MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 20, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Janet H. Smith, Francis J. Carney, Glenn C. Hanni, R. Scott Waterfall, Terrie T. McIntosh, Paula Carr, Todd M. Shaughnessy, W. Cullen Battle, Thomas R. Lee, Leslie W. Slaugh, Virginia S. Smith, James T. Blanch, Honorable Lyle R. Anderson (by telephone conference call)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Thomas R. Karrenberg, R. Scott Waterfall, Debora Threedy

I. WELCOME AND INTRODUCTION

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom introduced the Honorable Lyle R. Anderson as a new member of the Committee. Judge Anderson will attend today's meeting by telephone conference call.

II. APPROVAL OF MINUTES

The minutes of the October 23, 2002, meeting were reviewed and approved.

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

Mr. Wikstrom informed the Committee that he has spoken to Judge Timothy Hanson to obtain further information on Judge Hanson's suggestion that the parties be required to include a statement of the case as part of their Rule 26 discovery plan. However, since Judge Anthony Schofield and Judge Anthony Quinn are not in attendance at today's meeting and the Committee would like their input, it was agreed that further discussion on this issue will be postponed until a later date.

IV. RECODIFICATION OF CODE OF JUDICIAL ADMINISTRATION INTO RULES OF CIVIL PROCEDURE

Cullen Battle then took charge of the meeting to present the members with suggestions concerning the Committee's continuing work of recodifying the Code of Judicial Administration into the Utah Rules of Civil Procedure. Mr. Battle stated that before going on to other issues, he would like to go back and discuss Tim Shea's latest

draft of revisions.

A. Page Limits

Referring to page 14 of the Agenda (revision of Rule 4-501(1)(A)), Mr. Battle asked whether the members agreed that this revision does away with the 10-page limit for memoranda supporting or opposing a motion. The members agreed that the revision appears to do this, and discussed whether the removal of this requirement is appropriate.

Mr. Battle commented that he has no objection to eliminating the page limit since it would do away with ex-parte motions requesting an extension of page limits. Leslie Slaugh stated that he would like the page limit to remain because it places a restriction on those persons who tend to go on and on. Glenn Hanni commented that a page limit forces attorneys to give more thought to what they are doing, and that he believes judges are liberal in granting requests for overlength memoranda. Mr. Wikstrom stated that he believes the ten-page limit should remain in the Rule.

James Blanch then asked if anyone knew of any judges who refuse to grant requests for overlength memoranda. There was mention of one state judge who typically refuses such requests. A comment was made that refusing these requests is an abuse of discretion and a due process issue, but that no one ever challenges a judge who refuses.

Thomas Lee suggested that more pages should be allowed for summary judgment memoranda, but believes the ten-page limit for other memoranda should be retained. Mr. Slaugh agreed that it makes sense to allow more pages for summary judgment memoranda. Mr. Hanni agreed with Mr. Slaugh, and stated that if judges cannot be relied on to grant page limit extensions, a page limit increase should be written into the Rule.

It was then suggested that the Rule should not include a page limit at all, but include instead a requirement that memoranda be "concise." Mr. Lee disagreed, and stated there must be a bright-line rule on limit rather than leaving it open-ended. Several people commented that the federal court's 25-page limit for summary judgment memoranda works very well.

After additional discussion, a vote was taken on whether to adopt a 25-page limit for summary judgment memoranda. Judge Anderson did not vote. Otherwise, the vote was unanimously in favor.

A vote was also taken on whether to retain the 10-page limit for memoranda on other types of motions. The vote was unanimously in favor.

B. Citation to Evidence

Mr. Lee then stated that he had a few grammatical changes, and pointed out a few

places where he believes that "memoranda" should be changed to "memorandum." Mr. Lee also stated that the term "points and authorities" should be eliminated from the new Rule. Mr. Carney explained the meaning of "points and authorities," and the members agreed that it was an antiquated phrase and should be removed.

Mr. Blanch asked whether there will be a different page limit for reply memoranda and commented that, if so, the Rule should state what it is.

Mr. Battle stated that the title of this section should simply be "Filing and Service."

Mr. Lee stated that referring to "the record" is ambiguous, and suggested that this portion of the new Rule read "accompanied by a memorandum, including citation to or copies of any legal materials and relevant factual materials." Mr. Carney agreed with eliminating the term "the record," and commented that this typically is an appellate term.

Todd Shaughnessy stated that he believes the new Rule must include the requirement of citing to specific pages. Mr. Carney asked whether this means the Committee must require the type of pinpoint cites that Utah appellate courts now require. Tim Shea pointed out that he had included "pinpoint citations" in the last draft of the Rule, and that members had objected to that term.

Mr. Wikstrom stated that he is concerned that if the Committee removes language regarding citing to relevant evidence, that those people who do not know the Rules of Evidence will construe the removal as meaning they do not have to provide such citations.

A discussion then began about whether the Committee is trying to over-instruct in this new Rule. Mr. Carney stated that the Committee is not over-instructing, and that judges need something to point to as requirements. Mr. Lee suggested again that the new Rule read "accompanied by a memorandum, including citation to or copies of any legal materials and relevant factual materials." Mr. Wikstrom suggested using the term "admissible evidence." Janet Smith commented that if the term "factual" is the only one used, it will leave out other types of evidence.

Ms. Smith then stated that she thinks the Committee should leave the language as it originally was. Mr. Hanni agreed and asked why we would want to change language that has worked for years. Echoing Mr. Wikstrom's concern, Mr. Shea expressed concern that if the Committee removes certain language such as that requiring certain evidence, some people will interpret this to mean something that the Committee does not intend.

A motion was made to stay with the original language, but to remove the term "points and authorities." The motion was approved unanimously.

C. Page Limits for Reply Memoranda

Mr. Shea stated that he wanted to confirm that the page limits previously approved apply to all memoranda, *i.e.*, original, response, reply. The general answer was "yes."

Mr. Carney then suggested that reply memoranda have a lesser page limit, and Mr. Blanch commented that in federal court, the rules require that reply memoranda be shorter. There was no further discussion.

D. Notice to Submit for Judgment

Mr. Shaughnessy suggested that the order of items in the new Rule be changed so that the Notice to Submit section is at the end.

Mr. Carney suggested that the term "Notice" be changed to "Request." After discussion about the history of the use of the terms "Notice" and "Request," Mr. Slaugh moved to change the term "Notice to Submit" to "Request to Submit." Mr. Blanch voted against the change, and all other members voted in favor.

E. Requests for Hearings

Mr. Battle directed the Committee's attention to subparagraph (c) (Hearings) on page 16 of the Agenda, and stated that he thinks this creates a presumption that no one can request a hearing in a non-dispositive motion. He suggested that the new Rule include that a party will have to request **any** hearing, and that the court must grant the hearing unless the motion is frivolous. Mr. Battle also commented that he thinks this section is awkward as revised, and should be completely revamped.

Mr. Shea stated that it is difficult to make the changes Mr. Battle suggests without rewriting the entire Rule. Mr. Slaugh commented that since these are new Rules, the Committee is not just making revisions, and questioned whether changes must be shown by interlineations. Mr. Shea noted that he had planned to use interlineation when he submits the new rules.

Mr. Wikstrom stated that he is concerned about the process involved in revising the Rules, and Mr. Shea commented that the Rules of Judicial Administration were never "vetted" like the Rules of Civil Procedure were. Mr. Wikstrom then suggested that the Committee just issue the new rules because of their volume, and let the Bar compare those with the Rules of Judicial Administration they will replace. Mr. Battle stated that he will work on this.

F. Time for Completing Revisions

Mr. Wikstrom expressed concern as to whether the Committee will meet the deadline for revising the rules. Mr. Shea stated that he does not know what would happen if this occurs, but will speak to Alicia about it. Mr. Shea commented that November of 2003 is the target date for the new rules to become effective. Mr. Battle

said that two recommendations must go to the Supreme Court at the same time: the Advisory Committee's recommendations on new rules, and the Judicial Council's recommendation to revoke the Rules of Judicial Administration.

G. Courtesy Copies

Mr. Carney questioned whether the courtesy copy requirement should even be included in a rule. Mr. Lee commented that there are only a small number of judges who do not want courtesy copies. Mr. Slaugh suggested that those judges who want courtesy copies could make this known during the Rule 26 scheduling conference. Ms. Smith suggested that the requirement be left in, and that judges who do not want courtesy copies can simply throw them away.

The members discussed who should be required to submit the copies, and the timing of when they are sent to the judge. Judge Anderson commented that he believes the best way to handle this is to include it in the section on submitting a motion for decision, and to have the submitting party provide all copies to the judge, with the other side permitted to supplement if they believe it necessary. Mr. Carney suggested including a requirement that the party who submits for decision must ask the judge's preference regarding courtesy copies.

Mr. Carney volunteered to rewrite the section on courtesy copies and send it to Mr. Shea before the next meeting.

H. Orders

Mr. Battle pointed the members to the section on "Orders" on page 17 of the Agenda, and stated that he questions whether subparagraph (2) is even needed. Mr. Battle commented that the problem is the second sentence of subparagraph (2). Mr. Slaugh stated that he thinks subparagraph (2) is necessary, but that the second sentence should be eliminated.

Mr. Carney then commented that there used to be a Registry of Judgments, and Mr. Slaugh stated that he thinks this no longer exists. Mr. Wikstrom stated that he thinks the concern is that a judgment may get tacked onto something else. The members then discussed whether there is a separate Registry of Judgments, with Mr. Shea stating that a Registry does not exist, but that an Index of judgments is kept on the computer. Mr. Shea also stated that the only way to obtain a copy of a judgment is to go to the court file.

Mr. Battle then suggested that the first sentence of subparagraph (2) be left as is, but that the second sentence of this subparagraph be deleted.

A discussion then began in response to Mr. Shea's question about whether subparagraph (1) is needed. David Scofield stated that subparagraph (1) should be taken out. Mr. Slaugh disagreed, noting that something is needed to show how the judgment is entered since not everything shows up in hearing minutes. Mr. Lee pointed out that

subparagraph (1) is needed since the standard on appeal is determined by the way judgment is entered.

I. Attorneys' Fees Affidavits

Mr. Battle pointed to line 23 of proposed Rule 74 (page 20 of Agenda), and stated that he thinks this is broader than the term "affidavit" which is used. Mr. Wikstrom noted that line 16 on page 20 should read "prosecute and defend the claim."

Mr. Battle also questioned the inclusion of the statement about Rule 5.4 of the Rules of Professional Conduct. Judge Anderson commented that he believes the section prohibiting fee sharing comes from the CJA section on bad check collections. Mr. Wikstrom stated that the mere existence of the statement about Rule 5.4 is a flag, and that perhaps it was originally included to address some demonstrated abuse. Mr. Carney stated that he believes there was a good reason for the inclusion of Rule 5.4, but that perhaps it is no longer needed. Mr. Carney then volunteered to speak to some judges and collections lawyers to find out why the reference to Rule 5.4 was originally included.

The members discussed and agreed that detailed time sheets should not be required. According to Mr. Shaughnessy, the hourly rate must be included in an affidavit, and there is a body of case law dealing with what is needed to establish the amount of attorneys' fees.

Mr. Battle then pointed to page 21 of the Agenda regarding default judgments, and questioned whether lines 5-8[1] could even be included in a judgment. Paula Carr commented that when court clerks see the language of lines 5-8, they know the document is to be filed as a judgment, but that the "augmentation" of "reasonable costs and attorney's fees expended in collecting said judgment" is not added into the actual judgment amount unless there is a supplemental judgment and the judge approves it. Mr. Carney commented that he believes there will be protests if the language of lines 5-8 is eliminated.

Mr. Wikstrom asked the members if they thought there is a due process problem with allowing the language of lines 5-8 to be included in judgments. Mr. Scofield agreed that there is, and commented that parties are entitled to notice and the opportunity to be heard before this is tacked onto a judgment. Mr. Lee observed that the Committee may be treading on substantive ground here, as opposed to procedure.

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[1]The original language is:

> AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT.

Ms. Smith suggested looking at the history of this section to determine why the language about "augmentation" was originally included. Ms. Smith and Mr. Carney both stated that before this language is removed, the Committee should find out why it was originally included. It was agreed that Mr. Carney would attempt to find out why this language was originally included and why it is needed.

J. Withdrawal of Counsel in Civil Cases

Mr. Battle pointed to page 23 of the Agenda (new Rule 76--Withdrawal of Counsel), and commented that little has been changed in this Rule.

Judge Anderson asked that the rule include language that the client must be notified. Judge Anderson also stated that it is unclear to him whether subsection (c) means that an attorney can withdraw without leave of court. Mr. Carney stated that it sounds as though subsection (c) does not require court approval to substitute counsel. Judge Anderson then expressed concern that under the new Rule, if counsel that has been substituted later requests a delay in the proceedings, it will be impossible for them to obtain it.

Mr. Battle questioned whether a "substitution" rule is even needed, and stated that perhaps only a "withdrawal" rule is needed. Mr. Hanni commented that he believes that to substitute counsel, both old and new counsel should have to sign the notice. Judge Anderson stated that it is his experience that when new attorneys file a substitution of counsel, they do not think they are required to step into the prior counsel's shoes. Mr. Shea suggested that the rule read that, unless otherwise approved by the court, new attorneys take the case subject to existing deadlines.

V. 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, December 18, 2002, at the Administrative Office of the Courts. The December 18, 2002, meeting will begin with a discussion on property bonds, and Mr. Carney and Mr. Slaugh will lead the discussion on probate and divorce rules.

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