MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, December 18, 2002
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Thomas R. Karrenberg, R. Scott Waterfall, Francis J. Carney, Terrie T. McIntosh, Paula Carr, W. Cullen Battle, Leslie W. Slaugh, Virginia S. Smith, Honorable Lyle R. Anderson

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Janet H. Smith, Glenn C. Hanni, Todd M. Shaughnessy, Thomas R. Lee, James T. Blanch, Debora Threedy

GUESTS: Richard Carling, Esq.

I. WELCOME AND APPROVAL OF MINUTES

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the November 20, 2002 meeting were reviewed and approved.

II. PROPOSED RULES 74 AND 75

Mr. Wikstrom introduced and welcomed guest Richard Carling. Mr. Carling has been invited to the meeting to provide the Committee with perspective regarding several issues that were discussed at the last meeting, and to respond to the Committee's questions on those issues. The issues concerned Rule 4-505 and Rule 4-505.1 of the Code of Judicial Administration, which the Committee has incorporated into proposed Rules 74 and 75. Discussion at the November 20, 2002 meeting had brought to light some concerns about the reference in proposed Rule 74 to Rule 5.4 of the Rules of Professional Conduct (fee-sharing), and about whether to retain fee schedules in proposed Rule 75. Mr. Carling, who was involved in the original implementation of Rule 4-505 and Rule 4-505.1, responded to questions from Committee members and provided perspective on the historical issues behind portions of those Rules.

After the discussion with Mr. Carling, Mr. Wikstrom suggested changing the word "reasonable" to "extraordinary," and "shall" to "may" in the language in BOLD in proposed Rule 74 at subpart (4). Tim Shea commented that Judge Roger Livingston believes the reference to Rule of Professional Conduct 54 and the requirement that attorneys certify there has been no fee-

sharing, should be retained as part of proposed Rule 74. It was agreed that the Rule 54 reference should be retained, and that the requirement of certification on fee-sharing should be retained. It was agreed that the Rule 5.4 reference should be retained, and that the requirement of certification on fee-sharing should be retained.

A motion was made to do the following:

(1) change the language in proposed Rule 74 **from** "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 AS SHALL BE ESTABLISHED BY AFFIDAVIT" **to** "IT IS FURTHER ORDERED THAT THIS JUDGMENT MAY BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN EXTRAORDINARY COLLECTION EFFORTS AS APPROVED BY THE COURT";

(2) delete "in accordance with the schedule approved by the Judicial Council," which had been added to proposed Rule 75 at subpart (a);

(3) retain in proposed Rule 75 the fee schedule presently contained in Rule 505.01, except to change the final category of fees **from** "4500.01--5000," **to** "$4500.01 or more."

The Motion was seconded by Judge Anthony Quinn, and approved unanimously.

There then was discussion about items that might be included in committee notes to proposed Rules 74 and 75. Mr. Shea posed a question as to whether the language of proposed Rule 75 at lines 7-11[1] should be part of the Rule, or whether it should be included in a committee note. Judge Anthony Schofield commented that he thinks the committee notes should include comments about "reasonableness," and should clarify that attorneys' fees include such things as supp orders, etc. Thomas Karrenberg suggested that Mr. Shea draft a sentence or two on the meaning of "extraordinary" for a committee note for proposed Rule 74.

There was also discussion about whether "costs" should be part of the BOLD language of proposed Rule 74. Judge Schofield moved to delete the word "costs." Judge Anthony Quinn

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[1]This language is as follows: "Attorneys fees awarded pursuant to this rule may be augmented after judgment pursuant to Rule 74. When the court considers a motion for augmentation of attorneys fees awarded pursuant to this rule, it shall consider the attorney time spent prior to the entry of judgment, the amount of attorney fees included in the judgment, and the statements contained in the affidavit supporting the motion for augmentation."

seconded the motion, which was approved unanimously.

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

Mr. Wikstrom reported on his conversation with Judge Timothy Hanson, who had suggested that the parties be required to include a statement of the case as part of the Rule 26 discovery plan. Mr. Wikstrom told Judge Hanson about concerns expressed by Committee members, including that the statement of the case might later be used to argue that counsel had waived any matters that were not raised. Judge Hanson told Mr. Wikstrom that this was not an issue on which he had strong feelings, but he thought a statement of the case requirement might be helpful to judges in deciding how to set a schedule.

Judge Quinn commented that, in his view, judges would not likely know any more about how to schedule after reading a twenty-five word statement of the case, than they would if the parties simply stipulated to a schedule. He stated that the parties know the case better than he does as a judge, and he is not likely to second-guess them. Judge Schofield agreed that a twenty-five word statement would not help him, since he cannot know what discovery is needed. Thomas Karrenberg pointed out that Rule 16 conferences are always available, and that judges should assume that the attorneys know the case.

Mr. Wikstrom then stated that unless someone made a motion to change the rule, the Committee would move on to the next item on the agenda. No motion was made.

IV. COMMENT TO RULE 47. QUESTIONS BY JURORS

Mr. Wikstrom directed the Committee's attention to a letter to Mr. Shea from the law firm of Van Cott, Bagley, Cornwall & McCarthy, which comments on a proposed change to Rule 47 of the Rule of Civil Procedure. Van Cott expressed its "unqualified opposition" to the proposed change that would allow jurors to ask questions at trial. Van Cott also stated that it could not "think of any change that would be more disruptive of a trial," and went on to describe what types of disruptions might occur. Mr. Wikstrom stated that this was the only letter that has been received regarding this change.

Judge Lyle Anderson commented that there is a strong sentiment among judges to allow questions by jurors. He stated that he believes that it is inconceivable that cases are always so well-presented that jurors would not have questions.

Mr. Wikstom stated that if he heard no motion to delete the reference to jurors being allowed to ask questions, he would move on to the next issue. No motion was made.

V. RULE 68. OFFERS OF JUDGMENT

The Committee discussed offers of judgment in the context of Rule 68. Frank Carney commented that the proposed change with allow the plaintiff to receive costs, but that a prevailing plaintiff already receives costs. Mr. Carney also stated that he believes that changing the rule would be a massive change and also a substantive change. Leslie Slaugh responded that he believes that this is properly done through a rule, but does not believe that changing the rule as proposed would be a good idea. Mr. Karrenberg stated that the proposed change would change the American rule. Mr. Wikstrom stated that he does not believe that many defendants use the rule even now, because the stakes are so low.

After discussion, the consensus of the Committee was that this change was neither needed nor desirable.

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

The Committee resumed its discussion of the recodification of the Code of Judicial Administration into the Rules of Civil Procedure.

a. Proposed Rule 72

Referring to proposed Rule 72, Cullen Battle stated that he believes more work needs to be done, and suggested looking to the comparable Federal Rules of Civil Procedure for assistance. He asked that discussion about this rule be continued until a later time to allow more work to be done before the entire Committee reviews the proposed rule and makes its comments.

Comments were made that the memorandum submitted by James Blanch for today's meeting likewise suggests looking to the Local Federal Rules of Civil Procedure as a starting point for work on revising the Utah Rules. Judge Anderson stated that although he likes the Local Federal Rule, he believes there are reasons that federal litigation requires and allows more extensive time limits for briefing.

After discussion, the Committee reached a consensus that the starting point for additional work on proposed Rule 72 would be examining the Local Federal Rules.

b. Rule 76--Withdrawal of Counsel

The Committee discussed proposed Rule 76 (withdrawal of counsel). Mr. Wikstrom observed that he is not sure why we would want to change the rule, and Mr. Karrenberg agreed. Mr. Wikstrom also suggested keeping the language that has been stricken in what was previously subpart (5).

The Committee discussed whether both the old and new attorneys should have to file a notice of substitution of counsel, and whether the client's signature should be required. Mr.

Wikstrom stated that he thinks there should be a way to substitute counsel even if there is a motion pending. Mr. Slaugh suggested reversing the order of the sentences in subpart (a).

It was agreed that "in a court" should be stricken from new subpart (b), so that the language reads "informing the client of the responsibility to appear or appoint counsel."

c. Rule 73--Property Bonds

Mr. Carney stated that the phrase "civil proceedings" has been deleted from proposed Rule 73. The Committee agreed there is no problem with deleting this.

Mr. Wikstrom asked who should be responsible for recording the bond (*see* p. 29, line 18, subpart (b)), and asked why the property owner should be required to do it. Judge Schofield stated that the language could be changed to read that the bond is not approved until it is recorded, rather than requiring the property owner to record the bond. It was agreed that making this change was appropriate.

Mr. Slaugh suggested deleting the first line on page 29,[2] and the consensus was that this should be done.

Mr. Karrenberg commented that the requirement of including a property description in the bond makes a lot of work for the court. Judge Anderson responded that there is a reason why this requirement is in the rule---so that the court won't have to do it.

Mr. Wikstrom then asked Mr. Shea to contact the recorder's office to ask whether the proposed rule would satisfy their requirements.

d. Rule 4-801--Transfer of Small Claims Cases

Mr. Shea stated that Rule 4-801 appears to be administrative, and that perhaps it should remain in the Code of Judicial Administration. The consensus of the Committee was that Mr. Shea is correct.

e. Rule 100--Coordination of Cases Pending in District Court and Juvenile Court.

Mr. Wikstrom asked whether proposed Rule 100 is substantive or procedural. Mr. Shea responded that it is procedural to the extent that the parties are required to notify the court if there are cases pending in other courts. Mr. Shea also commented that a lot of work has gone into revising this rule.

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[2]This line reads "be prepared by an owner of record or counsel."

Mr. Slaugh stated that there is an issue about the mechanics of the "communication" referred to at page 33, lines 26-27 (subpart (a)(3)). He also stated that line 10 on page 34 (subpart (b)(2)) should read "court on its own initiative," and not "court on its own motion."

Mr. Battle commented that this is an entirely new area and asked whether there should be a new "chapter." Mr. Shea stated that there is a big break before Rule 100, so that there is room for growth. He also stated that this is not a separate "chapter," it is only a separate "area."

There was a discussion as to where the court file should stay. Judge Schofield commented that he hates to see "portions" of the court file removed, and Paula Carr agreed that the clerks do not want a file taken apart.

After additional discussion and reading of the rule, it was agreed that it should remain in the Code of Judicial Administration.

f. Rule 101–Uniform Custody Evaluations

Mr. Battle commented that Rule 101 also seems to be substantive and not procedural, although part of the rule may be procedural. Terrie McIntosh agreed, and stated that the rule seems to be something that should be statutory. Mr. Shea commented that the Committee on Children and Family Law put this proposed rule together, and that there is no statute that regulates child custody evaluations. Judge Schofield suggested that the Committee recommend that someone suggest this issue to the legislature for its action.

Mr. Slaugh stated that his problem with the rule is that he questions whether the Committee can impose specific licensure requirements because this is really an expert witness question. Judge Schofield responded that it is helpful to judges to have something to point to that sets minimum qualifications.

Mr. Wikstrom asked Mr. Shea to check with DOPL about its minimum licensing requirements.

VII. 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, January 22, 2003, at the Administrative Office of the Courts.

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