MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 23, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Trystan B. Smith, Francis J. Carney, Barbara L. Townsend, Honorable Reuben J. Renstrom, Leslie W. Slaugh, Terrie T. McIntosh, David W. Scofield, Lori Woffinden, Honorable Derrek P. Pullan, Honorable Lyle R. Anderson, Jonathan O. Hafen, Steven Marsden, James T. Blanch, Lincoln L. Davies, Todd M. Shaughnessy, W. Cullen Battle

ABSENT: Thomas R. Lee, Judge David O. Nuffer, Judge Anthony B. Quinn, Anthony W. Scofield, Janet H. Smith

STAFF: Timothy M. Shea, Sammi V. Anderson

GUESTS: Angela Fonnesbeck (Family Law Section), Stewart Ralphs (Family Law Section)

Ms. Fonnesbeck and Mr. Ralphs attended the meeting to discuss a potential rule requiring basic financial disclosures at the outset of family law cases.

Tom Brunker (AG's Office), Rick Schwermer (AOC), Kirk Torgensen (AG's Office), Mark Fields (AOC)

Mr. Brunker, Mr. Schwermer, Mr. Torgensen and Mr. Fields attended the meeting to discuss proposed changes to Rule 65C (Post-Conviction Reviews in Capital Cases).

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the June 24, 2009 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. INTRODUCTION OF NEW MEMBERS AND SAMMI ANDERSON.

Mr. Wikstrom introduced Judge Reuben Renstrom and Trystan Smith as new members of the committee. The new members made the appropriate disclosures as required by the Supreme Court Rules. Mr. Wikstrom also introduced Sammi Anderson as the new secretary for the committee.

III. RULE 108. DISCLOSURES IN DOMESTIC RELATIONS PROCEEDINGS.

Ms. Fonnesbeck, current chair of the Family Law Section, and Mr. Stewart Ralphs represented the Family Law Section in a discussion regarding the need for basic initial disclosures in domestic proceedings. Proposed Rule 108 is the product of discussion and comment from the Family Law Section over the course of the last 18 months.

Ms. Fonnesbeck and Mr. Ralphs emphasized the prevalence of pro se litigants and mandatory mediation in domestic proceedings. They expressed the view that basic mandatory disclosures regarding income and assets would facilitate early resolution of many domestic cases.

Mr. Slaugh and Mr. Scofield noted that disclosures regarding one party's ownership interest in a business entity require special treatment so that the interest of the entity in safeguarding confidential business information is also protected. Mr. Slaugh proposed compromise language based on whether the party to the proceeding has control over the entity. Mr. Wikstrom asked that any language changes be sent to Tim Shea. Mr. Shea suggested the Rule be called Rule 26(a) rather than Rule 108.

IV. RULE 65C. POST-CONVICTION REVIEWS IN CAPITAL CASES.

Mr. Wikstrom introduced the proposed amendment to Rule 65C governing post-conviction relief. Reference was made to a September 14, 2009 letter to the committee from Representative Kay L. McIff. Mr. Wikstrom discussed efforts, led by the Attorney General's office, to amend the Utah State Constitution to provide that post-conviction remedies be governed by statute, notwithstanding any other law. It was ultimately decided that an amendment to Rule 65C, in conjunction with statutory amendments to the Post-Conviction Remedies Act ("PCRA"), would be a more prudent alternative. The proposed amendment is the compromise effort of an informal task force including members of the Attorney General's office, the defense bar, Representative McIff, academics, representatives from the Administrative Office of the Courts and Mr. Wikstrom as Chair of the committee.

Mr. Wikstrom reported that the compromise in the proposed amendment has been approved by the Attorney General's office and participating defense counsel. Mr. Slaugh questioned the necessity of a sentence in subparagraph (a) to summarize the PCRA. Mr. Brunker from the Attorney General's office responded the language is included to ensure this area of law is governed by statute, the PCRA, not older common law.

Mr. Wikstrom noted Representative McIff's desire to preserve some undefined, limited area where the Court reserves the right to exercise its discretion in this area. Judge Pullan questioned representatives from the Attorney General's office whether the Attorney General is taking the position that Courts have no common law authority to set aside a conviction. Judge Pullan sought assurances that the Court's discretion to act in egregious circumstances is preserved under the proposed amendment. Mr. Brunker and Mr. Torgeson assured Judge Pullan that it was not the intention of the Attorney General to foreclose the Court from granting relief outside the PCRA in appropriate circumstances. Judge Pullan emphasized his view that the courts must have the ability to correct egregious injustices through the writ process and indicated his support for the proposed amendment only so long as that ability is preserved to the judiciary. Judge Pullan was assured by those representatives of the Attorney General's office present that courts would retain that ability.

Mr. Slaugh moved the approval of the amendment. Mr. Battle seconded. The motion was unanimously approved. Publication will happen on an expedited basis.

V. FINAL ACTION ON RULES 58A (ABSTRACT OF JUDGMENT) AND RULE 63A (CHANGE OF JUDGE AS A MATTER OF RIGHT).

Mr. Shea indicated that both of these proposed amendments have been published for comment. The changes to Rule 58A are intended to clarify existing language and the process for creating an abstract of judgment. Mr. Carney asked Ms. Woffinden whether there was any need to have the abstract attested under oath. Ms. Woffinden indicated there is no need, that the Clerk can sign under seal of the court. The committee unanimously approved the amendment to the Rule with the change to allow the Clerk to sign under the seal of the court.

As for Rule 63A, the Committee considered comments that the Rule should apply to one-party actions. Mr. Shea and Mr. Wikstrom explained that the amendment is intended to clarify that parties in one-action proceedings, such as probate matters or adoptions, are not permitted to unilaterally change judges as a matter of right. The amendment is intended to eliminate the possibility of judge shopping in one-party actions. The Committee approved the proposed amendment as written notwithstanding the comment.

VI. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom introduced the topic and expressed a desire that the committee reach consensus on a cogent, non-final set of proposed rules as the foundation for future discussions. As an overview, the point of the simplified procedures is to have significant disclosure at the outset. Mr. Wikstrom expressed his belief that many cases would be trial-ready just upon the basis of initial disclosures, and without need of follow-up discovery. If not, the parties would meet and try to agree on a discovery plan. Lawyers would be charged with preparing and presenting to their clients a proposed budget for discovery, and with obtaining client approval for that budget. If the parties agree on the discovery schedule, the court shall approve. If the parties cannot agree, they would go to the court to set a discovery plan and schedule. Judge Pullan and Judge Anderson expressed the view that it is best for the court to have the benefit of the early disclosures for purposes of this conference.

The committee first discussed depositions. Mr. Slaugh expressed the view that many cases require fewer depositions than are taken and approved of the concept that depositions be limited by number of hours, rather than by number of separate depositions. Mr. Hafen expressed caution in setting the deposition hour limit too low and emphasized the need to let lawyers handle their cases efficiently and as they see fit. Mr. Hafen advocated to allow the parties and lawyers decide how to divide up the total number of deposition hours, with the caveat that party depositions are limited to 7 hours and non-party depositions to 4 hours. The committee was unanimous that each side should have 20 hours for depositions, to be divided up as the sides so choose, with party depositions limited to 7 hours and non-party depositions limited to 4 hours.

Mr. Wikstrom next raised the topic of interrogatories. Discussion followed as to the usefulness of contention interrogatories and whether they should be prohibited. Mr. Slaugh indicated that contention interrogatories are useful to flesh out affirmative defenses identified by the other side. Mr. Hafen suggested limiting interrogatories to 15 per side and allowing parties to use those interrogatories as contention interrogatories if they are so inclined. Mr. Shea emphasized that the default limits proposed by the committee are not binding. If the parties and lawyers believe they require additional discovery, and if the budget for that discovery has been presented to and approved by the parties, the court should permit discovery beyond the default limits. The committee was unanimous that each side should get 15 interrogatories, to be used as contention interrogatories or otherwise.

The committee then considered requests for production. Ms. Townsend expressed a desire to maintain consistency. Mr. Wikstrom responded there is currently no limit on requests for production. The committee discussed various proposed limits and concerns associated with drafting and interpreting requests for production too narrowly or too broadly. Mr. Scofield expressed a concern regarding whether responsive documents must be identified as responsive to particular requests for production. Mr. Smith discussed concern regarding how requests for production would be divided among multiple parties on the same side. Judge Anderson noted the court's role in determining whether parties "on the same side" are sufficiently adverse that they warrant separate discovery limits. The committee decided that each side should have 25 requests for production. The committee declined to add any language as to requiring that responsive documents be made to correspond with particular requests for production.

The committee next turned to requests for admission. Mr. Slaugh indicated requests for admission are useful for authenticating documents and Judge Anderson noted his observation that requests for admission are used effectively in collections cases. Mr. Hafen suggested a limit of 25. The committee unanimously approved a limit of 25 requests for admission per side.

Mr. Wikstrom then introduced the topic of timing for the requisite disclosures. Mr. Shea suggested that Plaintiff be required to make the requisite disclosures 14 days after Defendant files an Answer. The committee approved this suggestion. Mr. Shea discussed keying the deadline for Defendant's disclosures to Plaintiff's disclosures. The committee agreed. Defendant's disclosures will be due 28 days after Plaintiff's disclosures are made. Ms. Townsend raised the issue as to what will happen when multiple defendants are served at different times. Judge Anderson was not troubled by this as later served defendants always have these kinds of issues to address. Mr. Wikstrom proposed that Defendant's disclosures be due 28

days after Plaintiff makes disclosures or 28 days after that Defendant has answered, whichever is later. The committee agreed.

Judge Pullan inquired as to whether Plaintiff would suffer a penalty if Plaintiff failed to make disclosures within 14 days. The committee discussed several options, including dismissal without prejudice, Rule 37 sanctions, allowing a motion to dismiss by Defendant, etc. Mr. Wikstrom and Mr. Marsden proposed that no party be permitted to take additional discovery until after their own disclosures filed. The committee approved this suggestion.

The committee then discussed what would happen once the parties' requisite disclosures are made. Mr. Wikstrom raised the possibility of requiring attorneys to meet and confer to agree on additional discovery. The committee expressed concerns that attorneys don't generally meet and confer. Mr. Hafen suggested that the default assumption be that the matter is trial ready and no additional discovery is needed *unless* parties stipulate otherwise or one party requests additional discovery. The committee agreed. Absent stipulation or motion for additional discovery, courts should expect a pre-trial order and set a trial date. The committee agreed that 150 days after first Defendant's disclosures, fact discovery will be presumed closed absent stipulation or request for additional discovery. A pre-trial conference and trial date can be initiated by the court or on request of the parties.

Significant discussion regarding the scope of discovery followed. Judge Pullan emphasized access to justice, especially for smaller cases, and expressed a need to educate the judiciary on the proportionality of cases, *ie*, amount in controversy vis a vis costs of discovery, so that courts are more willing to cut discovery off in low value cases. Multiple committee members expressed their opinion that the scope of discovery issue will depend entirely on courts' willingness to enforce the restrictions.

Mr. Wikstrom then asked what role Rule 35 examinations should have in the initial phase of discovery. Mr. Carney addressed the different perspectives held by the plaintiff and defense bars. Mr. Smith discussed the significant costs associated with the examination. Judge Pullan suggested that once fact discovery is closed, judges be involved in a proportionality review before expert discovery, including the Rule 35 examination, is undertaken. The committee further discussed whether Rule 35 should be revised to treat the independent medical examination just as other experts are treated. Mr. Carney expressed his opinion that independent medical examinations are treated differently by the rules only because they evolved at a time when expert practice other than independent medical examination was not extensive.

Mr. Wikstrom emphasized that the first two phases, requisite disclosures and targeted discovery, are confined to fact discovery. The committee turned to expert discovery. Mr. Carney suggested that the party bearing the burden of proof have 30 days after the close of fact discovery to submit expert report(s). Rebuttal reports will be due 30 days later. The committee agreed. The committee further agreed that there be no expert depositions and that experts not be permitted to exceed the scope of their reports at trial.

Mr. Shea raised the issue of exemptions from Rule 26(a) disclosures. The committee agreed that the exemption for pro se litigants and amounts in controversy under $20,000 must be abolished. Mr. Shea raised the possibility of limiting subpoenas duces tecum. The committee declined to impose any limit in this regard. Mr. Shea then raised the issue of electronically stored information and queried whether the rules should require a meeting to discuss preservation of this information. Mr. Wikstrom suggested that if one party believes the other party should be obligated to preserve evidence, that the onus is on the party believing electronic evidence exists to notify the other side. Mr. Shaughnessy suggested that the rule state that parties are under no obligation to alter existing document storage/destruction policies unless and until notified by the other side. The committee decided that, after a complaint is filed, if one party wants to preserve electronic evidence, that party must seek a meeting and try to reach an agreement as to scope of preservation. If the parties are unable to agree, that party can file a motion for preservation with the court.

VII. ADJOURNMENT.

The meeting adjourned at 8:00 p.m. The October meeting is cancelled. The next meeting will be held at 4:00 p.m. on Wednesday, November 18, 2009, at the Administrative Office of the Courts.