

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes February 28, 2018

PRESENT: Chair Jonathan Hafen, Katy Strand, Paul Stancil, Leslie Slaugh, Susan Vogel, Barbara Townsend, Judge Clay Stucki, Judge Kate Toomey, Rod Andreason, Judge James Blanch, Judge Andrew Stone, Michael Petrogeorge, Timothy Pack, Judge Laura Scott, Judge Kent Holmberg, Judge Amber Mettler

EXCUSED: James Hunnicutt, Lauren DiFrancesco, Justin Toth, Lincoln Davies, Dawn Hautamaki, Trystan Smith

GUESTS: Cathy Dupont, Mark Olson, Charles Stormont, Commissioner Michelle Blomquist

STAFF: Nancy Sylvester

(1) Welcome, Approval of minutes.

Rod Andreason moved to approve the minutes with changes which were sent into Nancy Sylvester. Judge Kate Toomey seconded. The motion passed unanimously.

(2) RULE 73. ATTORNEY FEES.

Nancy Sylvester reminded the committee that they had discussed Rule 73 two meetings ago. The committee requested Mark Olson and Charles Stormont to meet and come to an agreement on what the rule language should look like. Mr. Olson and Mr. Stormont discussed where the fees were incurred and what was reasonable. They recognized that the overwhelming majority of cases filed are debt collections, and the majority of those result in defaults. They had built in a default rule for contested versus uncontested cases, with the option to object to the default for reasonableness. They believed this is a reasonable approach. Mr. Stormont stated that both plaintiffs and the defense bar support this proposal. Judge James Blanch said he supported the proposal because it is tied to the amount of effort, rather than the amount in controversy. He asked Mr. Olson if the defense bar will use this process rather than creating affidavits. Mr. Olson said he believed the collection bar will change their behavior to reflect the fee schedule.

Judge Laura Scott asked how many collection cases involve stipulated payment plans which are then not paid, resulting in a double attorney's fees? Mr. Olson said that if such payment plans are in place they will have to agree to reasonable attorney's fees. Judge Blanch said that would be outside the scope of this rule since people would be contracting for attorney's fees. Michael Petrogeorge echoed the same, saying that would be a settlement contract and outside the scope of the rule.

Mr. Petrogeorge also said under the new procedure, the complaint could not include the amount of the attorney's fees since the lawyers will not know if it is contested at filing. Timothy Pack

proposed no longer requiring the amount of fees in the complaint. Leslie Slauch proposed that parties should claim that there will be attorney's fees under the rule, but not provide the specific amount.

Susan Vogel was concerned that responding to a complaint, even to say I admit I owe the debt, would create the \$750 fee. Mr. Olson and Mr. Stormont responded that if there is an unopposed motion for judgment on the pleadings it would trigger the lower fees. Ms. Vogel expressed concerns that the summons says an answer is required, even though it is not. She also expressed her belief that a judge should review the basis for the fees. Judge Blanch said clerks will likely be approving the award of fees since there is such a high volume. Judge Andrew Stone said if they have questions about whether the case is contested or not, clerks will ask the judge to weigh in. Mr. Stormont said the ability to object indicates that the court can and will review these.

Mr. Petrogeorge thought the rule needed a clarifying amendment with respect to appearances and motions for summary judgment. Judge Stone said appearances should be clarified to reflect if there is evidence or argument at a hearing. Judge Scott said as amended by the committee, the rule continued to read that additional fees were permitted if the defendant were to appear at any hearing. Judge Blanch questioned whether the rule should distinguish evidence at a hearing versus written evidence.

The committee made clarifying edits to the committee note.

Judge Toomey moved to approve the rule in the form below:

Rule 73. Attorney fees.

(a) Time in which to claim. Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided in part (f) of this Rule, or in accordance with Utah Code Section 75-3-718, and no objection to the fee has been made.

(b) Content of motion. The motion must:

(b)(1) specify the judgment and the statute, rule, contract, or other basis entitling the party to the award;

(b)(2) disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

(e) Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees, cite the law or attach a copy of the contract authorizing the award, and state that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) Fees. Attorney fees awarded under this Rule may be augmented upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) of this Rule within a reasonable time after the fees were incurred, except as provided in parts (f)(1), (f)(2) and (f)(3) of this Rule, and only where the augmented fees sought exceed those already awarded.

(f)(1) Fees upon entry of uncontested judgment. When a party seeks a judgment, the responding party does not contest entry of judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has complied with part (e) of this Rule, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to \$350.00 for such attorney fees without a supporting affidavit.

(f)(2) Fees upon entry of judgment after contested proceeding. When a party seeks a judgment, the responding party contests the judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has established its right to attorney fees, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to \$750 for such attorney fees without a supporting affidavit.

(f)(3) Post Judgment Collections. When a party has established its entitlement to attorney fees under any paragraph of this Rule, and subsequently:

(f)(3)(A) applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, or 64E; or

(f)(3)(B) files a motion pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314, a party may request as part of its application for the writ or motion that its judgment be augmented according the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

Action	Attorney Fees Allowed
Application for any writ under Rule 64, including 1 st application for a writ under Rule 64D	75.00
Any subsequent application for a writ under Rule 64D to the same garnishee	25.00
Any motion filed with the court under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C	75.00
Any subsequent motion under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C filed within 6 months of the previous motion	25.00

(f)(4) Fees in excess of the schedule. If a party seeks attorney fees in excess of the amounts set forth in parts (f)(1), (f)(2), or (f)(3) of this Rule, the party shall comply with parts (a) through (c) of this Rule.

(f)(5) Objections. Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

Advisory Committee Notes.

To be added to the Advisory Committee Notes:

2018 Advisory Committee Notes

An overwhelming number of cases filed in the courts, especially debt collection cases, result in the entry of an uncontested judgment. The work required in most cases to obtain an uncontested judgment does not typically depend on the amount at issue. As such, the prior schedule of fees based on the amount of damages has been eliminated, and instead replaced by a single fee upon entry of an uncontested judgment that is intended to approximate the work required in the typical case. A second amount is provided where the case is contested and fees are allowed, again in an effort to estimate the typical cost of litigating such cases. Where additional work is required to collect on the judgment, the revised rule provides a default amount for writs and certain motions, and eliminates the “considerable additional efforts” limitation of the prior Rule. It also recognizes that defendants often change jobs, and thus provides for such default amounts to vary depending on whether a new garnishee is required to collect on the outstanding amount of the judgment.

Thus, the amended Rule attempts to match the scheduled amounts to the work required of attorneys, rather than tying the scheduled amounts solely to the damages claimed. But the Rule remains flexible so that when attorney fees exceed the scheduled amounts, a party remains free to file an affidavit requesting appropriate fees in accordance with the rule.

Judge Blanch seconded Judge Toomey's motion. The motion passed unanimously. Chairman Hafen and Nancy Sylvester will present the rule to the Supreme Court and recommend that it be circulated for comment.

(3) RULE 109. AUTOMATIC TEMPORARY DOMESTIC ORDERS. NEW.

Commissioner Blomquist proposed new Rule 109 on behalf of the Judicial Council's Standing Committee on Children and Family Law. The Board of District Court Judges had approved the language of this rule. The purpose of the rule is to impose a standard temporary order on parties to domestic actions, the idea of which is to avoid parties litigating the items in the order prior to final adjudication, thereby saving them time and money. Colorado has a similar rule and automatic order.

Judge Toomey questioned whether the language was redundant or clear enough. Paul Stencil was concerned about over inclusiveness. He said that prohibiting the transfer of property may be over-kill when looking at only custody issues. He suggested clarifying language for paragraph (a)(1). Mr. Pack wanted to know if this should apply at all in non-divorce cases. Judge Toomey suggested clarifying language for paragraph (a)(6) about that section applying only when there is a minor child. With respect to paragraph (a)(1), Judge Stone asked if there will be a difficulty enforcing the requirement of not annoying or bothering. He said there may be trivial complaints. Commissioner Blomquist believed that even if that was difficult to enforce, it may help behavior. Ms. Vogel and Mr. Andreason were concerned with the definition of travel being too broad. Judge Toomey proposed using mileage; Judge Stone proposed using overnights. Mr. Hafen proposed mirroring Utah Code section 30-3-36 and Ms. Sylvester proposed referring to the statute in the rule but then noted that the statute does not actually speak to miles.

Judge Stucki said that the rule is trying to get to unusual or non-customary or non-routine travel. Judge Blanch pointed out that the parties can customize this on short notice, so it won't be set in stone. Mr. Slaugh proposed both non-routine and overnight. With respect to paragraph (a)(10), Mr. Slaugh asked if the third party should be required to be an adult. He also expressed concerns about the obligation to remove the child. Commissioner Blomquist said this is really about a parent who has the other third parties around; the parent who is there has the duty. Mr. Petrogeorge proposed that the wording include "while exercising parent time." Ms. Vogel proposed "when the child is under their care" because there may not be parent time at the time this order is entered.

Mr. Slaugh was also concerned that the requirement for a hearing does not make sense for the entire time that this will be in force. Once the answer is filed perhaps it should be the normal motion period or 21 days after the answer is filed.

Judge Stone said that (a)(6) should address the situation when there is another protective order in place that could conflict with this automatic order. Mr. Andreason proposed adding the language, "Any separate order governing the parties or their minor children will control over conflicting provisions of this domestic injunction."

Mr. Slauch pointed out that that the “until” in paragraph (d) was redundant: “(d) The domestic injunction remains in effect until the final decree is entered, the petition is dismissed, the parties agree otherwise in a writing signed by all parties, or *until* further order of the court.”

Mr. Andreason asked how the petitioner will know about this injunction. Commissioner Blomquist proposed that it would be given to them when they file their petition. Mr. Slauch asked whether the order had to be served. He said he would like it to be effective immediately upon filing of the petition. Ms. Vogel proposed including the injunction in the divorce petition so the person signing it would be agreeing to the injunction and it would be served on the other party with the petition. Mr. Slauch proposed requiring all divorce petitions to include that the petitioner will be bound and that the summons would provide this notice. Judge Toomey said she thought this had overlap with other rules. Judge Scott suggested looking at Rule 26.3 as a guidepost.

The committee deferred discussion of the rule until the next month. Commissioner Blomquist would look at the committee’s suggestions and come back with a new draft.

(5) ADJOURNMENT

The meeting adjourned at 6 p.m. The next meeting is scheduled for March 28, 2018 at 4 p.m.