MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday May 25, 2011
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Professor David Moore, Honorable Kate Toomey, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, James T. Blanch, W. Todd Shaughnessy, David W. Scofield, Lincoln L. Davies, Robert J. Shelby, Jonathan O. Hafen

EXCUSED: Trystan B. Smith, Honorable David O. Nuffer, Barbara L. Townsend

TELEPHONE: Honorable Derek P. Pullan, Lori Woffinden

STAFF: Timothy M. Shea, Sammi V. Anderson, Diane Abegglen

GUESTS: Steven G. Johnson (Chair of the Advisory Committee for the Rules of Professional Conduct), Honorable Randall N. Skanchy (Third District Judge)

I. APPROVAL OF MINUTES:

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the April 27, 2011 minutes. The committee unanimously approved the minutes.

II. DISQUALIFICATION OF COLLABORATIVE LAWYERS.

Mr. Steven G. Johnson, Chair of the Advisory Committee for the Rules of Professional Conduct, presented to the committee on the issue of collaborative lawyering. Collaborative lawyering was the subject of a bill introduced during the 2011 legislative session. The bill was sponsored by Mr. Brian Florence. Parties can agree to use collaborative lawyering where they wish to resolve the dispute as amicably as possible and without litigation. The attorneys under such an agreement agree to provide full disclosure absent discovery and to otherwise cooperate fully toward resolution. A potential problem arises if the matter nonetheless is not resolved and heads toward litigation. Mr. Florence's bill would provide for disqualification of the prior attorneys in this event. The courts agreed to look at the issue and consider whether it might better fit as an amendment to a court rule, as opposed to a statute. Mr. Johnson explained that the Professional Conduct Rules committee did not see this as an ethical issue since it does not seem a matter of right or wrong, and since there is no defined conflict of interest scenario articulated in the current Rules of Professional

Conduct that would apply. Mr. Johnson expressed a reluctance to deviate from the Model Rules of Professional Conduct and questioned whether the committee might create a specific subset to Civil Procedure Rule 74 governing disqualification. Mr. Slaugh advocated reserving the issue to the contracting parties. Judge Anderson pointed out the difficulty in defining "collaborative law" for purposes of a rule amendment or a statute. Mr. Shaughnessy queried how attorney-client privilege issues are addressed in the collaborative lawyer arrangement. Mr. Blanch queried whether the committee or more generally, the courts, should work with the legislature to reach mutually agreeable language for the statute, reasoning that, since it is essentially a matter of contract, a statute may be the best place to address it.

Mr. Wikstrom suggested inviting the bill's sponsor, Mr. Brian Florence, to talk with the committee about the collaborative law issue. Mr. Wikstrom asked Mr. Johnson to leave the relevant materials and confirmed with Mr. Johnson that it is acceptable to table this issue until the September 2011 meeting.

III. RULE 65C. POST-CONVICTION RELIEF.

The committee next considered proposed revisions to Rule 65C, governing post-conviction relief. Judge Toomey led the discussion on the proposed revisions, which are intended to flag for the parties and judiciary that Utah Code Ann. Section 78-B-109 provides for appointment of pro bono counsel upon request of an indigent petitioner, to represent the petitioner in the post-conviction court on post-conviction appeal. The proposed revisions also highlight Section 78B-9-202, which governs the appointment and payment of counsel in death penalty cases. The committee suggested amending the title of the revised subsection (j) to "Appointment of Counsel" and shortened the proposed amendment to read "The court may appoint counsel pursuant to Sections 78B-9-109 or 78B-9-202." The proposed amendments were thus revised and unanimously approved.

IV. RULE 83. VEXATIOUS LITIGANTS.

The committee next turned to the topic of a proposed rule addressing vexatious litigants. Judge Skanchy presented the topic and led the discussion. The District Board of Judges has proposed the rule after drafting by a subcommittee of judges and two reviews by the District Board of Judges. The vexatious litigant rule is directed at serial litigants that frequently submit voluminous filings, using imagined courts, etc. Judge Skanchy noted that he is currently a named defendant in an imagined court and Mr. Slaugh noted that his firm is a defendant in similar litigation.

Mr. Blanch asked how courts are without power to deal with vexatious litigants under their inherent powers. Mr. Shea explained that judges would like to have a standard and defined terms and Mr. Slaugh explained that the lack of standards and/or definitions governing the process make it very expensive to get these frivolous actions dismissed. Judge Skanchy noted the difficulty in trying to define a concept that is easy to understand, but can be difficult to define and enforce.

The committee expressed concerns with the proposed rule as drafted. Mr. Slaugh noted that the phrase "tribal courts" is used at line 18 and queried whether the rule should include a definition of "tribal courts", possibly including the phrase "federally recognized." Judge Pullan discussed his

earlier e-mail and proposed revisions. Judge Pullan's main concerns are that the rule as drafted bring together pre-filing orders in a pending action and pre-filing orders as to future claims. Judge Pullan would prefer the rule were redrafted to separate and distinguish between those kinds of orders. Judge Pullan also favored including a section that identifies the different options available to the court for imposing orders dealing with these issues. Judge Pullan further expressed concern about appeals of orders barring future claims. Judge Pullan opined that the rule should tread carefully where the Open Courts provision of the Utah Constitution is concerned because it is the unusual situation where courts are defining access to the courts. Mr. Shea noted that the appeal provision was borrowed from an Ohio statute addressing vexatious litigants. Mr. Slaugh suggested coordinating with the Appellate Rules committee on this issue. Mr. Shea noted the draft should say "there is no appeal of right" because a vexatious litigant could still petition for a writ.

Mr. Wikstrom asked about attorneys fees. Judge Pullan assumed that fees would be awarded, if appropriate, under Rules 11 or 37. Mr. Wikstrom noted that the committee does not have authority to "award" attorneys fees as it happens, for example, under statute or contract. Judge Skanchy stated that the rule is only intended to provide for the bond to be posted to secure fees in the event they are awarded.

Judge Pullan offered to chair a subcommittee to examine the proposed rule more closely and asked Mr. Shaughnessy to participate. Mr. Slaugh volunteered to serve on the subcommittee and Judge Skanchy agreed to work with the subcommittee as well.

V. PUBLIC COMMENTS ON THREE RULES PUBLISHED FOR COMMENT.

Mr. Shea led the discussion as to public comments posted in response to proposed revisions to Rules 101, 64D and 108. The only proposed amendment to Rule 101 was to delete a paragraph and move it to Rule 108. There were no comments as to this proposed amendment. The committee will recommend adoption of the rule as amended.

As to the proposed amendments to Rule 64D, requiring that a party seeking garnishee liability would first be required to show they had "met and conferred" with the garnishee, there were a limited number of comments. The majority of those argued that the proposed revision is not fair because the garnishee has already been given an opportunity to respond appropriately and has failed to do so. Mr. Slaugh noted that it is essentially a discovery issue and should therefore include some meet and confer requirement. Mr. Wikstrom asked the committee for a motion to change the proposed rule in light of the public comments. Hearing no motion, the committee adopted no changes in response to the comments. The committee will recommend adoption of the rule as amended.

Comments on the proposed amendments to Rule108 - Objections to Court Commissioner's Recommendations - essentially fell into three categories: 1) The policy should be that a party has an absolute right to present evidence to the district court judge, regardless of what happens before a commissioner; 2) The proposed revisions could become palatable with some modifications to the proposed language. 3) Advocating for deletion of paragraphs having to do with the timing of objections based on issues surrounding a party's ability to obtain a record of the hearing.

The committee discussed the comments. Mr. Shea noted that it is the universal perception that the commissioner system needs to be addressed. The process before commissioners is quite varied in terms of standards and procedures and there is wide recognition that the systems needs those standards and procedures to be fixed and not variable.

The proposed revisions wrestle with what is required by due process versus the reality of the courts' burgeoning case loads and the important roles played by commissioners within that framework. Mr. Shea explained that the system is set up so that the recommendation becomes order by operation of law absent a timely objection. However, problems may arise where the system gives so much deference to the commissioner's recommendation that the commissioner becomes the de facto decision maker. Mr Shea explained that under the revisions, if a party files an objection to a commissioner's recommendation on a custody issue, that party will receive an evidentiary hearing. An objection to a noncustody issue will not result in an evidentiary hearing, at least prior to the evidence being heard in open court at trial.

Mr. Shea noted that the amendments have been approved by the Board of District Judges. Mr. Shea also explained that he had spoken with the IT Department about the time frame for producing audio recordings of the hearings before commissioners. Mr. Shea suggested that the time frames for objecting to a recommendation could be driven by the availability of the record.

Mr. Shaughnessy expressed concern regarding Senator Hillyard's comment indicating that when commissioners were authorized by the legislature, that authorization was with the understanding that all matters would be resolved by a *de novo* hearing in front of the district judge, regardless of the issue before the commissioner. Mr. Shea stated that he could find nothing supporting Senator Hillyard's comment in the legislative history.

Messrs. Battle, Hafen and Wikstrom suggested forwarding this to the Family Law section for feedback. Mr. Hafen moved to send the proposed amendments to the Executive Committee of the Family Law Section requesting a single, uniform response regarding serious concerns or suggested clarifying language. Mr. Hafen's motion was seconded and unanimously approved.

VI. RULE 4. SERVICE OF PROCESS.

The current rule requires that alternative service by publication be made in the English language. Mr. Shea proposed that the publication of notice may be made in a language other than English, especially where it is known that one or more defendants are proficient in a different language. Mr. Hafen moved to approve the language proposed by Mr. Shea at line 138, striking the requirement that alternative service must be made in English. Mr. Hafen's motion was amended to remove the word "other" fr line 127. This motion was seconded and unanimously approved.

VII. ADJOURMENT.

The meeting adjourned at 5:35 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday August 3, 2011, at the Administrative Offices of the Courts.