ACT

Mr. Shea stated that he wanted to get the consensus of the Committee as to whether the Civil Rules should require an affidavit certifying that the opposing party is not a soldier or sailor before a default judgment can be entered. Mr. Shea was asked why this is needed, and responded that no one is following the law, since the federal Soldiers and Sailors Relief Act requires it.

The Committee discussed whether this requirement should be included in the default rules. Mr. Battle asked whether a federal law could invalidate **all** Utah default judgments if this is not a requirement of the Utah default rules, even if the party is not a member of the military. There was discussion as to whether this is ever a problem, and Judge Schofield stated he has seen it come up in some divorce actions.

Mr. Carney commented that an affidavit does not seem to be needed, since it would be part of the "good cause" to set aside a default judgment, *i.e.*, if the person against whom default was granted is a soldier or sailor, that is good cause. Mr. Battle questioned whether the Committee wanted to start a precedent of using federal laws to change Utah Rules. Virginia Smith suggested placing information about the Soldiers and Sailors relief act in the advisory committee notes.

After further discussion, it was agreed that the issue would be tabled until it becomes a problem.

XII. RECODIFICATION OF THE CJA

The Committee then proceeded to a substantive discussion of recodification of the CJA into the Civil Rules. It was agreed that the Committee should examine each rule separately. Mr. Shea provided a handout with recommendations and remaining issues for each CJA section, and the Committee followed this form. The Committee discussed the following provisions:

CJA 4-102 The Committee agreed this provision should be omitted.

CJA 4-105 The Committee discussed whether this provision is even needed, with Mr. Lee commenting that this appeared to be inherent judicial power. The Committee agreed this provision should be omitted.

CJA 4-107 Mr. Shea stated there is still a question to be answered by this provision, and suggested that it be included in Utah R.Civ.P. 42(a).

CJA 4-501 Mr. Battle stated that the proposal is to make this provision part of a new Rule 72. Mr. Slaugh suggested that it be placed in Rule 10. Mr. Wikstrom stated this will be left an open question for now.

Mr. Battle stated this was combined so that it includes both motions and orders, which would be comparable to the federal rules of practice. He commented that he sees no justification for leaving it separate. Mr. Shea stated the Committee may want to consider whether the sections on summary judgment should be part of a proposed Rule 72 or part of Rule 56.

Mr. Shea then stated that there is a proposal that parties can request a hearing on a non-dispositive motion. The Committee then discussed what seems to be a presumption under the present CJA that a hearing will not be granted on any motion, and whether the present CJA even allows a party to request a hearing on a non-dispositive motion. Mr. Battle commented that he and Mr. Shea had attempted to make the proposed rule more neutral on the hearing issue, and Mr. Shea commented that they would work a bit more on the language.

Mr. Wikstrom raised the issue of overlength memoranda, and asked for opinions as to whether the five-page summary requirement should be retained. Judge Quinn commented that he saw no problem with omitting the summary requirement, but liked the requirement of a table of contents. After further discussion about whether a summary should be required, Mr. Wikstrom suggested that the Committee members give some thought to this for later discussion.

The Committee then discussed what a proposed order should include, and whether one was even needed. Mr. Slaugh commented that when a judge has issued a memorandum decision, he sees no reason why there needed to be an additional order saying essentially the same thing. Mr. Carney questioned why Utah courts even have memorandum decisions, as opposed to the orders issued in federal courts. Mr. Slaugh agreed that the federal practice makes more sense, since the judge makes the ruling. After a comment regarding whether the prevailing party should make a proper

set of findings, Mr. Blanch commented that this would typically apply only to bench decisions.

Mr. Wikstrom reiterated that the purpose today is simply to raise issues to get Committee members thinking about them.

CJA 4-503 Mr. Battle proposed that all of this provision dealing with jury instructions be omitted, and included in Rule 51.

CJA 4-504 Mr. Shea stated that there appears to be an internal inconsistency regarding written orders in subsections (7) and (9). Mr. Battle suggested simply eliminating subsections 3, 7, and 9, and no one expressed opposition to this.

The Committee then discussed whether there even needed to be a requirement that the court be notified of a settlement. Mr. Shaughnessy stated that it is unfair not to notify the court of a settlement, and Mr. Blanch agreed. Mr. Carney agreed to draft language on a notification requirement.

CJA 4-505 and 4-505.1 Mr. Battle stated that proposed changes have been made in these rules, and it is suggested that they be made into new Rules 74 and 75.

Mr. Wikstrom asked how important it is to have monetary amounts on small defaults included in the rule . Ms. Carr stated that it is very important for the clerk. Judge Quinn commented that he is finding that attorneys are departing more frequently from the tables, and submitting attorneys' fees affidavits. Mr. Slaugh stated that he would like the rule to include a legal basis for the award and the reasonableness of the attorneys' fees. He also commented that the rule should be more generic and less specific. Ms. Carr again stated that the schedule is convenient, since the clerk can handle the attorneys' fees issue, which otherwise it must be determined by the judge.

XIII. 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, November 20, 2002, at the Administrative Office of the Courts.

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