

# MINUTES

## UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 26, 2003  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

**PRESENT:** Francis M. Wikstrom, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, David W. Scofield, R. Scott Waterfall, Terrie T. McIntosh, Thomas R. Lee, Glenn C. Hanni, Paula Carr, W. Cullen Battle, Leslie W. Slaugh, Thomas R. Karrenberg, Todd M. Shaughnessy, Virginia S. Smith, James T. Branch

**STAFF:** Tim Shea, Judith Wolferts

**EXCUSED:** Janet H. Smith, Francis J. Carney, Debora Threedy, Honorable Lyle R. Anderson

**GUESTS:** Matty Branch

### I. WELCOME AND APPROVAL OF MINUTES

Tim Shea called the meeting to order at 4:00 p.m. Committee Chairman Francis M. Wikstrom had contacted Mr. Shea earlier to report that an unexpected personal matter had arisen and that he would be delayed. Prior to Mr. Wikstrom's arrival, Glenn Hanni suggested that additional commentary regarding oral argument as a fundamental right be included on page 4 of the January 22, 2003 Minutes. It was agreed to defer discussion on this until Mr. Wikstrom arrived. On Mr. Wikstrom's arrival, the minutes of the January 22, 2003 meeting were reviewed, and Mr. Hanni's suggestion was again raised. After discussion, the Minutes were approved as originally submitted.

### II. RECODIFICATION OF CODE OF JUDICIAL ADMINISTRATION INTO RULES OF CIVIL PROCEDURE

W. Cullen Battle led the Committee in a discussion of the Rules as drafted thus far.

#### 1. Rule 75--Attorneys' Fees

Mr. Battle had three comments regarding the present draft of Rule 75. He first noted that the first sentence of line 2 of Rule 75 (Agenda, p. 7), sounds like substantive law. Thomas Lee pointed out that the Committee had specifically used this particular language so as **not** to be substantive. After discussion, it was agreed that this language would be left as is.

Mr. Battle next suggested that line 14 of Rule 75 (Agenda, p. 7) should specifically state

that the schedule of fees is for “debt collection” cases. Judge Anthony W. Schofield and Thomas Karrenberg discussed what a “debt collection” case is, with Mr. Karrenberg commenting that any contract case is a debt collection case. Mr. Battle stated that he believes that the schedule included in Rule 75 was intended to be automatic in a “debt collection” case, but that the present language suggests that the schedule could apply in any case. Judge Schofield then commented that he believes the schedule could apply in any situation where there is a “debt” to collect. After discussion, it was agreed to leave this language as it is.

Mr. Battle’s third suggestion was that the language in line 16 of Rule 75 (Agenda, p. 7) be changed to strike “authorizing,” and to insert “authorizing the award” at the end of the sentence. After discussion, it was agreed to make this change.

Leslie Slaugh pointed out a punctuation error, which was corrected, and Todd Shaughnessy suggested that “position” be substituted for “profession” in line 9. The Committee agreed. After further consideration of the word “position,” Mr. Lee suggested that a parenthetical, *e.g.*, (lawyer, paralegal), be including after “position” to clarify what is intended.

Mr. Battle then moved to adopt the Rule for publication as amended, including adding “In such cases” as a preface to the first full sentence of line 16. Mr. Slaugh seconded the Motion, which was approved unanimously.

## **2. Rule 76–Withdrawal of Counsel**

Mr. Battle addressed Rule 76, and directed attention to the first sentence (Agenda, p. 8, ll. 10-13). Terrie McIntosh commented that she thinks this sentence is too long, and suggested that it be divided into two sentences. After discussion, a majority of the Committee agreed with Ms. McIntosh’s suggestion.

Mr. Battle next suggested that “of record” be deleted after “counsel” in line 12 (Agenda, p. 8), and that “of the case” be substituted. He also suggested adding “existing” before “hearing schedule and deadlines” in line 17 (Agenda, p. 9). Mr. Slaugh directed the Committee’s attention to line 6 (Agenda, p. 9), and stated that “opposing counsel” should be changed to “opposing party.” The Committee agreed to these changes.

Mr. Battle then moved that Rule 76 be adopted for publication as amended. Mr. Karrenberg seconded the Motion, which was approved unanimously.

## **3. Rule 77–Property Bonds**

Mr. Slaugh referred the Committee to line 20 of Rule 77 (Agenda, p. 10), and asked what is meant by “exoneration of the bond.” David Scofield commented that this was included in order to place the burden of obtaining a release on the person requesting it, *i.e.*, on the property owner instead of on the court. The Committee then discussed clarifying line 20, and it was

agreed that “shall” would be retained, and that “for approval” would be added to the end of the sentence, after “to the court.”

Mr. Battle then moved that Rule 77 be adopted for publication as amended. The Motion was seconded and approved unanimously.

#### **4. Rules 101–107 (Divorce Rules)**

Mr. Slauch pointed to lines 9-11 of Rule 102 (Agenda, p. 12), and stated that he believes this language creates a presumption that attorneys’ fees will be granted. Several Committee members pointed out that this language is pre-existing, and that the Committee has not changed or added to it. Judge Schofield also commented that no judge that he knows believes that this language creates a presumption that attorneys’ fees will be granted, and Judge Anthony Quinn pointed out that the word “may” is used. Mr. Slauch withdrew his comment.

Mr. Lee stated that he continues to be concerned about what he believes to be the substantive nature of Rule 102, *i.e.*, that it creates a remedy. Mr. Wikstrom commented that this rule applies to temporary fees which can later be adjusted, and that the rule makes it easier for judges since it sets standards. Mr. Scofield stated that this rule applies only to dividing the marital estate and nothing more, and Judge Schofield commented that this provision is used by judges every day and if it is not placed here, where can it be placed? Mr. Lee withdrew his objection.

Mr. Battle then asked for comments concerning Rules 103 through 107.

Mr. Slauch asked whether line 27 of Rule 104 (Agenda, p. 14), conflicts with Rule 103. After discussion, it was agreed that there is no conflict. With regard to Rule 104, Ms. McIntosh suggested striking the last sentence of lines 28-29 (Agenda, p. 15), and the Committee agreed with this suggestion. Mr. Slauch suggested changing “the” at the end of line 18 in Rule 107 to “an” (Agenda, p. 19), and it was agreed to do this. Following on this, Mr. Lee suggested checking to make sure there is consistency of language in the “Divorce” rules.

Mr. Battle moved that Rules 101 through 107 be adopted for publication as amended. The motion was seconded, and approved unanimously.

#### **5. “Divorce” and “Adoption” Rules**

After discussing Rules 101 through 107, Mr. Wikstrom asked Mr. Shea to scan through the divorce and adoption rules as soon as possible, so that the Committee can send drafts to divorce lawyers who work with these rules on a consistent basis. Mr. Wikstrom would like these lawyers to have the opportunity to make suggestions prior to the Committee’s March 26, 2003, meeting. Virginia Smith stated that these rules should also be provided to the Commissioners for their review.

## **6. Rules 108-109 (Adoption Rules)**

Mr. Battle next asked for comments about Rules 108 and 109, which deal with adoption.

### **a. Rule 108–Opening Sealed Adoption Files**

Mr. Slaugh commented that lines 18-23 of Rule 108 (Agenda, p. 20) appear to be more substantive than procedural, and questioned what he considers to be advising petitioners about the procedures for obtaining medical information. Paula Carr stated that this language is very helpful to pro se parties, since it informs them where to obtain the information. Judge Schofield agreed that this information is very helpful to parties.

The Committee then discussed Rule 108's comments regarding “adoption agency.” Mr. Slaugh questioned why line 15 of this rule (Agenda, p. 21), uses the language “records of the adoption agency,” since he does not believe the court has any authority over adoption agencies. Judge Schofield agreed, and noted that the rule deals with court records and not those of the adoption agency.

Judge Quinn suggested that the term “adoption file” be substituted for “adoption records” in these rules, and the Committee agreed to this change.

Ms. Smith and Mr. Karrenberg questioned the use of the word “sensitive” in Rule 108, and Mr. Lee suggested using other phrasing. After discussion, it was agreed that Mr. Shea and Mr. Lee will edit Rule 108 to make the language less emotional and more consistent with that of other Rules of Civil Procedure. Rule 108 will then be distributed to probate attorneys for comments.

### **b. Rule 109–Adoptions**

Judge Schofield stated that the adoption petitions that he sees never contain all of the items listed as requirements in Rule 109 (Agenda, pp. 22-23). It was also noted that there is a specific statute dealing with this, and the Committee discussed whether it is necessary to have a rule when there already is a statute. In the context of this discussion, Mr. Wikstrom referred to Utah Code Ann § 78-30-14, which suggests that the requirements listed in Rule 109 are left to the court’s discretion. Judge Quinn further commented that at one time the statute required that there always be an investigation unless it was waived, whereas now there is an investigation only if the court orders it. Both Judge Schofield and Judge Quinn suggested eliminating the rule as superfluous. It was finally agreed that Judge Schofield would work with Mr. Shea to examine the rule more closely before a final decision is made.

## **7. Rules 90, 91, 92**

Mr. Battle asked for comments on Rules 90, 91 and 92. Mr. Slaugh stated that he

believes the three separate rules can be combined into one. Mr. Shea responded that he thinks Rules 90 and 91 can be combined, but that he is not sure that this is feasible with Rule 92.

Judge Schofield asked whether, as a practical matter, attorneys are even complying with the requirements of these rules. Mr. Shea stated that he and Mr. Wikstrom have met with probate attorneys and have been told that those attorneys do use these rules and the associated forms.

Mr. Wikstrom then expressed concern about adopting Rules 90-92 and sending them to the Supreme Court, when the Committee does not appear to be comfortable doing so. Responding to Ms. Smith's statement that it is her understanding that the recodification must be completed by the Committee's March meeting, Mr. Shea stated that these particular rules could be left in the CJA for the time being. Mr. Battle asked Mr. Shea whether these rules will be lost if the Committee does not go forward with recodifying them. Mr. Shea commented that the Committee could recommend that they be left in the CJA for the present time. Mr. Wikstrom then suggested notifying probate practitioners that the Committee will not go forward on these rules unless there are comments by the practitioners. R. Scott Waterfall agreed with Mr. Wikstrom's suggestion, and Mr. Waterfall and Mr. Slaugh commented that these rules should also be sent to trust officers for their comments. Mr. Slaugh also suggested that probate clerks at the Third District Court be asked for input and comments on these rules.

#### **8. Rule 7–Pleadings Allowed; Motions, Memoranda, Orders, Objection to Commissioner's Order**

Mr. Battle asked for comments on Rule 7 (Agenda, pp. 39-42), which has been revised by Mr. Lee to conform to the Committee's previous comments. Suggestions for technical language changes were made by Mr. Wikstrom, Mr. Lee, Mr. Battle, Mr. Slaugh, Mr. Karrenberg, and Judge Quinn.

The issue of required hearings was again raised. Mr. Hanni stated that he has no objection to the present language of the rule as long as it preserves the right to oral argument on dispositive motions. Mr. Lee stated that the rule as written does not require a hearing on motions for partial summary judgment, and suggested that this be added. Mr. Slaugh then suggested including the language "any motion under Rule 56," which would resolve Mr. Hanni's and Mr. Lee's concerns. Judge Quinn suggested adding "that would dispose of any claim or defense" to Mr. Slaugh's proposed language. It was agreed that Mr. Slaugh's and Judge Quinn's suggested language will be used.

Mr. Shaughnessy raised the issue of whether the parties should be required to raise a request for oral argument in their first memorandum. After extensive discussion, it was agreed that Rule 7 should state that any party may make a request by placing it in the caption of any memorandum or Request to Submit for Judgment. Mr. Shaughnessy then suggested that subpart (c)(3)(D) be omitted, and that the information regarding a request for hearing be included in

subpart (e). It was agreed that this was appropriate.

Mr. Battle then moved that Rule 7 be adopted for publication as amended. Mr. Lee seconded the Motion, and it was approved unanimously.

#### **9. Rules 9, 42, 51, 54**

Mr. Battle requested comments on Rules 9, 42, 51, and 54.

Mr. Slaugh raised the issue of the language of subpart (k) of Rule 9 (Agenda, p. 44). After discussion by the Committee, it was agreed that the language be changed to read “A complaint for failure to pay a judgment shall describe the judgment in detail, or a copy of the judgment shall be attached.” Mr. Shaughnessy suggested that subpart (k) be preceded by a caption stating “Renewal of Judgment.”

Referring to lines 27-28 of Rule 42 (Agenda, pp. 44-45), Mr. Battle suggested that the two sentences be combined.

Mr. Battle then moved that Rules 9, 42, 51, and 54 be adopted for publication as amended. The Motion was seconded and approved unanimously.

#### **10. Thanks**

Mr. Wikstrom thanked Mr. Battle and Mr. Shea for their good work on the revisions to the rules discussed at this meeting.

### **III. DISQUALIFICATION OF TRIAL JUDGE AFTER REMAND**

Mr. Wikstrom has received a letter from Douglas G Mortensen, with attachments, stating Mr. Mortensen’s position that a trial judge should be disqualified from hearing a case that has been remanded after appeal. The letter states that a survey of the Utah Trial Lawyers Association favors a rule that would so disqualify a judge, and suggests that the Committee should be listening to lawyers and litigants on this issue. Mr. Wikstrom commented that the issue raised by Mr. Mortensen was considered a couple of years ago. The Litigation Committee of the Bar circulated the proposal to lawyers and received no response, and Mr. Wikstrom later testified on this issue to a legislative committee.

After discussion, Mr. Wikstrom suggested that Mr. Mortensen be invited to the March 26, 2003 Committee Meeting to present his position on this issue. It was agreed that Mr. Mortensen will be invited to do this.

#### **IV. RULE 68; HJR 3**

The issue of Rule 68 and the most recent legislative proposal concerning that rule were discussed. Mr. Wikstrom asked whether the Committee would like to assign a couple of Committee members to speak to legislators about Rule 68. When several members expressed concern about involving the legislature in this matter, Mr. Wikstrom commented that the problem is that the Committee is concerned that this rule is substantive. In response to this, Mr. Shaughnessy stated that the Committee is not creating a right, it is simply creating wording on it. There was additional discussion about the potential risks of the rule, and the Committee concluded that further input is needed.

#### **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, March 26, 2003, at the Administrative Office of the Courts.